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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT BILL 2024:
PORTUGUESE TAX CONVENTION

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
Agreements Act	<i>International Tax Agreements Act 1953</i>
Assessment Acts	The ITAA 1936 and ITAA 1997
APP	Australian Privacy Principle
BEPS	Base Erosion and Profit Shifting
Convention	<i>Convention between Australia and the Portuguese Republic for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance and its Protocol</i>
EU General Data Protection Regulation	<i>Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [27 April 2016] OJ L 119, 4 May 2016, p.1-88</i>
FBT Act	<i>Fringe Benefits Tax Assessment Act 1986</i>
GATS	<i>General Agreement on Trade in Services, done in Marrakesh on 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995)</i>
G20	Group of 20
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
MAP	Mutual agreement procedure
MLI	<i>Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, done at Paris on 7 June 2017,</i>

	[2019] ATS 1 (entered into force 10 January 2019)
OECD	Organisation for Economic Cooperation and Development
OECD Model	OECD Model Tax Convention on Income and on Capital
OECD Model Commentary	OECD Model Convention Commentaries (contained in the OECD Model Tax Convention on Income and Capital Full Version (as it read on 21 November 2017))

Chapter 1: The Convention

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Outline of chapter

- 1.1 Schedule 1 amends the Agreements Act to give force of law to the Convention.

Context of amendments

- 1.2 The Convention was signed in Lisbon, Portugal, on 30 November 2023. It improves bilateral tax arrangements between Australia and the Portuguese Republic by alleviating double taxation of income. It also enables greater administrative cooperation in tax matters, including through information exchange, to help reduce tax evasion and avoidance.
- 1.3 Countries commonly seek to eliminate double taxation and mitigate tax evasion and avoidance through tax treaties, particularly since the Final Reports of the OECD/G20 Base Erosion and Profit Shifting Project in 2015. In 2024, Australia had bilateral tax treaties in force with 46 jurisdictions.
- 1.4 The Convention broadly follows the OECD Model. OECD Members and many other countries use the OECD Model as the basis of bilateral conventions to
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eliminate double taxation. This helps to ensure a uniform approach to resolving the most common problems that arise in international taxation.

Double taxation

- 1.5 A key objective of the Convention is to alleviate the double taxation that results from the interaction of the Australian and Portuguese tax systems. The OECD defines double taxation as the imposition of comparable taxes in two (or more) countries on the same taxpayer in respect of the same taxable income or capital.
- 1.6 Australia and the Portuguese Republic, 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 taxes non-residents on income from Australian sources.
- 1.7 Double taxation can occur when there is an overlap of source and/or residence taxing rights, such as when a person who is resident in one country derives income from another.
- 1.8 Under the Convention, Australia and the Portuguese Republic agree to restrict their respective taxing rights to alleviate double taxation. The Convention allocates taxing rights between Australia and the Portuguese Republic over different categories of income including business profits, dividends, interest, royalties, and pensions. The Convention 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.

Tax evasion and avoidance

- 1.9 Another key objective of the Convention is to prevent tax evasion and avoidance. This is made clear in the title and the preamble of the Convention which clarify that Australia and the Portuguese Republic do not intend the provisions of the Convention to create opportunities for tax evasion and avoidance.
- 1.10 As members of the Inclusive Framework on BEPS, Australia and the Portuguese Republic are committed to the implementation of the OECD/G20 BEPS Project. That project provides governments with solutions, designed to be implemented domestically and through treaty provisions, for closing the gaps in existing international tax rules that allow corporate profits to disappear or be artificially shifted to low/no tax environments. These solutions are outlined in the Base Erosion and Profit Shifting 2015 Final Reports.
- 1.11 The Convention adopts a range of the integrity and tax certainty provisions recommended by the BEPS Project. These are outlined in the table below.

Table 1.1 How the Convention implements the BEPS Project

Convention provisions	BEPS Project 2015 Final Reports
Title	Action 6
Preamble	Action 6
Article 1 (Persons covered), paragraph 2	Action 2
Article 1 (Persons covered), paragraph 3	Action 6
Article 4 (Residency), paragraph 3	Action 6
Article 5 (Permanent establishment), paragraphs 5, 6, 7, 9 and 11 and subparagraph 8(a)	Action 7
Article 7 (Business profits), paragraph 8	Action 14
Article 9 (Associated enterprises), paragraphs 2 and 3	Action 14
Article 10 (Dividends), subparagraph 2(a)	Action 6
Article 13 (Alienation of property), paragraph 4	Action 6
Article 22 (Relief from double taxation)	Action 2
Article 24 (Mutual agreement procedures), paragraphs 1, 2 and 3, and Chapter II of the Protocol	Action 14
Article 29 (Entitlement to benefits), paragraph 1	Action 6

Summary of new law

1.12 Schedule 1 amends the Agreements Act to give the Convention force of law in Australia.

1.13 Key features of the Convention include:

- reduced withholding tax rates to create a more favourable bilateral investment environment while making it cheaper for Australian business to access foreign capital and technology;
- rules to reduce potential double taxation, which can deter investment; and
- providing greater tax certainty to taxpayers in both jurisdictions.

- 1.14 Importantly, the Convention also includes OECD/G20 BEPS treaty-related recommendations, in line with Australia’s ongoing commitment to tackling international tax avoidance practices.

Detailed explanation of new law

- 1.15 These amendments list the Convention as a current agreement that is given the force of law by the Agreements Act.
[Schedule 1, item 2, subsection 5(1) of the Agreements Act]
- 1.16 The effect of this listing is that the Convention has priority over provisions of the Assessment Acts, the FBT Act and any Act imposing income tax to the extent of any inconsistency – other than certain provisions of those laws. In particular, sections 4 and 4AA of the Agreements Act preserve the priority of Australia’s anti-avoidance rules in Part IVA of the ITAA 1936 and section 67 of the FBT Act. In practice, this means that the reduced withholding tax rates and other matters agreed in the Convention apply subject to Australia’s anti-avoidance rules. Section 4 also preserves the priority of Subdivision 195-C of the ITAA 1997 dealing with corporate collective investment vehicles.
- 1.17 The amendments define the Convention as the Convention, and its Protocol, entered into between Australia and the Portuguese Republic on 30 November 2023 in Lisbon.
[Schedule 1, item 1, subsection 3AAA(1) of the Agreements Act]
- 1.18 The Convention is based on the OECD Model. Consistent with the way that Australia negotiates its tax treaties, the OECD Model Commentary is directly relevant to the interpretation of the equivalent provisions of the Convention.¹
- 1.19 The following section provides an overview of the provisions of the Convention. As the OECD Model Commentary explains the provisions of the Convention that are identical to the equivalent provision in the OECD Model, the overview focusses on the departures from the OECD Model that were agreed to by Australia and the Portuguese Republic.
- 1.20 Where particular provisions of the Convention are not explained in the following section, it is because those provisions are aligned with the equivalent provision in the OECD Model and their operation is explained by the OECD Model Commentary.

¹ The OECD Model and the OECD Model Commentary can be freely accessed online at: <https://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>; and <https://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-2017-full-version-g2g972ee-en.htm>

The Convention

Title and Preamble

- 1.21 The title and the preamble are a general statement of the object and purpose of the Convention. The title and preamble provide that the Convention is for: the elimination of double taxation concerning taxes on income; and, the prevention of tax evasion and avoidance, including through the provisions of the treaty.
- 1.22 As the title and preamble form part of the context of the Convention, they serve an important role in interpreting the provisions of the Convention. This is consistent with the general rule of treaty interpretation in Article 31(1) of the Vienna Convention on the Law of Treaties, which provides that 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

- 1.23 Article 1 establishes that the Convention applies to persons who are residents of Australia or Portugal or both. The terms ‘Person’ and ‘Contracting States’ are defined in Article 3, and ‘resident’ is defined in Article 4 (see below).
[Article 1, paragraph 1]
- 1.24 Paragraph 21 helps to ensure that the benefits of the Convention for income (including profits or gains) derived by or through entities or arrangements that are wholly or partly fiscally transparent are granted in appropriate cases, but only to the extent that:
- the income is treated as the income of a resident of Australia or Portugal under their respective domestic laws; and
 - the entity or arrangement is established under the law of Australia or Portugal, or a third jurisdiction which has an agreement in force with the Contracting State from which the income is derived allowing for the exchange of tax information and the third jurisdiction treats the entity or arrangement as wholly fiscally transparent.
- 1.25 In the case of Australia, entities that are treated as wholly or partly fiscally transparent for Australian tax purposes include partnerships and trusts. Such entities include partnerships that are subject to Division 5 of Part III of the ITAA 1936 (but not corporate limited partnerships that are subject to Division 5A of Part III). They also include trusts that are subject to Division 6 of Part III of the ITAA 1936 where the beneficiary of the trust is presently entitled or specifically entitled to the income and/or gains of the trust, as well as trusts that are subject to Division 276 of the ITAA 1997 (but not a public trading trust subject to Division 6C of Part III).

- 1.26 Paragraph 3 confirms the general principle that the Convention does not restrict in any way Australia or Portugal's right to tax their own residents, except where this is intended.
[Article 1, paragraph 3]
- 1.27 This paragraph lists the Articles of the Convention that affect the taxation of a resident of Portugal or Australia. Inclusion of Article 19 and paragraph 4 of Article 21 in the list, and not listing paragraph 3 of Article 7, are departures from the OECD Model to suit the particular needs of this Convention.

Article 2 – Taxes covered

- 1.28 Article 2 specifies that taxes on income are covered by the Convention. Article 2 also specifies the existing taxes to which the Convention particularly applies to.
[Article 2]
- 1.29 Article 2 departs slightly from the OECD Model to reflect that in Australia, taxes on income are collected at the federal level and not by political subdivisions or local authorities. In Portugal, taxes on income may be collected by political subdivisions, administrative subdivisions or local authorities.
[Article 2, paragraph 1]
- 1.30 In Australia, the taxes covered by the Convention are the income tax, resource rent taxes, and the fringe benefits tax.
[Article 2, subparagraph 3 a)]
- 1.31 In Portugal, the taxes covered by the Convention are the personal income tax, the corporate income tax, and the surtaxes on corporate income tax.
[Article 2, subparagraph 3 b)]
- 1.32 The Convention also applies to any identical or substantially similar taxes that Australia (under federal law) or Portugal may implement domestically in the future. The competent authorities of Australia and Portugal (the Australian and Portuguese tax authorities) are required to notify each other of any significant changes to their taxation laws.
[Article 2, paragraph 4]

Article 3 – General definitions

- 1.33 Article 3 provides definitions of and rules of interpretation for basic terms and key concepts that are used throughout the Convention that apply for all purposes. Certain other terms are defined in other Articles of the Convention, such as 'resident of a Contracting State' (Article 4) and 'Permanent Establishment' (Article 5).
- 1.34 The definition of 'Australia' in the Convention follows the model set out in Australia's other modern tax treaties. The definition excludes all external

territories except for certain Territories which are specified. The definition includes areas adjacent to Australia (and the relevant Territories) which are subject to a domestic law dealing with the exploration for, and exploitation of, natural resources of the exclusive economic zone or the seabed and subsoil of the continental shelf.

[Article 3, subparagraph 1 a)]

- 1.35 The term ‘Portugal’ means the Portuguese Republic, inclusive of its territorial sea, as well as maritime areas adjacent to the outer limit of the territorial sea, comprising the seabed and subsoil thereof, over which the Portuguese Republic exercises sovereign rights or jurisdiction.

[Article 3, subparagraph 1 b)]

- 1.36 The term ‘enterprise’ applies to the carrying on of any business.

[Article 3, subparagraph 1 g)]

- 1.37 Consistent with the OECD Model, these definitions read together clarify that, under the Convention, business activities are considered to constitute an enterprise, regardless of the meaning of that term under domestic law.

- 1.38 The definition of ‘company’ in the Convention means any body corporate or any entity which is treated as a company or a body corporate for tax purposes.

[Article 3, subparagraph 1 e)]

- 1.39 This definition is broadly consistent with the definition in the OECD Model, which refers to any entity that is treated as a body corporate for tax purposes. The definition is adapted to reflect that Australia’s income tax laws do not use the expression ‘body corporate’.

- 1.40 The term ‘competent authority’ means the Commissioner of Taxation in Australia and the Minister of Finance or the Director General of the Tax and Customs Authority in Portugal, or their authorised representative.

[Article 3, subparagraph 1 f)]

- 1.41 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 Portugal and are used interchangeably to refer to Australia and Portugal, as the context requires.

[Article 3, subparagraph 1 h)]

- 1.42 The term ‘international traffic’ means any transport by a ship or aircraft, except when that transport is solely between places in a Contracting State, and the enterprise that operates the ship or aircraft is not an enterprise of that State.

[Article 3, subparagraph 1 i)]

- 1.43 This definition is used to preserve the right of a Contracting State to tax transportation that occurs domestically, even when it is carried out by an enterprise of the other State. The definition follows the alternative formulation to the standard OECD Model that is provided for in paragraph 6.3 of the 2017 OECD Model Commentary on the definition.

- 1.44 The term ‘national’ means any individual possessing the nationality or citizenship of a Contracting State, and any legal person, company, partnership, or association deriving its status as a national in accordance with a Contracting State’s domestic laws.
[Article 3, subparagraph 1 j)]
- 1.45 The terms ‘person’ includes an individual, a company, and any other body of persons.
[Article 3, subparagraph 1 k)]
- 1.46 The term ‘recognised pension fund’ of a Contracting State extends the OECD Model definition to ensure that it applies appropriately to Australian superannuation funds.
[Article 3, subparagraph 1 l)]
- 1.47 The changes ensure that Australian superannuation funds are covered by the definition irrespective of the requirement that an entity or arrangement of a State be treated as a separate legal entity under the taxation laws of the State. This addition resolves the issue identified in paragraph 10.6 of the OECD Model Commentary on the definition, which recognises that in some States, a pension fund might not constitute a separate legal person.
- 1.48 The definition of recognised pension fund in the Convention also expands on the condition in subparagraph 1 l) ii) of Article 3, which covers entities or arrangements that are established and operated exclusively to invest funds for entities or arrangements that provide retirement benefits. The extension covers the investment of a life insurance company’s funds, to the extent those funds support retirement income products provided by the life insurance company. This extension reflects the fact that Australia’s superannuation system also extends to life insurance companies.
- 1.49 The term ‘tax’ means Australian tax or Portuguese tax as the context requires, but excludes any penalty or interest imposed under either Australia’s or Portugal’s domestic laws.
[Article 3, subparagraph 1 m)]
- 1.50 The taxes covered by the Convention are stipulated in Article 2 (Taxes Covered). The specific exclusion for penalties and interest is not contained in the OECD Model but is a standard feature of Australia’s tax treaties. The exclusion reflects that penalties and interest are not treated as a tax under Australia’s income tax laws. As such, the Convention does not restrict the Commissioner of Taxation’s ability to levy penalties or interest, and Australia is not required to provide relief under the Convention for penalty or interest charges.
- 1.51 A term not defined in the Convention has the same meaning that it has under the domestic law of the Contracting State applying the Convention. The definition of a relevant term under a Contracting State’s taxation law has precedence over its meaning under other domestic laws.
[Article 3, paragraph 2]

Article 4 – Resident

- 1.52 The Article provides a basic rule that defines the term ‘resident of a Contracting State’ for the purposes of the Convention as any person who is liable to tax as a resident of Australia, or in the case of Portugal, is liable to tax by reason of the person’s domicile, residence, place of management, or similar criterion. The term ‘resident of a Contracting State’ also includes that State, and any political subdivision (or in the case of Portugal, administrative subdivision) or local authority thereof, as well as a recognised pension fund of that State.
[Article 4, paragraph 1]
- 1.53 With respect to Australia, this language deviates from the OECD Model, which refers to a person being liable to tax by reason of their ‘domicile, residence, place of management or any other criterion of a similar nature’. The broader language covers the OECD criteria as well as additional criteria for residency under Australia’s domestic laws. For example, voting power is a relevant factor for the residency of a company under Australia’s domestic laws.
- 1.54 The Convention generally applies on the basis that a person is a resident of either Australia or Portugal.
- 1.55 Article 4 contains a series of tie-breaker rules for determining the country of residence for an individual who is a resident of both Australia and of Portugal under the basic residence rule in paragraph 1.
[Article 4, paragraph 2]
- 1.56 The tie-breaker rules are based on the equivalent provision in the OECD Model. Consistent with the OECD Model, the rules apply hierarchically (for example, the second tie-breaker rule only applies if an individual’s residence cannot be determined under the first rule).
- 1.57 The final tie-breaker rule provides that the competent authorities of Australia and Portugal shall endeavour to resolve the individual’s residence by mutual agreement.
[Article 4, subparagraph 2 d)]
- 1.58 The requirement to endeavour to determine an individual’s residence by mutual agreement is a departure from the equivalent provision in the OECD model, which obliges the competent authorities to settle the question of residency. This ensures the treaty aligns with the operation of Australian domestic law.
- 1.59 Article 4 also contains a tie-breaker rule for persons other than individuals that are residents of both Australia and Portugal under the basic residence rule. This rule provides that the competent authorities of Australia and Portugal shall seek to determine by mutual agreement which country the dual-resident is a resident of for the purposes of the Convention. In reaching such agreement, the competent authorities must consider the dual-resident’s place of effective management, place of incorporation or constitution, and any other relevant

factors.

[Article 4, paragraph 3]

- 1.60 Factors relevant to tie-breaker determinations vary depending on the circumstances but may include considerations such as:
- where the meetings of the entity's board of directors or equivalent body are usually held;
 - where the chief executive officer and other senior executives usually carry on their activities;
 - where the senior day-to-day management of the entity is carried on;
 - where the entity's headquarters are located;
 - which jurisdiction's laws govern the legal status of the entity;
 - where its accounting records are kept; and
 - whether determining that the entity is a resident of one jurisdiction but not of the other for the purpose of the Convention would carry the risk of an improper use of the provisions of the Convention.

[Protocol, Chapter I, paragraph 2]

- 1.61 If the competent authorities cannot agree on a dual-resident's residence status, Article 4(3) will treat the dual-resident as neither a resident of Australia nor Portugal for the purposes of claiming any benefits under the Convention, except for those provided by Article 23 (Non-discrimination) and 24 (Mutual agreement procedure).
- [Article 4, paragraph 3]***
- 1.62 As a result, such persons (other than individuals) will not be able to enjoy the benefits under the Convention available to residents, except for any benefits provided under the non-discrimination Article and the mutual agreement procedure.
- 1.63 This tie-breaker rule is based on the equivalent provision in the OECD Model. However, in contrast to the OECD Model, the competent authorities are not authorised to agree to extend the benefits of the Convention to a person where they cannot agree on a person's residence status. This departure is aligned with Australia's position in respect of Article 4 of the MLI.
- 1.64 Although the Convention may deem certain dual-residents to not be Australian residents for the purposes of enjoying benefits under the Convention (either because they are treated as a resident of Portugal, or residents of neither Australia nor Portugal), such persons remain a resident for the purposes of Australian domestic tax law. This is because the residence rule in the Convention does not affect the characterisation of a person's residence under Australia's domestic law. Accordingly, such a person remains liable for taxation in Australia as a resident, insofar as is permitted under the Convention.

Article 5 – Permanent establishment

- 1.65 Article 5 introduces the concept of ‘permanent establishment’, which is used to determine the rights of a Contracting State to tax the profits of an enterprise of the other Contracting State. This concept is central to the operation of Articles 7 (Business profits), 10 (Dividends), 11 (Interest), 12 (Royalties), 13 (Alienation of property), 14 (Income from employment), 21 (Other income) and 23 (Non-discrimination).
- 1.66 Article 5 applies the primary definition of ‘permanent establishment’ in the OECD Model. The definition applies for the purposes of the Convention and provides that a ‘permanent establishment’ is a fixed place of business through which an enterprise wholly or partly conducts its business.
[Article 5, paragraph 1]
- 1.67 Article 5 also includes a non-exhaustive list of examples of places of business that constitute permanent establishments under paragraph 1. This list is based on the OECD Model but contains one variation.
[Article 5, paragraph 2]
- 1.68 Similar to the majority of Australia’s other modern tax treaties, the primary definition of ‘permanent establishment’ includes business conducted on a fixed place that is an agricultural or forestry property.
[Article 5, subparagraph 2 g)]
- 1.69 This reflects Australia’s policy to retain taxing rights over the use of Australian land for primary production activities.
- 1.70 Consistent with the OECD Model, Article 5 further holds that a building site or a construction or installation project constitutes a permanent establishment. However, the Convention reduces the OECD Model’s 12-month threshold for a site or project to be considered a permanent establishment to nine months.
[Article 5, paragraph 3]
- 1.71 The truncation of the 12-month threshold to nine months further bolsters Australia’s source-based taxation rights concerning its natural resources.
- 1.72 Article 5 deems three additional activities as permanent establishments, in line with Australia’s reservations on Article 5 of the OECD Model Commentary.
[Article 5, paragraph 4]
- 1.73 First, consistent with Australia’s reservation to Article 5, set out in paragraph 202 of the OECD Model Commentary, Article 5 deems supervisory or consultancy activities connected to a building site or construction or installation project (exceeding in the aggregate nine months in any 12-month period) carried on by an enterprise of a Contracting State in the other State to be a permanent establishment.
[Article 5, subparagraph 4 a)]

- 1.74 This reservation reflects Australia's concerns that Article 5 of the OECD Model may not be broad enough to cover supervisory activities and consultancy activities which are not supervisory but of a similar character.
- 1.75 Second, Article 5 deems natural resource activities exceeding in the aggregate 90 days in any 12-month period to be a permanent establishment. In other words, a permanent establishment is 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)]
- 1.76 This provision preserves Australia's ability to tax profits from activities concerning Australian natural resources. This provision is consistent with Australia's reservation to paragraph 1 of Article 5 of the OECD Model, as noted in paragraph 188 of the OECD Model Commentary.
- 1.77 Finally, Article 5 provides that a permanent establishment is deemed to exist where an enterprise operates substantial equipment in a country for one or more periods which exceed, in aggregate, nine months in any 12-month period.
[Article 5, subparagraph 4 c)]
- 1.78 The meaning of the term 'substantial', in the context of the phrase, 'substantial equipment', is determined on the relevant facts and circumstances of each individual case.
- 1.79 Factors such as size, quantity or value of the equipment, or the role of the equipment in income producing activities are relevant considerations. Examples of substantial 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 industries.
- 1.80 The inclusion of the operation of substantial equipment in subparagraphs 4 b) and 4 c) of Article 5 reflects Australia's concerns that such operations may otherwise not meet the requirements of the concept of a 'fixed place of business' in accordance with the OECD Model definition of permanent establishment.
- 1.81 Australia's experience is that the definition of permanent establishment in paragraph 1 of Article 5 of the OECD Model may be inadequate to deal with high-value mobile activities, in particular those involving the use of substantial equipment.
- 1.82 For example, the inclusion of the operation of substantial equipment as a permanent establishment ensures the definition of permanent establishment covers activities such as where vessels are used as platforms for offshore oil and gas activities. Such activities are places of business through which an

enterprise carries on a business in Australia. However, the mobile nature of a vessel platform means they may not satisfy the requirements in the OECD Model for a place of business to be fixed. The inclusion of these provisions makes clear that such activities shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State under the Convention.

[Article 5, subparagraphs 4 b) and 4 c)]

- 1.83 The reference to ‘operation’ and ‘operates’ in subparagraphs 4 b) and 4 c) ensure that only the active use of substantial equipment is covered by Article 5. ***[Article 5, subparagraphs 4 b) and 4 c)]***
- 1.84 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.
- 1.85 For example, if a Portuguese enterprise itself operates a mobile crane at an Australian port for more than nine months in a 12-month period, the enterprise would be deemed to have a permanent establishment in Australia under subparagraph 4 c) of this Article. If that Portuguese 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 Portuguese 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 Portuguese enterprise in Australia, the Portuguese enterprise would be considered to operate the crane in Australia.
- 1.86 Article 5 further sets out rules for aggregating the time spent on particular projects by closely related enterprises for the purpose of paragraphs 3 and 4. ***[Article 5, paragraph 5]***
- 1.87 These provisions prevent enterprises from circumventing the permanent establishment time thresholds by splitting up activities. They are consistent with paragraph 52 of the OECD Model Commentary for Article 5, which notes that the time threshold has been the subject of some abuse, and that although contract splitting activities may fall within the scope of anti-avoidance rules, “...some States may nevertheless wish to deal expressly with such abuses”.
- 1.88 Paragraph 11 defines the phrase ‘closely related’, such that a person or enterprise is closely related to an enterprise if one has control of the other or both are under the control of the same persons or enterprises. This is assessed on a case-by-case basis, dependent on the facts and circumstances of each case. ***[Article 5, paragraph 11]***
- 1.89 As per paragraph 120 of the Commentary on Article 5 (Permanent establishment) of the OECD Model, this “would cover... situations where a person or enterprise controls an enterprise by virtue of a special arrangement that allows that person or enterprise to exercise rights that are similar to those that it would hold if it possessed directly or indirectly more than 50 per cent of

the beneficial interests in the enterprise”.

[Article 5, paragraph 11]

- 1.90 Furthermore, a person or enterprise is automatically 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
 - another person possesses directly or indirectly more than 50 per cent of the beneficial interest in the person and the enterprise.
- 1.91 Where a person is a company, the total voting power and value of the company’s shares or of the beneficial equity interest in the company is considered to be the amount of beneficial interest in the person or enterprise.
[Article 5, paragraph 11]
- 1.92 Article 5 also contains a list of preparatory or auxiliary activities that are exceptions to the general definition of permanent establishment in paragraph 1 of Article 5, consistent with the equivalent provision in the OECD Model. These exceptions are subject to an antifragmentation rule that applies where business operations are split between locations.
[Article 5, paragraphs 6 and 7]
- 1.93 Article 5 also deems a permanent establishment to exist where a person, other than an independent agent, acts on behalf of an enterprise, even though the enterprise may not have a fixed place of business (within the meaning of paragraphs 1 and 2) in a Contracting State, under stipulated conditions.
[Article 5, paragraphs 8 and 9]
- 1.94 The conditions set out in the Convention are consistent with those of the OECD Model, with the exception of subparagraph 8 b) which extends the Article to cover situations where a person acts on behalf of an enterprise in the manufacturing or processing of goods or merchandise belonging to the enterprise.
[Article 5, subparagraph 8 b)]
- 1.95 This variation prevents an enterprise that undertakes manufacturing or processing activities in a country through an intermediary from avoiding tax in that country. Its inclusion reflects Australia’s reservation to Article 5 of the OECD Model outlined at paragraph 188 of the OECD Model Commentary on Article 5. This reflects Australia’s policy to retain taxing rights over profits from manufacturing or processing activities conducted in Australia on behalf of an enterprise of the other Contracting State, particularly in relation to mineral resources.
- 1.96 Paragraph 12 is an Australian specialty and there is no equivalent in the OECD Model. It provides that the principles set out in Article 5 apply when determining whether a permanent establishment exists in a third country, or a third country enterprise has a permanent establishment in Australia or Portugal. This is for the application of the source rules in paragraph 6 of Article 11

(Interest), and paragraph 5 of Article 12 (Royalties).
[Article 5, paragraph 12]

Article 6 – Income from immovable property

- 1.97 Article 6 establishes that income generated by a resident of one Contracting State from immovable property located in the other Contracting State may be taxed in that other State.
[Article 6, paragraph 1]
- 1.98 Consistent with the OECD Model, Article 6 states that ‘immovable property’ is defined in accordance with the laws of the country in which it is located. Immovable property includes, for example, leases and other interests in or over land, and livestock and equipment used in agriculture and forestry. The Convention adds to this definition to clarify that the right to explore or mine for mineral, oil or gas deposits or other natural resources is also immovable property, and that this right is located in the country where the exploration or mining may take place.
[Article 6, paragraphs 2 and 3]
- 1.99 These provisions secure Australia’s ability to tax income generated by Portuguese residents from mining interests and rights located in Australia.
- 1.100 Article 6 determines the allocation of taxing rights over income of an enterprise from agriculture or forestry. This is reflected in the phrase ‘including income from agriculture or forestry’ in paragraph 1 of the Article. Accordingly, profits from the relevant activities may be taxed in Australia where the immovable property is situated in Australia, irrespective of whether the enterprise has a permanent establishment in Australia. This approach is consistent with the current OECD Model.
[Article 6, paragraph 1]
- 1.101 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.
[Article 5, subparagraph 2 c)]
- 1.102 Article 6 applies to income from the direct use, leasing of, or use in any other form, of immovable property, as well as income from the immovable property of an enterprise.
[Article 6, paragraph 4 and 5]
- 1.103 Article 6 also applies to income, profits or gains from movable property that is associated with immovable property, and to income, profits or gains from the provision of services for the maintenance or operation of immovable property. Paragraph 6 is a variation from the OECD Model which reflects a reservation by Portugal. It applies in relation to all immovable property including real property (see Example 1.1) and rights to explore for or mine natural resources.
[Article 6, paragraph 6]

Example 1.1

A Portuguese company owns and rents an office building in Australia. At the same time, the Portuguese company owns and rents furniture for this office building, and holds a separate contract with the tenant to provide cleaning and facilities services for the office building.

The income from leasing the office building is income from immovable property, and Australia has taxing rights under paragraphs 1 and 4 of Article 6.

The furniture is movable, not immovable property. This property, however, is associated with the immovable property. The provisions of Article 6 that apply to the leasing of the office building also apply to the leasing of the furniture (paragraph 6 of Article 6). Hence, Australia would have taxing rights over the income from leasing the furniture (paragraphs 1 and 4 of Article 6).

The income from provision of cleaning and facilities services for the office building is income from the provision of services for the maintenance or operation of immovable property. The provisions of Article 6 also apply to such income (paragraph 6 of Article 6). Hence, Australia would have taxing rights over the income from the provision of cleaning and facilities services for the office building (paragraph 1 of Article 6).

- 1.104 The term ‘movable property’ means property that is not immovable property.
[Protocol, Chapter I, paragraph 3]

Article 7 – Business profits

- 1.105 Article 7 provides for the taxation of business profits. The Article is based on the OECD Model text of Article 7 and its Commentary as they read before 22 July 2010. This approach is consistent with Australia’s reservation to Article 7 of the OECD Model outlined in paragraph 99 of the OECD Commentary on Article 7.
- 1.106 The Article provides that the business profits of a resident of one country may only be taxed in the other country if those profits are attributable to the carrying on of a business through a permanent establishment, as defined in Article 5 (Permanent establishment), in that other country.
[Article 7, paragraph 1]
- 1.107 However, where profits include items of income or gains which are dealt with separately in other Articles, the provisions of those other Articles apply and are not affected by the provisions of Article 7.
[Article 7, paragraph 5]

- 1.108 The profits of a permanent establishment are to be determined for the purposes of this Article on the basis of arm's length dealings.
[Article 7, paragraph 2 and 3]
- 1.109 The Convention modifies a number of the standard OECD Model provisions to clarify the way the arm's length principle is to be applied. These provisions are consistent with corresponding provisions in Australia's other tax treaties, and with internationally accepted concepts more generally.
- 1.110 The Convention supplements the standard OECD Model reference in paragraph 2 of Article 7 to a permanent establishment 'dealing wholly independently with the enterprise of which it is a permanent establishment', so that it also includes a reference to 'other enterprises with which it deals'.
[Article 7, paragraph 2]
- 1.111 This addition recognises that the permanent establishment of an enterprise also has dealings with other enterprises and ensures that in working out the profits that are attributable to the permanent establishment, those dealings must also be on an arm's length basis.
- 1.112 The Convention also supplements the standard reference in paragraph 3 of Article 7 to the expenses of an enterprise that must be allowed as deductions. In addition to being expenses incurred for the purposes of the permanent establishment, the expenses must be ones that would be deductible if the permanent establishment were an independent entity which paid those deductions.
[Article 7, paragraph 3]
- 1.113 Paragraph 4 of Article 7 is concerned with a permanent establishment which, although carrying on certain business activities in its own right, also undertakes purchasing of goods or merchandise for its head office. Paragraph 4 is designed to clarify that the profits of the permanent establishment derived from the business activities carried on in its own right will not be increased by adding to them any amount in respect of profits attributable to the purchasing activities undertaken for the head office. It follows, that any expenses incurred by the permanent establishment in respect of those purchasing activities will not be deductible in determining the taxable profits of the permanent establishment.
[Article 7, paragraph 4]
- 1.114 Article 7 also contains a provision that excludes profits from any form of an insurance business other than life insurance from the application of Article 7.
[Article 7, paragraph 6]
- 1.115 This exclusion means that Australia and Portugal retain the right to tax the income of non-resident insurers and re-insurers (other than life insurers) under their respective domestic laws. The provision is consistent with Australia's reservation to Article 7 of the OECD Model and preserves the application of Division 15 of Part III of the ITAA 1936 (Insurance with non-residents).

- 1.116 Article 7 contains a further rule to ensure that the Article applies appropriately to business profits that a resident of Australia or Portugal derives through one or more interposed trust estates. This rule specifies that such a resident is deemed to have carried on the business of the trust through a permanent establishment located in the other country.
[Article 7, paragraph 7]
- 1.117 This provision is consistent with Australia's reservation to Article 7 of the OECD Model and ensures that Article 7 does not prevent Australia from taxing the beneficiary of a trust estate on the basis that the trustee, rather than the beneficiary, is the entity that has a permanent establishment in Australia.
- 1.118 Article 7 provides a general ten-year limit on the time that Australia and Portugal can adjust the profits that are attributable to a permanent establishment. The ten-year limit applies from the end of the taxable period in which the profits might have been attributable to the permanent establishment. The limit does not apply on a finding of fraud, gross negligence or wilful default, or where an audit has commenced in relation to the profits of the enterprise within a period of ten years from the end of the taxable year in which the profits would have been attributable to the permanent establishment.
[Article 7, paragraph 8]
- 1.119 This provision is based on the wording included as an option in the OECD Model Commentary on Article 7 of the OECD Model which limits the length of time during which an adjustment can be made to the profits attributable to a permanent establishment as a matter of practical administration. For Australia, under Subdivision 815-C of the ITAA 1997, there is a seven-year time limit from the date the assessment was made for transfer pricing adjustments in respect of permanent establishments.

Article 8 – Shipping and air transport

- 1.120 Article 8 provides that profits from international shipping or air transport are taxable only in the country of residence of the operator.
[Article 8, paragraph 1]
- 1.121 Notwithstanding the general rule in paragraph 1, Article 8 also provides that profits derived by an enterprise of one country from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise that are shipped and discharged in the other country, may be taxed in the other country. This also applies to profits derived from leasing a ship or aircraft.
[Article 8, paragraph 2]
- 1.122 This approach to the coverage of the profits from domestic sea and air transportation, which gives effect to source-country taxing rights over internal traffic, is consistent with Australia's reservation to Article 8 of the OECD Model, outlined in paragraph 38 of the OECD Commentary on Article 8.

- 1.123 The provisions of Article 8 also apply to profits from the participation in a pool, a joint business or an international operating agency.
[Article 8, paragraph 3]

Article 9 – Associated enterprises

- 1.124 Article 9 deals with adjustments to profits that may be made for tax purposes where transactions have been entered into between associated enterprises (for example, parent and subsidiary companies, or entities under common control) on other than arm's length terms.
- 1.125 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.
- 1.126 Paragraphs 1 and 2 of the Convention's Article 9 are based on paragraphs 1 and 2 respectively of the OECD Model. Amendments to the wording reflect Australia's consistent treaty practice.
[Article 9, paragraphs 1 and 2]
- 1.127 The term 'might be expected to' 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 between the associated enterprises.
[Article 9, paragraph 1]
- 1.128 The words 'dealing wholly independently with one another' address Australia's concerns that the appropriate benchmark for determining whether the conditions made or imposed, between associated enterprises, differ from those which might be expected to be made between independent enterprises, should involve consideration of whether those dealings between the enterprises occurred on a truly independent basis.
[Article 9, paragraph 1]
- 1.129 The term 'made or imposed' in paragraph 1 is to be interpreted broadly and includes any conditions that operate between those enterprises.
[Protocol, Chapter I paragraph 3]
- 1.130 Article 9 provides a general ten-year limit on the time that Australia and Portugal can initiate transfer pricing adjustments in respect of separate legal entities. The ten-year limit applies from the end of the taxable period to which the adjustment relates. The limit does not apply on a finding of fraud, gross negligence or wilful default, or where an audit has commenced in relation to the profits of the enterprise within a period of ten years from the end of the taxable year in which the profits would have accrued to the enterprise.
[Article 9, paragraph 3]
- 1.131 This provision is based on the wording included as an option in the OECD Model Commentary on Article 9 of the OECD Model which limits the length

of time during which adjustments to transfer pricing can be made in respect of separate legal entities. For Australia, under Subdivision 815-B of the ITAA 1997, there is a seven-year time limit from the date the assessment was made that applies for transfer pricing adjustments in respect of separate legal entities.

Article 10 – Dividends

- 1.132 Article 10 allocates taxing rights over dividends paid between Australia and Portugal.
- 1.133 The Article follows the standard OECD Model approach of generally permitting source-based taxation of dividends paid by a company which is a resident of one country to a resident of the other country.
[Article 10, paragraphs 1 and 2]
- 1.134 The Article also provides that:
- certain cross-border intercorporate dividends are subject to a maximum 5 per cent rate of tax in the source country, while all other dividends are subject to a maximum of 10 per cent rate of tax in the source country;
 - in certain circumstances, dividends beneficially owned by Governments, central banks, tax exempt Portuguese pension funds, and Australian superannuation funds or other Australian residents carrying out complying superannuation activities are subject to a maximum 5 per cent rate of tax in the source country;
 - 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 extraterritorial application by either country of taxing rights over dividend income is not permitted.
- [Article 10, paragraphs 2, 3, 5 and 6]*

Definition of ‘dividends’

- 1.135 The term ‘dividends’ is defined in the Article as:
- income from shares or other rights, not being debt-claims, participating in profits; and
 - other amounts which are subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident for the purposes of its tax; and
 - profits attributed under an arrangement for participation in profits (associação em participação) as per Portuguese domestic laws.

[Article 10, paragraph 4]

- 1.136 This definition is based on the equivalent provision in the OECD Model but contains four key variations.
- 1.137 First, the definition does not refer to ‘jouissance’ shares or rights, mining shares, and founders’ shares, as these shares are not used in either Australia’s or Portugal’s domestic tax laws.
- 1.138 Second, the definition uses the term ‘other amounts’ instead of ‘income from other corporate rights’. This removes any doubt as to whether the definition can be applied to certain deemed dividends that might not be characterised as ‘income’ (such as bonus shares and certain capital distributions), as well as to distributions from certain noncorporate entities (such as deemed dividends received from trusts).
- 1.139 Third, the reference to ‘for the purposes of its tax’ in respect of the residence of the company making a distribution is intended to ensure that the domestic law characterisation of a company as a resident of a country is retained, even where the general residence tie-breaker rule would ordinarily prevent the company from being the resident of that country for the purposes of the treaty. This rule ensures that the correct tax laws are used to define the meaning of ‘dividends’ when applying the dual-resident company rule in paragraph 7 of Article 10.
- 1.140 Finally, for clarity, the definition specifically includes profits attributed under an arrangement for participation in profits within the meaning of Portuguese domestic law.
- 1.141 This definition accords with Australia’s reservation on paragraph 3 of Article 10 of the OECD Model, set out in paragraph 82.2 of the OECD Model Commentary on Article 10, that Australia reserves the right to expand the definition of dividends in paragraph 3 in order to cover other amounts which are subjected to the same taxation treatment as income from shares under its domestic law.

Maximum rates of withholding tax

- 1.142 The Article sets the standard maximum rates of taxation for the country in which a dividend is sourced. These rates are 5 per cent for certain intercorporate dividends, and 10 per cent for all other dividends, and are based on the standard approach in the OECD Model.

[Article 10, paragraph 2]

- 1.143 For the 5 per cent rate for intercorporate dividends to apply, the beneficial owner of the dividends must be a company (other than a partnership) which, throughout a 365-day period that includes the day the dividends are paid:
- in the case of Australia, holds directly at least 10 per cent of the voting power in the company resident of Australia paying the dividends; or

- in the case of Portugal, holds directly at least 10 per cent of the capital in the company resident of Portugal paying the dividends.

[Article 10, subparagraph 2 a)]

1.144 The term ‘partnership’ does not include any entity which is treated as a body corporate for tax purposes in a Contracting State (for example, in the case of Australia, a corporate limited partnership) and is a resident of that Contracting State. If a partnership is treated as a body corporate, it is therefore eligible to access the lower rate, provided the other conditions in subparagraph 2 a) of Article 10 are met.

[Protocol, Chapter I, paragraph 5]

- 1.145 The holding period required by Article 10 of the Convention can be for any 365 day period that includes the day of the payment of the dividends. Thus, under paragraph 2 a) of Article 10, the holding period may straddle the dividend payment date. This approach is consistent with the approach in the OECD Model.
- 1.146 However, in contrast to the OECD Model, Article 10 of the Convention uses a minimum of 10 per cent voting power in a company (instead of 25 per cent of the capital) as the threshold for determining when the intercorporate dividend rate applies. The focus on voting power is Australia’s consistent treaty practice and has previously been endorsed by the OECD (see, for example, paragraph 15 of the Commentary to Article 10 of the OECD Model). Australia’s approach aligns with domestic taxation law, including the 10 per cent threshold to determine whether a dividend is a portfolio or a non-portfolio level interest.
- 1.147 Consistent with Australia’s reservation to paragraph 2 of Article 10 of the OECD Model, the Convention does not contain a provision authorising the competent authorities of Australia or Portugal to settle, by mutual agreement, the mode of application of the limits in paragraph 2.

Reduced rate of tax for governments, central banks, and recognised pension funds

1.148 Article 10 of the Convention also provides a maximum 5 per cent rate of source country taxation for certain dividends that are beneficially owned by governments, central banks, or recognised pension funds, of Australia or Portugal.

[Article 10, subparagraph 3]

1.149 Dividends which are beneficially owned by Australia or Portugal, or one of their political subdivisions (or in the case of Portugal, administrative subdivisions) or local authorities (including a government investment fund), are taxable up to a 5 per cent rate in the source country if they directly hold less than:

- 10 per cent of the voting power in the company paying the dividend, in the case of a company resident of Australia; or
- 10 per cent of the capital in the company paying the dividend, in the case of a company resident of Portugal.

[Article 10, subparagraph 3 b) i)]

- 1.150 This threshold ensures that the reduced rate only applies where the beneficial owner of the dividends holds a portfolio interest in the company and is consistent with Australia's long-standing practice in respect of sovereign immunity.
- 1.151 The requirement that the beneficial owner not be able to determine the identity of persons who control and direct the operations of the company paying the dividend ensures that the reduced rate only applies to portfolio interests and is also consistent with Australia's long-standing practice in respect of sovereign immunity.

[Article 10, subparagraph 3 a)]

- 1.152 A relevant entity is able to determine the identity of one of those persons if it has the capacity or power to appoint, choose, settle or decide upon that person. 'Determine the identity of' is a question of fact. The phrase 'able to' focuses on the relevant entity's capacity or power. The sub-test is therefore not limited to situations where the entity has already determined, or intends to determine, the identity of one of the relevant decision makers. A right to determine will be sufficient for the requisite level of influence to exist.
- 1.153 The Protocol to the Convention also clarifies that the term 'government investment fund' means an entity that satisfies certain conditions. That is, the entity must be wholly owned by a Contracting State, or political subdivision (or in the case of Portugal, administrative subdivision) or a local authority thereof, be funded solely by public monies and all returns on the entity's investments must be public monies. The term does not include certain entities which are described in the Protocol, such as partnerships, or entities with a principal activity related to non-financial goods or services. The definition is based on concepts in Australia's sovereign immunity rules (refer Division 880 of the ITAA 1997) and is intended to ensure that the reduced rate is only available where the government entity is performing governmental functions (as opposed to engaging in commercial activities).

[Protocol, Chapter I, paragraph 7]

- 1.154 The requirement that all the returns on the entity's investments are public monies ensures that the benefits of the exemption do not flow to individuals acting in a private capacity.
- 1.155 The 5 per cent limitation on source country taxation also applies to dividends which are beneficially owned by:
- the Reserve Bank of Australia and the Central Bank of Portugal (Banco de Portugal);

- in the case of Australia, a recognised pension fund of Australia, or a resident of Australia (such as a life insurance company), deriving such dividends from the carrying on of complying superannuation activities; or
- in the case of Portugal, a recognised pension fund of Portugal whose income is exempt from Portuguese tax.

[Article 10, subsubparagraphs 3 b) ii) to iv)]

1.156 The reduced rate for dividends beneficially owned by Australian superannuation funds does not require the dividends to be exempt from tax in Australia. This approach reflects that Australian superannuation funds that are complying funds have concessional tax arrangements (which can include tax exemptions), but generally are not fully exempt from tax.

[Article 10, subsubparagraph 3 b) iii)]

1.157 The term ‘complying superannuation activities’ is understood to mean those activities undertaken by an entity that is subject to concessional tax treatment because it complies with applicable regulatory provisions or those activities that generate income from segregated exempt assets or the complying superannuation class of taxable income of a life insurance company that is subject to concessional treatment.

[Protocol, Chapter I, paragraph 6]

Dividends effectively treated as business profits

1.158 Paragraphs 1 and 2 of Article 10 do not apply to dividends that are effectively connected with a permanent establishment of the beneficial owner of the dividends that is located in the country where the dividends are sourced. The taxation of such dividends is instead dealt with by Article 7 (Business profits).

[Article 10, paragraph 5]

1.159 This exception is based on the OECD Model.

Extra-territorial taxation excluded

1.160 Article 10 limits the extra-territorial application, by either Australia or Portugal, of taxing rights over dividend income. Broadly, a country is precluded from taxing dividends paid by a company that is a resident solely of the other country, unless:

- The person that derives the dividends is a resident of the first country; or
- The shareholding that gives rise to the dividends is effectively connected with a permanent establishment in the first country.

[Article 10, paragraph 6]

- 1.161 This provision ensures that source country taxation does not extend to the distribution of profits, which may already be taxed in accordance with the provisions of the Convention, to the company's shareholders that are unconnected to the source country.
- 1.162 The provision is based on the OECD Model but contains a deviation. The reference to dividends being 'beneficially owned' by a resident replaces the standard OECD approach that requires the dividends to be 'paid' to a resident. This approach ensures that the limitation applies appropriately where the recipient of the dividend payments is not the beneficial owner.

Dual resident company rule

- 1.163 The limitation on extra-territorial taxation does not apply to dividends that are paid by a dual-resident company that is deemed to be a resident only of Australia or Portugal because of the residency tiebreaker rule in Article 4 (Resident). Where such dividends are beneficially owned by a resident of the country to which the dual-resident company's residency was allocated under the treaty, Article 10 applies as though the dual-resident company was a resident of the other country.
[Article 10, paragraph 7]
- 1.164 The effect of this rule is that the country of source can continue to tax dividends paid by a dual-resident company whose residency is allocated to the other country, provided that the dividends are paid out of profits arising in the source country which are not subject to tax at the corporate level. Australia's consistent treaty practice is to include this provision to prevent dual-resident companies being established in Australia to allow untaxed Australian profits to be paid to shareholders resident in a treaty partner country or a third country, without any Australian tax at either the company or shareholder level.

Article 11 – Interest

- 1.165 Article 11 allocates taxing rights over interest paid between Australia and Portugal.
- 1.166 The Article generally permits source-based taxation of interest paid to residents of each country. However, the maximum rate of withholding tax for the source country is 10 per cent of the gross amount of interest. There is an exemption from source-based taxation in certain circumstances to interest derived by a Contracting State, or a political subdivision (or in the case of Portugal, administrative subdivision) or a local authority thereof (including a government investment fund), or the Reserve Bank of Australia or the Central Bank of Portugal (Banco de Portugal). There are reductions in the maximum rate of source taxation in certain circumstances for financial institutions and recognised pension funds.
[Article 11, paragraphs 1, 2 and 3]

1.167 The Article also provides that:

- interest that is effectively connected with a permanent establishment of the beneficial owner are to be dealt with under Article 7 (Business profits);
- interest shall be deemed to arise in the payer's country of residence according to domestic law; and
- the concessional arrangements for interest only apply to the amount that might have been expected to be paid or credited under arm's length dealing between independent parties.

[Article 11, paragraphs 5, 6 and 7]

Definition of 'interest'

1.168 The term 'interest' is defined in the Article as:

- 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);
- income 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.

[Article 11, paragraph 4]

1.169 This definition is based on the equivalent provision in the OECD Model but extends that definition to include income that is subjected to the 'same taxation treatment as income from money lent' by the law of the source country. This extension ensures that income that is effectively treated as interest under a State's domestic law is dealt with by Article 11 and is consistent with Australia's reservation to Article 11 of the OECD Model outlined in paragraph 45 of the OECD Model Commentary on Article 11.

Maximum rate of withholding tax

1.170 The Article sets the maximum rate of taxation for the country in which interest arises. This rate is 10 per cent of the gross amount of interest.

[[Article 11, subparagraph 2 c)]

Reduced rate of tax for financial institutions

1.171 The Article sets a reduced maximum rate of source taxation for financial institutions. This rate is 5 per cent of the gross amount of interest.

[Article 11, subparagraph 2 a)]

- 1.172 This 5 per cent rate limit applies to interest derived by a financial institution which is unrelated to and deals wholly independently with the payer. This applies to interest derived by a financial institution that is a resident of the other country and the beneficial owner of the interest.
- 1.173 The 5 per cent rate limit for interest paid to financial institutions recognises that the general 10 per cent source country tax rate on gross interest can be excessive given the cost of their funds.
- 1.174 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 2 a)]
- 1.175 The 5 per cent rate limit 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.
- 1.176 The denial of the 5 per cent rate limit 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 a lower withholding tax rate. The 5 per cent rate limit 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, subparagraphs 2 a) and 2 c)]
- 1.177 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 Portuguese 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.
- 1.178 However, a back-to-back arrangement would generally not include a loan guarantee provided by a related party to a Portuguese financial institution.

Reduced rate of tax for recognised pension funds

- 1.179 Article 11 also provides a 5 per cent rate limit for interest that arises in Portugal that is derived and beneficially owned by a recognised pension fund of Australia, or a resident of Australia, deriving such interest from the carrying on of complying superannuation activities. This extension recognises that Australia’s superannuation system extends to other entities, such as life

insurance companies.

[Article 11, subparagraph 2 b i); Protocol, Chapter I, paragraph 6]

- 1.180 Consistent with the reduced rate of dividend withholding tax in Article 10 (Dividends), Article 11 provides a 5 per cent rate limit for interest that arises in Australia that is derived and beneficially owned by a recognised pension fund of Portugal whose income is exempt from tax in Portugal.
[Article 11, subparagraph 2 b ii)]
- 1.181 The 5 percent rate limit does not apply to a recognised pension fund, or to another entity that can access the reduced rate, where the beneficial owner of the interest is able to directly or indirectly determine the identity of one or more persons who make the decisions that comprise the control and direction of the operations of the issuer of the debt-claim.
[Article 11, subparagraph 2 b)]
- 1.182 This restriction ensures that the reduced rate is only applicable where the beneficial owner of the interest is an arm's length lender who does not play an active role in the management or operation of the entity paying the interest. This reflects that the reduced rate is intended to apply to 'passive' investments by the lender, which exclude debt arrangements that convey special rights or obligations, or that are entered into where the lender plays an active role in the other entity because of some other arrangement (such as a substantial shareholding).
- 1.183 Where the reduced rate does not apply, the general 10 per cent rate limit applies.
[Article 11, subparagraph 2 c)]

Exemption for governmental entities and central banks

- 1.184 Article 11 of the Convention also provides an exemption for interest that arises in either Australia or in Portugal, and that is derived and beneficially owned by the other country or one of their political subdivisions (or in the case of Portugal, administrative subdivisions) or local authorities (including a government investment fund).
[Article 11, paragraph 3]
- 1.185 The Protocol to the Convention clarifies that the term 'government investment fund' means an entity that satisfies certain conditions. That is, the entity must be wholly owned by a Contracting State, or political subdivision (or in the case of Portugal, administrative subdivision) or a local authority thereof, be funded solely by public monies and all returns on the entity's investments must be public monies. In addition, the term does not include certain entities which are described in the Protocol, such as partnerships, or entities with principal activity related to non-financial goods or services. The definition is based on concepts in Australia's sovereign immunity rules (refer Division 880 of the ITAA 1997) and is intended to ensure that the exemption is only available where the government entity is performing governmental functions (as

opposed to engaging in commercial activities). **[Protocol, Chapter I, paragraph 7]**

- 1.186 The requirement that all the returns on the entity's investments are public monies ensures that the benefits of the exemption do not flow to individuals acting in a private capacity.
- 1.187 The exemption also applies to interest that is beneficially owned by the central banks of Australia and Portugal (the Reserve Bank of Australia and the Central Bank of Portugal (Banco de Portugal), respectively).
[Article 11, paragraph 3]
- 1.188 The exemption from source-based taxation does not apply where the beneficial owner of the interest is able to directly or indirectly determine the identity of one or more persons who make the decisions that comprise the control and direction of the operations of the issuer of the debt-claim.
[Article 11, paragraph 3]
- 1.189 This restriction is consistent with the scope of Australia's domestic sovereign immunity rules, which are limited to passive investments.
- 1.190 Where the exemption does not apply, the general 10 per cent rate limit applies.
[Article 11, subparagraph 2 c)]

Interest effectively treated as business profits

- 1.191 Paragraph 1, and subparagraphs a) and c) of paragraph 2, of Article 11 do not apply to interest that is effectively connected with a permanent establishment of the beneficial owner of the interest that is located in the country where the interest arises. The taxation of such interest is instead dealt with by Article 7 (Business profits).
[Article 11, paragraph 5]
- 1.192 This exception is consistent with the OECD Model.

Deemed source of interest

- 1.193 Article 11 contains a rule that generally deems interest to arise in the country in which the payer is a resident for the purposes of its tax. This deeming rule is broadly based on the equivalent provision in the OECD Model, although the Convention also includes the phrase 'for the purposes of its tax'. This 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 Convention by virtue of paragraphs 2 or 3 of Article 4 (Resident). This wording operates to allow Australia to tax interest paid by a resident of Australia to a resident of Portugal who is the beneficial owner of that interest.
[Article 11, paragraph 6]

1.194 This deemed source rule does not apply to interest payments that are an expense of a person that is incurred in carrying on a business through a permanent establishment. In such cases, the interest is deemed to arise in the country in which the permanent establishment is situated.

[Article 11, paragraph 6]

1.195 This provision is based on the equivalent provision in the OECD Model. However, in contrast to the OECD Model, the provision in the Convention is not limited to permanent establishments that are located in the Contracting States (that is, Australia or Portugal). As such, interest can be deemed to arise in a third country where it is connected to a permanent establishment of the payer in such a country.

Related persons

1.196 Article 11 contains a general safeguard against payments of excessive interest where a special relationship exists between the parties to a loan transaction (or between those parties and some other person). In such cases, the beneficial treatment provided by Article 11 is limited to the amount of interest that would have been expected to have been agreed to if the parties to the loan arrangements were dealing at arm's length. Any excess part of the interest continues to be taxable according to the domestic laws of Australia and Portugal and the other provisions of the Convention.

[Article 11, paragraph 7]

1.197 This provision is based on the equivalent provision in the OECD Model. The provision contains a minor departure, referring to 'the amount which might have been expected to', rather than 'the amount which would have been agreed'. This allows adjustments where it is not possible to determine the amount that 'would' have been agreed between the related parties due to an absence of independent comparisons.

Article 12 – Royalties

1.198 Article 12 allocates taxing rights over royalties paid or credited between Australia and Portugal.

1.199 In contrast to the OECD Model, which allocates taxing rights over royalties on an exclusive residency basis, Article 12 of the Convention also permits source based taxation of royalties that arise in Australia or in Portugal.

[Article 12, paragraphs 1 and 2]

1.200 The Article provides that:

- royalties that arise in Australia or Portugal and that are beneficially owned by a resident of the other country may be subject to a maximum 10 per cent rate of tax in the country in which they arise;

- royalties that are effectively connected with a permanent establishment of the beneficial owner are to be dealt with under Article 7 (Business profits);
- royalties are generally deemed to arise in the payer's country of residence according to domestic law; and
- the concessional arrangements for royalties only apply to the amount that might have been expected to be paid or credited under arm's length dealing between independent parties.

[Article 12, paragraphs 2, 4, 5 and 6]

Definition of 'royalties'

- 1.201 The definition of 'royalties' in the Article expands on the equivalent definition in the OECD Model.
- 1.202 These extensions generally ensure that the definition in the Convention is aligned with the definition in Australia's domestic income tax law. As a result of these changes, the definition in Article 12 to the Convention is structured differently to that in the OECD Model.
- 1.203 In contrast to the OECD Model, which refers to payments that are received as consideration, the definition in the Convention expands on the reference to payments so that the definition applies to 'payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration'.

[Article 12, paragraph 3]

- 1.204 The definition of 'royalties' in the Convention includes payments or credits made as consideration for:
- the use of, or right to use, intellectual property, as well as the supply of any assistance that is ancillary and subsidiary to such use;
 - the supply of scientific, technical, industrial or commercial knowledge or information, as well as the supply of any assistance that is ancillary and subsidiary to the use of such knowledge or information;
 - the use of, or right to use, motion picture films, or any tapes or discs, or any other means of reproduction or transmission;
 - the use of, or right to use, radiofrequency spectrum; or
 - not supplying or granting another person any property or right that is covered by the definition.

[Article 12, paragraph 3]

- 1.205 In contrast to the part of the definition in the OECD Model that refers to 'information concerning industrial, commercial or scientific experience', the definition of 'royalties' in the Convention refers to the supply of such

information or knowledge.

[Article 12, subparagraph 3 b)]

- 1.206 This expanded reference ensures that the definition covers the full range of technical know-how that may be supplied as a royalty.
- 1.207 In contrast to the part of the definition in OECD Model that includes a general reference to ‘artistic work... including cinematograph films’, the definition in the Convention refers specifically to ‘motion picture films and films or audio or video tapes or disks, or other means of image or sound reproduction or transmission for use in connection with television, radio or other broadcasting’.
- [Article 12, subparagraph 3 d)]***
- 1.208 While, in practical terms, the general reference to ‘artistic work’ in the OECD Model is likely to include each of the specific extensions in this part of the definition, this expanded reference is included to ensure that this part of the definition is capable of being applied in the context of modern technological developments. This approach reflects Australia’s consistent treaty practice.
- 1.209 The definition of ‘royalties’ in the Convention also applies to payments or credits made for the use of, or right to use, the radio frequency spectrum specified in a spectrum licence.
- [Article 12, subparagraph 3 e)]***
- 1.210 This provision is not included in the OECD Model. The provision is commonly included in Australia’s tax treaties and is aimed at preserving 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. The extension also ensures that the definition of ‘royalties’ in the Convention is aligned with Australia’s domestic law definition.
- 1.211 Article 12 also 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.
- [Article 12, subparagraph 3 f)]***
- 1.212 This provision is not included in the OECD Model and ensures that such payments are subject to tax as a royalty payment under the terms of this Article.

Royalties effectively treated as business profits

- 1.213 Article 12 does not apply to a royalty that is effectively connected with a permanent establishment of the beneficial owner of the royalty that is located in the country in which the royalty arises. The taxation of such royalties is instead dealt with by Article 7 (Business profits).
- [Article 12, paragraph 4]***

- 1.214 This exception is consistent with the OECD Model but adapted to reflect that the definition of ‘royalties’ in the Convention also includes amounts that are ‘credited’.

Deemed source of royalties

- 1.215 Article 12 contains a rule that generally deems royalties to arise in the country in which the payer is a resident for the purposes of its tax. This paragraph allows Australia to tax royalties paid by a resident of Australia to a resident of Portugal who is the beneficial owner of those royalties.
[Article 12, paragraph 5]
- 1.216 While there is no equivalent provision in Article 12 of the OECD Model, this deeming rule follows the provision that is included in Article 11 (Interest) of the Convention, which is broadly based on the deeming rule for Article 11 (Interest) of the OECD Model.
- 1.217 This deemed source rule does not apply to royalty payments that are an expense of a person that is incurred in carrying on a business through a permanent establishment. In such cases, the royalty is deemed to arise in the country in which the permanent establishment is situated.
[Article 12, paragraph 5]
- 1.218 As with the deeming rule for interest in Article 11 (Interest), royalties can be deemed to arise in a third country where they are connected to a permanent establishment of the payer in such a country.

Related persons

- 1.219 Article 12 contains a general safeguard against payments or credits of excessive royalties where a special relationship exists between the parties to a transaction (or between those parties and some other person). In such cases, the beneficial treatment provided by Article 12 is limited to the amount of royalties that would have been expected to have been agreed to if the parties to the arrangements were dealing at arm’s length. Any excess part of the royalty continues to be taxable according to the domestic laws of Australia and Portugal and the other provisions of the Convention.
[Article 12, paragraph 6]
- 1.220 This provision is based on the equivalent provision in the OECD Model. The provision contains minor departures, referring to ‘the amount which might have been expected to’ rather than ‘the amount which would have been agreed’. The provision is also modified to reflect that the definition of ‘royalties’ in the Convention extends to amounts that are credited.

Article 13 – Alienation of property

- 1.221 Article 13 allocates taxing rights over income, profits or gains arising from the alienation of immovable property and movable property. Paragraphs 1 to 4 of Article 13 align with the equivalent provisions in the OECD Model.
- 1.222 The reference to ‘income, profits or gains’ in this Article is intended to put beyond doubt that a gain from the alienation of property, which in Australia may be income or a profit under ordinary concepts, is to be taxed in accordance with this Article.
- 1.223 Article 13 permits source-based taxation of income, profits or gains from the alienation of immovable property by the country in which the property is situated.
[Article 13, paragraph 1]
- 1.224 Article 13 permits source country taxation by a country of income, profits or gains from the alienation of movable property that forms part of the business property of a permanent establishment located in that country.
[Article 13, paragraph 2]
- 1.225 The term ‘movable property’ means property that is not immovable property.
[Protocol, Chapter I, paragraph 3]
- 1.226 The Article also assigns exclusive residence-based taxation for income, profits or gains that an enterprise that operates ships or aircraft in international traffic derives from the alienation of such ships or aircraft, or from movable property related to their operation.
[Article 13, paragraph 3]
- 1.227 This provision aligns with the equivalent provision in the OECD Model. However, as noted above in respect of Article 3 (General definitions), the definition of ‘international traffic’ used in this Convention is based on the alternative formulation provided in the OECD Model Commentary.
- 1.228 The Article also permits the source country to tax income, profits or gains derived from the alienation of any shares or ‘comparable interests’ (for example, in a partnership or trust) by a resident of the other country where, at any time during the 365 days preceding the alienation, more than half of the value of such interests related to immovable property located in that country.
[Article 13, paragraph 4]
- 1.229 This rule is designed to deal with arrangements involving the effective alienation of incorporated immovable property, or like arrangements. It ensures that capital or revenue gains on disposal of a foreign resident’s interests in certain assets are taxable by Australia. Such treatment applies whether the immovable property is held directly or indirectly through a chain of interposed entities. The rule refers to ‘any shares’, whereas the OECD Model simply refers to ‘shares’. This expanded reference is intended to make it clear that the provision has the broadest possible application.

- 1.230 It is understood that the term ‘comparable interests’ includes, in the case of Portugal, participation units in an undertaking for collective investment within the scope of the Tax Incentives Statute ("Estatuto dos Benefícios Fiscais").
[Protocol, Chapter I, paragraph 8]
- 1.231 Article 13 contains a ‘sweep up’ rule that generally assigns exclusive taxing rights over gains of a capital nature from the alienation of property that is not otherwise dealt with in the Article to the country of residence of the alienator.
[Article 13, paragraph 5]
- 1.232 This aspect of the sweep-up rule is based on the equivalent provision in the OECD Model. However, in contrast to the other provisions in Article 13 of the Convention, the sweep-up rule refers specifically to ‘gains of a capital nature’. This means that the broad reference to ‘income’ in Article 13 is not relevant to the sweep-up rule, which applies to a more limited class of ‘gains’. As such, income or profits that are not also gains of a capital nature are dealt with as business profits under Article 7 (Business profits), or as ‘other income’ under Article 21 (Other income).
- 1.233 Article 13 does not affect Australia or Portugal’s right to tax income, profits or gains from the alienation of property derived by a person who ceases to be a resident of their country in certain circumstances. This rule applies to a person that was a resident at any time during the year of income in which the property was alienated or had been a resident at any times during the five preceding years.
[Article 13, paragraph 6]
- 1.234 This provision preserves the operation of ‘exit taxes’ that are applied to a person who ceases to be a resident of Australia or Portugal. However, the five year limit means that any exit taxes that apply after a person ceases to be a resident (for example, because they have deferred effect) cannot be applied after the time limit expires. In such cases, any income, profits or gains from the alienation of an asset that would otherwise be subject to an exit tax in the former country of residency is taxable in the new country of residency (subject to the other provisions of the Article).

Article 14 – Income from employment

- 1.235 Article 14 provides that income from employment (that is, salaries, wages and similar remuneration) earned by an individual shall only be taxable in their State of residence.
[Article 14, paragraph 1]
- 1.236 However, if the individual’s employment occurs in the other State, then their salary, wages or similar remuneration may be taxed in that state, subject to certain conditions being met and the exceptions in the Article not being applicable (for example in respect of short-term visits, employment on a ship or aircraft).
[Article 14, paragraphs 1 to 3]

1.237 Article 14 additionally allocates taxing rights over fringe benefits. The effect is that fringe benefits can only be taxed in the State that has been allocated the sole or primary taxing right under the Convention, in respect to salary, wages or other similar remuneration from the employment to which the fringe benefit relates.

[Article 14, paragraph 4]

1.238 Article 14 expressly defers to the provisions of Articles 15 (Directors' fees), 17 (Pensions) and 18 (Government service) that also concern salaries, wages and similar remuneration.

[Article 14, paragraph 1]

Article 15 – Directors' fees

1.239 Article 15 provides that directors' fees and other similar payments earned by a resident of one state in their capacity as 'a member of the board of directors of a company' may be taxed in the country of residence of the company receiving the directorship services.

[Article 15]

1.240 It is understood that the term 'a member of the board of directors of a company' includes a member of the supervisory board (Conselho Fiscal) or another similar organ of a company which is a resident of Portugal, as foreseen in the corporate law (Código das Sociedades Comerciais).

[Protocol, Chapter I, paragraph 9]

Article 16 – Entertainers and sportspersons

1.241 Article 16 provides that income earned by a resident of one State as an entertainer or sportsperson in the other state, may be taxed in that other State.

[Article 16, paragraph 1]

1.242 If income from an entertainer or sportsperson's personal activities accrues to another person, it may be taxed in the State where the activities take place, notwithstanding Article 14 (Income from employment).

[Article 16, paragraph 2]

Article 17 – Pensions

1.243 Article 17 provides that pensions and other similar remuneration shall only be taxed in the recipient's country of residence, subject to the provisions of paragraph 2 of Article 18 (Government service).

[Article 17]

Article 18 – Government service

1.244 Article 18 provides that income (that is, salaries, wages and other similar remuneration) paid to an individual by a Contracting State or one of its political or administrative subdivisions or local authorities for the individual's government service are only taxable in that State. However, such income is taxable only in the other State, if the individual who earns the income is a resident of that State, provided that they are a national of that country, or did not become a resident solely to render the services.

[Article 18, paragraph 1]

1.245 Government pensions are taxable only in the source country unless the person is both a resident and a national of the other country, in which case the pension is taxable only in the residence country.

[Article 18, paragraph 2]

1.246 Paragraphs 1 and 2 do not apply where the relevant services are performed in connection with a business carried on by the State, or one of its political or administrative subdivisions or local authorities. In such cases, Articles 14 (Income from employment), 15 (Directors' fees), 16 (Entertainers and sportspersons) and 17 (Pensions) shall apply.

[Article 18, paragraph 3]

Article 19 – Professors, teachers and researchers

1.247 Article 19 exempts from tax remuneration which was received for undertaking study or research or for teaching by a professor, teacher or researcher who is or was a resident of the other Contracting State immediately before visiting the Contracting State while they are engaging in study or research or teaching at a higher educational institution in the Contracting State. This tax exemption applies where the period does not exceed two years and the remuneration is subject to tax in the other Contracting State.

[Article 19, paragraph 1]

1.248 However, this exemption only applies to remuneration for research if it is undertaken in the public interest and not primarily for the private benefit of a specific person or persons.

[Article 19, paragraph 2]

Article 20 – Students

1.249 Article 20 provides that where payments received by visiting students and business apprentices are made for the purposes of their maintenance, education or training then these payments will not be taxed by the country in which the student is undertaking their education or training, provided those payments are from sources outside that State. The student or business apprentice must be temporarily present in the country solely for the purpose of the individual's

education or training.

[Article 20]

- 1.250 Payments received by visiting students or business apprentices from employment are covered by other Articles.

Article 21 – Other income

- 1.251 Article 21 provides for the taxation of any form of income that is not dealt with by the earlier Articles of the Convention.

- 1.252 Any such income of a resident of Australia or Portugal, wherever arising, is taxable only in the country of residence.

[Article 21, paragraph 1]

- 1.253 Article 21 also provides an exemption to the general rule for income from a right or property, other than immovable property as defined in paragraph 2 of Article 6, that is effectively connected to a permanent establishment. In such cases, Article 7 applies to allocate the taxing right of that other income to the country in which the permanent establishment is situated.

[Article 21, paragraph 2]

- 1.254 Notwithstanding paragraphs 1 and 2, where the income of a resident of Australia or Portugal arises in the other State, it may also be taxed in the other State.

[Article 21, paragraph 3]

- 1.255 For example, Australia may also tax any superannuation lump sum payments from Australian superannuation funds or retirement benefit schemes relating to certain life events (such as disability or death) paid to a resident of Portugal. In other treaties, Australia provides for this in the Pensions Article.

- 1.256 This approach differs from that provided in the OECD Model, which allocates exclusive taxing rights on the basis of residency. The departure is consistent with Australia's reservation to the OECD Model.

- 1.257 Where income may be taxed in both countries in accordance with this Article, the country of residence of the person deriving the income is obliged by Article 22 (Relief from Double Taxation) to provide double taxation relief.

- 1.258 Article 21 allocates sole taxing rights to the source country for alimony or other maintenance payments made to a resident of the other country.

[Article 21, paragraph 4]

Article 22 – Relief from double taxation

- 1.259 Article 22 provides the rules to reduce double taxation. Under the Convention, Australia and Portugal agree to restrict their respective taxing rights to avoid double taxation. The Convention broadly follows the OECD Model for the alleviation of double taxation with the Convention adopting the credit method

of relief from double taxation. Under this method the residence country is required to give credit against its tax for the tax paid in the source country.

- 1.260 Australia provides for relief from double taxation by allowing a credit against its own tax for Portuguese tax paid under the laws of Portugal and in accordance with the Convention on income derived by a resident of Australia from sources in Portugal.
[Article 22, paragraph 1]
- 1.261 This is primarily achieved through Australia's domestic tax provisions that provide for tax credits, such as the foreign income tax offset rules in Division 770 of the ITAA 1997. Australia also provides an exemption for certain amounts of income (for example, certain branch profits are exempt under section 23AH of the ITAA 1936 and certain non-portfolio dividend distributions are exempt under Subdivision 768-A of the ITAA 1997). There is no Australian tax against which a credit could be applied for such exempt income.
- 1.262 Portugal provides for relief from double taxation by allowing a deduction against its own tax for Australian tax paid under the law of Australia and in accordance with the Convention on income derived by a resident of Portugal from sources in Australia. The deduction from Portuguese tax payable shall not exceed the Australian tax paid on the related income.
[Article 22, subparagraph 2 a)]
- 1.263 Portugal may take into account income that is exempt from tax in Portugal in accordance with the Convention when calculating the amount of tax on the remaining income derived by a resident of Portugal.
[Article 22, subparagraph 2 b)]

Article 23 – Non-discrimination

- 1.264 Article 23 provides the rules to prevent tax discrimination. Article 23 implements the provisions of the OECD Model with some departures.

Discrimination based on nationality

- 1.265 Under the Convention, Australia and Portugal agree that nationals of one country shall not be 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 in the same circumstances. This principle applies to both the taxation itself and any requirement connected with such taxation.
[Article 23, paragraph 1]

Non-discrimination and permanent establishments

1.266 Paragraph 2 forbids a country from levying tax less favourably on permanent establishments of the other country 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. This 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 23, paragraph 2]

Deductions for payments to foreign residents

1.267 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 7 of Article 11 (Interest) and paragraph 6 of Article 12 (Royalties).

[Article 23, paragraph 3]

Enterprises owned or controlled abroad

1.268 Paragraph 4 forbids a country from giving 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 Portuguese residents may not be given other or more burdensome treatment than similar locally owned or controlled Australian companies.

[Article 23, paragraph 4]

When this Article applies

1.269 Article 23 does not apply to a law of Australia relating to a rate of taxation in respect of an individual who is a working holiday maker under Australian law.

[Article 23, paragraph 5]

1.270 Paragraph 6 departs from the OECD Model so that instead of applying to taxes of every kind and description, the Article applies only to those taxes covered by Article 2 (Taxes covered) of the Convention. See explanation of Article 2 above.

[Article 23, paragraph 6]

Article 24 – Mutual agreement procedure

- 1.271 Article 24 provides for a procedure for resolving difficulties and disputes arising from the application of the Convention. It provides for the consultation between the competent authorities of Australia and Portugal with a view to reaching a solution in cases where a person can demonstrate actual or potential imposition of taxation contrary to the provisions of the Convention.
[Article 24, paragraphs 1 and 2]
- 1.272 Article 24 also obliges the competent authorities of Australia and Portugal to endeavour to resolve by mutual agreement any difficulties or doubts that arise regarding the interpretation or application of the Convention. The competent authorities may also consult together for the elimination of double taxation in cases not provided for in the Convention.
[Article 24, paragraph 3]
- 1.273 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, email or web conferencing), letter, telephone, direct meetings or any other convenient means.
[Article 24, paragraph 4]
- 1.274 In some instances, the competent authorities may not reach agreement on a solution to a particular case. Chapter II of the Protocol provides that some cases may be eligible for arbitration to be used to assist in resolving those cases.

GATS dispute resolution process

- 1.275 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 GATS.
[Article 24, paragraph 5]
- 1.276 Australia and Portugal 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.
- 1.277 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.

- 1.278 Paragraph 5 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 Convention may only be brought before the Council on Trade in Services with the consent of both Australia and Portugal. Paragraph 5 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.
- 1.279 Any doubt as to the interpretation of paragraph 5 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 Australia and Portugal.

Article 25 – Exchange of Information

- 1.280 Article 25 obliges the competent authorities to exchange information as is foreseeably relevant for carrying out the provisions of the Convention or to the administration or enforcement of domestic laws concerning the taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions (or in the case of Portugal, administrative subdivisions) or local authorities. The information is not restricted to persons or taxes covered under the Convention and may therefore cover persons who are not residents of either Australia or Portugal and taxes outside of those covered in Article 2.
[Article 25, paragraph 1]
- 1.281 Article 25 provides the purposes for which the exchanged information may be used and the persons to whom it may be disclosed, and limitations on the exchange of information, in a manner which is consistent with the approach taken in the OECD Model.
[Article 25, paragraphs 2 and 3]
- 1.282 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 25, paragraph 4]
- 1.283 Paragraph 5 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 an agency or a fiduciary capacity, or because it relates to ownership interests in a person.
[Article 25, paragraph 5]

Article 26 – Use and transfer of personal data

- 1.284 Article 26 provides rules on how to collect, use, disclose and manage personal data supplied or obtained by an agency. These are consistent with obligations under Australian law.
- 1.285 The applicable laws referred to throughout this Article are, for Australia, the *Privacy Act 1988* (including the APPs) and the *Freedom of Information Act 1982*, and for Portugal, the EU General Data Protection Regulation. Other laws may also be relevant to the extent they regulate collection, use and disclosure (i.e. processing) of personal data, such as where personal data constitutes ‘protected information’ under taxation laws. For instance, in Australia Subdivision 355-B of Schedule 1 to the *Taxation Administration Act 1953* prevents the sharing of protected information except in very limited circumstances.
- 1.286 The meaning of ‘personal data’ is intended to be consistent with the definition of ‘personal information’ in the *Privacy Act 1988*.
- 1.287 The agency receiving the personal data may use that information for the purposes of the Convention, in accordance with the domestic laws of the recipient country. The purposes of the Convention are to be considered broadly, and include exchange of information under Article 25 and use of information for the assessment, collection and enforcement of tax obligations.
[Article 26, subparagraph 1 a)]
- 1.288 This is consistent with APP 3, APP 6 and APP 8.2, which permit the collection, use and disclosure of personal information for certain purposes, including where reasonably necessary for a function of an APP entity. The Commissioner of Taxation, competent authority of this Convention, is an APP entity.
- 1.289 The data must also be adequate, relevant, and not excessive in relation to the purposes for which they are collected, transferred and then processed. This is consistent with paragraph 1 of Article 25 (Exchange of Information), which requires that the obligation to disclose be limited to information which is foreseeably relevant for carrying out the provisions of the Convention or to the administration or enforcement of domestic laws concerning the taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities (and in the case of Portugal, administrative subdivisions). These requirements are also consistent with APPs 3 and 6 (Collection of solicited personal information, and Use or disclosure of personal information), which outline that data must only be collected if it is reasonably necessary for the entity’s activities or functions, and can only be used or disclosed for the particular purpose for which it was collected, unless an exception applies.
[Article 26, subparagraph 1 b)]

- 1.290 The receiving agency must take all reasonable steps to ensure that data which are inaccurate or incomplete are erased or corrected, having regard to the purposes for which they were collected or for which they are further processed. This aligns with APPs 10 and 13 (Quality of personal information, and Correction of personal information). The requirement to ‘erase’ is intended to have the same meaning as ‘destroy’ within the *Privacy Act 1988*.
[Article 26, subparagraph 1 c)]
- 1.291 The agency must not keep the data in a form that permits identification of the data subjects for any longer than is necessary for the purposes for which the data were collected or for which they are further processed; the data shall be erased after that period in accordance with the domestic laws applicable in each Contracting State. This is consistent with APPs requiring an entity to take reasonable steps to destroy or de-identify information, including unsolicited information received (APP 4.3 Dealing with unsolicited personal information, and APP 11.2 Security of personal information).
[Article 26, subparagraph 1 d)]
- 1.292 If data is supplied which is inaccurate, or should not have been supplied, then the competent authority of the requesting State must be informed without delay, and that competent authority is then obliged to correct or erase such data without delay. This is consistent with APPs 4, 10 and 13 (Dealing with unsolicited personal information, Quality of personal information, and Correction of personal information).
[Article 26, paragraph 2]
- 1.293 A person also has a right of access to their personal data, subject to the domestic laws applicable in the Contracting State. This aligns with APP 12 (Access to personal information). The request may be refused in accordance with the domestic laws applicable in the Contracting State. The provision of access is flexible in that a person could be granted direct access, or via an intermediary.
[Article 26, paragraph 3]
- 1.294 Personal data which is transferred to a competent authority under the Convention must not be further transferred to a third jurisdiction or an international organisation without the prior consent of the requested Contracting State (from where the data originated) and appropriate legal safeguards for the protection of personal data. This is consistent with APP 8 (Cross-border disclosure of personal information).
[Article 26, paragraph 4]

Article 27 – Assistance in the collection of taxes

- 1.295 Australia and Portugal 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 Convention. 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 Portugal. The competent authorities may mutually agree on the mode of application of this Article.

[Article 27, paragraph 1]

1.296 The form of assistance is set out in paragraphs 3 and 4 of this Article.

Definition of revenue claim

1.297 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 Portugal, or by Portugal's political or administrative subdivisions or local authorities, but only insofar as the imposition of such taxes is not contrary to the Convention or any other instrument in force between Australia and Portugal. It also applies to interest, administrative penalties and costs of collection or conservancy related to such amount.

[Article 27, paragraph 2]

1.298 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 27, paragraph 4]

Enforceable revenue claims

1.299 Assistance in collection will only be provided by Australia in relation to a revenue claim that is enforceable in Portugal. Similarly, Portugal 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.

1.300 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 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]

1.301 Where Portugal makes a revenue claim, the Australian Commissioner of Taxation will apply the provisions of Division 263 (Mutual assistance in the administration of foreign tax laws) in Schedule 1 to the *Taxation Administration Act 1953* for the administration and collection of that claim.

Measures of conservancy

- 1.302 Australia or Portugal 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.
- 1.303 If requested to do so by Portugal, 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

- 1.304 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]
- 1.305 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

- 1.306 Any rules of Australia and Portugal 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.
- 1.307 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

1.308 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 Portuguese revenue claim.

[Article 27, paragraph 6]

Change in circumstances

1.309 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.

1.310 An example is where a request for assistance in collection has been made by Portugal, but the revenue claim ceases to be enforceable in Portugal prior to its collection by Australia.

1.311 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

1.312 The requested country is permitted to refuse the request for assistance in certain circumstances.

1.313 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)]

1.314 However, this does not prevent Australia from applying administrative measures to collect a Portuguese revenue claim, even though invoked solely to provide assistance in the collection of Portuguese taxes.

1.315 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)]

- 1.316 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)]

- 1.317 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)]

- 1.318 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 – Members of diplomatic missions and consular posts

- 1.319 Article 28 ensures that the provisions of the Convention do not result in members of diplomatic missions and consular posts receiving less favourable treatment than that to which they are entitled to in accordance with the general rules of international law or under the provisions of special agreements.

[Article 28]

- 1.320 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 – Entitlement to benefits

- 1.321 Article 29 seeks to address potential treaty abuse. It provides that treaty benefits under the Convention are not to be granted for an item of income, profits or gains, if it can be reasonably concluded that the obtaining of the 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 the granting of that benefit is in accordance with the object and purpose of the relevant provisions of the Convention.

[Article 29, paragraph 1]

- 1.322 This paragraph adopts the wording of the Principal Purpose Test in the OECD Model and is intended to ensure that the Convention should apply in

accordance with the purposes for which it was entered into, i.e. to provide benefits in respect of bona fide exchanges of goods and services and movements of capital and persons, as opposed to arrangements where one of the principal purposes is to secure a more favourable tax treatment.

- 1.323 Article 29 provides that where income, profits or gains is exempt from tax in Australia only because of the status of that individual as temporary resident under the applicable laws of Australia, then that individual cannot obtain treaty benefits in Portugal in respect of that item of income, profits or gains.
[Article 29, paragraph 2]
- 1.324 In Australia, temporary residents are not assessable on foreign-sourced income, subject to certain exceptions such as income that is remuneration for employment. The inclusion of paragraph 2 of Article 29 ensures that this tax treatment, when interacting with the operation of the treaty, does not create the potential for double non-taxation.
- 1.325 Article 29 preserves the application of domestic anti-abuse laws. This ensures that the Convention does not prevent the application of domestic laws that are designed to prevent the evasion or avoidance of taxes. Where such anti-abuse laws result in double taxation, the competent authorities are to consult in accordance with the mutual agreement procedure outlined in paragraph 3 of Article 24 of the Convention.
[Article 29, paragraph 3]
- 1.326 The Protocol describes a range of laws that are understood to be domestic anti-abuse rules for the purposes of this paragraph of Article 29. This clarifies the scope of the provision on an inclusive basis, as paragraph 3 of Article 29 is not limited to the listed examples, applying to anti-avoidance laws more generally.
[Protocol, Chapter I, paragraph 10]
- 1.327 The types of laws that are listed in the Protocol include:
- Australia and Portugal’s general anti-avoidance rules;
 - thin capitalisation and dividend stripping rules;
 - transfer pricing rules;
 - controlled foreign company and transferor trust rules; and
 - measures designed to ensure that taxes can be effectively collected and recovered, including conservancy measures.
- 1.328 General anti-avoidance laws include in the case of Australia, Part IVA of the ITAA 1936 and section 67 of the FBT Act, and in the case of Portugal, Articles 38 and 39 of LGT (Lei Geral Tributária) enacted by the Decree Law 398/98, of 17 December 1998.

Article 30 – Protocol

1.329 Article 30 provides that the Protocol to the Convention is an integral part of the Convention.

[Article 30]

1.330 This Article incorporates the provisions of the Protocol into the Convention. The Protocol sets out a number of positions that were agreed to in the course of negotiations. Particular provisions of the Protocol are referenced throughout this explanatory memorandum where those provisions are relevant to a specific Article.

Article 31 – Entry into force

1.331 Article 31 provides for the entry into force of the Convention. Australia and Portugal shall notify each other in writing, through the diplomatic channels, that the country has completed their domestic requirements for the entry into force of the Convention. The Convention enters into force on the date of the last notification.

[Article 31]

1.332 In Australia, enactment of the legislation giving the force of law in Australia to the Convention is the necessary prerequisite to the exchange of diplomatic notes taking place.

Date of application for Australian taxes

Withholding tax

1.333 The provisions of the Convention apply in Australia 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 the Convention enters into force.

[Article 31, subparagraph a) i)]

Fringe benefits tax

1.334 The Convention applies 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 Convention enters into force.

[Article 31, subparagraph a) ii)]

Other Australian taxes

1.335 The Convention applies 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 Convention enters into force.

[Article 31, subparagraph a) iii)]

Date of application of Portuguese taxes

Withholding tax

- 1.336 The Convention applies in Portugal to taxes withheld at source where the event giving rise to such taxes occurs on or after the first day of January next following the date on which the Convention enters into force.
[Article 31, subparagraph b) i)]

Other Portuguese taxes

- 1.337 The Convention applies to other Portuguese taxes for taxable periods beginning on or after the first day of January next following the date on which the Convention enters into force.
[Article 31, subparagraph b) ii)]

Article 32 – Termination

- 1.338 Article 30 provides that the Convention remains in force until it is terminated. Either country may terminate the Convention by giving written 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 Convention's entry into force. Termination is by written notice through the diplomatic channels.
[Article 32]

Cessation date for Australian taxes

Withholding tax

- 1.339 In the event of termination, the Convention will cease to apply in Australia in respect of withholding tax in relation to income that is derived by a non-resident on or after 1 January next following the date on which the notice of termination is given.
[Article 32, subparagraph 2 a) i)]

Fringe benefits tax

- 1.340 In the event of termination, the Convention 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 32, subparagraph 2 a) ii)]

Other Australian taxes

- 1.341 In the event of termination, the Convention 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 next following the date on which the notice of termination is given.
[Article 32, subparagraph 2 a) iii)]

Cessation date for Portuguese taxes

Withholding tax

1.342 In the event of termination, the Convention will cease to apply in Portugal to taxes withheld at source where the event giving rise to such taxes occurs on or after the first day of January next following the date on which the notice of termination is given.

[Article 32, subparagraph 2 b) i)]

Other Portuguese taxes

1.343 In the event of termination, the Convention will cease to apply to other Portuguese taxes for taxable periods beginning on or after the first day of January next following the date on which the notice of termination is given.

[Article 32, subparagraph 2 b) ii)]

Article 33 – Registration

1.344 Paragraph 1 of Article 102 of the *Charter of the United Nations* states that ‘Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it’.

1.345 Once the Convention is signed and enters into force in accordance with Article 31 (i.e. on the date of the last notification), Article 33 obliges the Contracting State in whose territory the Convention is signed to transmit the Convention to the Secretariat of the United Nations, for registration in accordance with Article 102 of the *Charter of the United Nations*.

1.346 Once the transmission of the Convention is complete, the Contracting State where the Convention was signed must notify the other Contracting State of the completion of this procedure, as well as of its registration number.

[Article 33]

1.347 Article 33 supports the obligations of Australia and the Portuguese Republic under the *Charter of the United Nations*, though is not found in Australia’s other treaties.

Protocol Chapter I – General Provisions

1.348 The Protocol provides that the competent authority of Portugal shall notify the competent authority of Australia of Portugal’s internal procedures concerning the mode of application of the Convention.

[Protocol, Chapter I, subparagraph 1 a)]

1.349 The Protocol provides that, for Australia, nothing in the Convention shall prevent the application of Part IVA of the ITAA 1936 or section 67 of the

FBT Act. This means that Australia's anti-avoidance measures prevail over the treaty.

[Protocol, Chapter I, subparagraph 1 b)]

- 1.350 An equivalent provision is made for Portugal, providing that nothing in the Convention shall prevent the application of Articles 38 and 39 of LGT (Lei Geral Tributária) enacted by the Decree Law 398/98, of 17 December 1998.
[Protocol, Chapter I, subparagraph 1 c)]
- 1.351 All other paragraphs of Chapter I of the Protocol are used with relation to specific provisions of the Convention, and are addressed in the relevant parts of this Explanatory Memorandum.

Protocol Chapter II – Arbitration

- 1.352 Chapter II of the Protocol contains provisions on the eligibility of cases for, and procedural rules relating to, arbitration. These provisions are drawn in part from the positions of Australia and the Portuguese Republic on the MLI, and support arrangements and understanding between the competent authorities.

Requesting mandatory binding arbitration

- 1.353 Paragraph 1 of Part I permits a person to request in writing that any unresolved issues eligible for arbitration arising from a MAP case submitted under paragraph 1 of Article 24, be submitted for arbitration. Such requests must be made in accordance with any rules and procedures agreed upon by the relevant competent authorities.
[Protocol, Chapter II, Part I, paragraph 1]
- 1.354 Issues that may be eligible for arbitration are:
- those arising from a MAP case presented to a competent authority on the basis that the action of either or both Contracting States have resulted (or will result) in the person being taxed not in accordance with the provisions of the Convention;
[Protocol, Chapter II, Part I, subparagraph 1 a)]
 - where the competent authorities were not able to reach an agreement to resolve the case within three years (or a different length of time as agreed to by the competent authorities before the expiration of three years).
[Protocol, Chapter II, Part I, subparagraph 1 b)]
- 1.355 This conforms with paragraph 1 of Article 19 of the MLI. However, consistent with Portugal's reservation on Article 19 of the MLI, the two-year period in the MLI is replaced with a three-year period.
- 1.356 If a court or administrative tribunal of either Contracting State has already delivered a decision on an unresolved issue, that issue cannot be submitted for

arbitration.

[Protocol, Chapter II, Part I, subparagraph 11 a)]

- 1.357 This conforms with paragraph 12 of Article 19 of the MLI and is consistent with both Australia's and Portugal's reservations on the MLI.
- 1.358 An arbitration process terminates if a court or administrative tribunal makes a decision on the issue before the arbitration panel delivers its decision.

[Protocol, Chapter II, Part I, subparagraph 11 b)]

Calculating the three-year period

- 1.359 The three-year period (or other length of time as agreed to by the competent authorities) commences from:
- if the competent authorities have not requested additional information – the earlier of:
 - the date on which both competent authorities notified the person of receipt of the information necessary to undertake substantive consideration of the case; and
 - the date that is three months after the competent authority that received the initial request for a MAP notifies the other competent authority of the receipt of the request; or
 - if the competent authorities have requested additional information – the earlier of:
 - the latest date on which the competent authorities that requested the additional information notified the person and the other competent authority of the receipt of the information requested; and
 - the date that is three months after both competent authorities have received all information requested from the person by either competent authority.

[Protocol, Chapter II, Part I, paragraphs 8 and 9]

- 1.360 The three-year (or other) period of time stops running if the MAP is suspended by a competent authority because a case with one or more of the same issues is pending before a court or administrative tribunal. The time period will start running again once the court or tribunal has delivered its final decision or the case is suspended or withdrawn. 'Final decision' means a non-interim decision of a court. It is not intended to imply a requirement for exhaustion of domestic legal remedies or for the highest court in the jurisdiction to deliver the judgment of invalidity.

[Protocol, Chapter II, Part I, paragraph 2]

- 1.361 This rule is designed to ensure that separate proceedings for the same issues do not proceed concurrently.

- 1.362 Where the person and a competent authority have agreed to suspend the MAP, the three-year (or other) period will stop running until the suspension is lifted.
[Protocol, Chapter II, Part I, paragraph 2]
- 1.363 The three-year (or other) period of time will be extended if both competent authorities agree that the person has failed to provide any additional material information requested by either competent authority in a timely manner. In such circumstances, the relevant period of time will be extended by the same amount of time taken by the person to provide the additional material information.
[Protocol, Chapter II, Part I, paragraph 3]

Acknowledging an initial request for a MAP and requesting additional information

- 1.364 To support efficient processing of matters, the competent authority that received the initial request has two months from the date of receipt to:
- notify the person and the other competent authority that the request has been received; and
 - send a notification of the request, and provide a copy of the request to the other competent authority.

[Protocol, Chapter II, Part I, paragraph 5]

- 1.365 In relation to the information needed to support a MAP, each competent authority must, within three months of receiving the request (either the initial request or a copy thereof):
- notify the person and the other competent authority of the receipt of all information necessary to undertake substantive consideration of the case; or
 - request additional information from the person.

[Protocol, Chapter II, Part I, paragraph 6]

- 1.366 Within three months of receiving any additional information from a person, the competent authority that requested that information must notify the person and the other competent authority of the receipt of the information or whether some of the requested information is still missing.
[Protocol, Chapter II, Part I, paragraph 7]

Status of arbitration decision

- 1.367 Decisions delivered by the arbitration panel are final and binding, subject to the exceptions contained in subparagraph 4 b).
[Protocol, Chapter II, Part I, subparagraphs 4 a) and b)]
- 1.368 The decision will not be binding if:

- the person does not accept the mutual agreement implementing the arbitration decision;
- the decision is found to be invalid by a final decision of the courts of either Contracting State; or
- the person pursues litigation on the issues in a court or an administrative tribunal.

[Protocol, Chapter II, Part I, subparagraph 4 b)]

Decision not binding – non-acceptance of the decision

- 1.369 Where the person does not accept the arbitration decision, the case will not be able to be considered further by the competent authorities.
- 1.370 The mutual agreement implementing the decision is considered to be not accepted by the person if, within 60 days after sending the notification of the mutual agreement to the person, the person:
- does not withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any courts or administrative tribunals; or
 - does not terminate any relevant pending legal or administrative proceedings.

[Protocol, Chapter II, Part I, subparagraph 4 b) i)]

Decision not binding - invalidity

- 1.371 Where the arbitration decision is found to be invalid by a final decision of the domestic courts of a Contracting State, the request for arbitration is considered to not have been made and the arbitration procedure is considered to not have taken place. This allows a new request for arbitration to be submitted unless the competent authorities agree to not allow a new request.

[Protocol, Chapter II, Part I, subparagraph 4 b) ii)]

- 1.372 'Final decision' means a non-interim decision of a court. It is not intended to imply a requirement for exhaustion of domestic legal remedies or for the highest court in the jurisdiction to deliver the judgment of invalidity.
- 1.373 These rules are not intended to provide independent grounds for invalidating an arbitration decision where such grounds do not exist under the domestic laws of the Contracting State, but instead ensure that the invalidation of a decision by a court of a Contracting State does not bind the other Contracting State to implement the decision.
- 1.374 An arbitration decision may be found to be invalid where, for example, there has been a breach of the impartiality or independence requirements applicable to the arbitrators (Protocol, Chapter II, Part II) or a breach of the confidentiality requirements set out in Protocol, Chapter II, Part III.

- 1.375 Despite considering the arbitration process to not have taken place, the provision does not impact the requirements in respect of confidentiality of the proceedings or sharing costs of the arbitration (Protocol, Chapter II, Parts III and VII).
[Protocol, Chapter II, Part I, subparagraph 4 b) ii)]

Decision not binding - litigation

- 1.376 Where the person pursues litigation on the issues that were resolved by the mutual agreement implementing the arbitration decision, the arbitration decision relating to any such litigation is not binding on either Contracting State.
[Protocol, Chapter II, Part I, subparagraph 4 b) iii)]
- 1.377 This provision ensures that litigation cannot be used to achieve non-taxation or reduced taxation, for example, where an arbitration decision binds one Contracting State while the outcome of the litigation binds the other Contracting State.

Decision not binding - agreement to different resolution

- 1.378 Regardless of paragraph 4 of Chapter II of the Protocol, the competent authorities of Australia and Portugal may agree on a different resolution of all unresolved issues within a period of three months after the arbitration decision has been delivered to them.
[Protocol, Chapter II, Part VI]
- 1.379 In such a situation, the arbitration decision is not binding and does not need to be implemented by the Contracting States.
[Protocol, Chapter II, Part VI]
- 1.380 This gives the competent authorities an additional three months to agree a different resolution of all the unresolved issues, for instance if a more appropriate resolution can be found.

Procedural Rules

Appointment of arbitrators

- 1.381 The competent authorities of each Contracting State can determine the rules for the appointment of arbitrators by mutual agreement.
[Protocol, Chapter II, Part II, paragraph 1]
- 1.382 However, in the absence of such mutual agreement, paragraph 2 provides the following default rules.
[Protocol, Chapter II, Part II, paragraph 1]
- 1.383 An arbitration panel must consist of three individual members who have expertise or experience in international tax matters.
[Protocol, Chapter II, Part II, subparagraph 2 a)]

- 1.384 Each competent authority must appoint one panel member within 60 days of a person requesting the referral of a dispute to arbitration.
[Protocol, Chapter II, Part II, subparagraph 2 b)]
- 1.385 The two panel members must appoint another person to be the Chair of the arbitration panel within 60 days of the appointment of the second member of the arbitration panel.
[Protocol, Chapter II, Part II, subparagraph 2 b)]
- 1.386 The Chair of the arbitration panel must not be a national or resident of either Contracting State.
[Protocol, Chapter II, Part II, subparagraph 2 b)]
- 1.387 At the time of appointment, each panel member must be impartial and independent of the competent authorities, tax administrations and ministries of finance of the Contracting States, and of all persons directly affected by the case (including their advisers).
[Protocol, Chapter II, Part II, subparagraph 2 c)]
- 1.388 Each panel member must maintain their impartiality and independence during the arbitration proceedings and avoid any conduct that may damage the appearance of impartiality and independence for a reasonable period after the conclusion of the arbitration proceedings.
[Protocol, Chapter II, Part II, subparagraph 2 c)]

Confidentiality of arbitration proceedings

- 1.389 For the purposes of the Protocol, the provisions of the Convention and domestic laws related to exchange of information, confidentiality and administrative assistance, the disclosure of information to the arbitration panel members and their staff (up to a maximum of three staff per member) is permitted. This includes disclosures to prospective arbitrators to the extent necessary to verify their ability to fulfil the relevant requirements.
[Protocol, Chapter II, Part III, paragraph 1]
- 1.390 Any information disclosed is to be considered as information exchanged under the provisions of the Convention relating to the exchange of information and administrative assistance.
[Protocol, Chapter II, Part III, paragraph 1]
- 1.391 Prior to the arbitration proceedings, the competent authorities of the Contracting States must obtain agreement in writing from the panel members and their staff that they will treat information relating to the proceedings in line with confidentiality and non-disclosure obligations as per:
- the exchange of information and administrative assistance provisions of the Convention; and
 - the domestic laws of the Contracting States.
- [Protocol, Chapter II, Part III, paragraph 2]***

Resolution of a case before arbitration concludes

- 1.392 Before the arbitration panel delivers its decision on a case, the case will be terminated if:
- the competent authorities of the Contracting States reach a mutual agreement to resolve the case; or
 - the relevant person withdraws the request for arbitration or the request for a MAP.
- [Protocol, Chapter II, Part IV]***
- 1.393 The termination is effective for both the arbitration proceedings and the relevant MAP.
- [Protocol, Chapter II, Part IV]***

Approach to be taken by arbitration proceeding

- 1.394 After the submission of a case to arbitration, the competent authority of each Contracting State must provide any necessary information to the arbitration panel without undue delay. Information that was unavailable to both competent authorities before the receipt of the arbitration request is not to be taken into account, unless both competent authorities agree otherwise.
- [Protocol, Chapter II, Part V, subparagraph 1 a)]***
- 1.395 The arbitration panel must decide the relevant issues in accordance with the relevant provisions of the Convention, and subject to those provisions, the relevant domestic laws of the Contracting States. The competent authorities may also mutually agree to identify other sources of law or authority to be considered by the arbitration panel.
- [Protocol, Chapter II, Part V, subparagraph 1 b)]***
- 1.396 The arbitration decision must be delivered to both competent authorities in writing, stating the sources of law relied upon and the panel's reasoning.
- [Protocol, Chapter II, Part V, subparagraph 1 c)]***
- 1.397 The arbitration decision needs to be reached by at least two (of the three) arbitration panel members (i.e. a simple majority).
- [Protocol, Chapter II, Part V, subparagraph 1 c)]***
- 1.398 The arbitration decision will not have any precedential value.
- [Protocol, Chapter II, Part V, subparagraph 1 c)]***
- 1.399 The competent authorities may also mutually agree on different rules to those set by subparagraphs 1 a), b), and c) of Part V.
- [Protocol, Chapter II, Part V, paragraph 1]***

Rules for arbitration process - non-disclosure

- 1.400 Paragraph 2 of Part V requires the competent authorities to ensure, before the arbitration proceedings commence, that the person and their advisors agree in writing not to disclose to any other person any information received during the

arbitration proceedings from either competent authority or the arbitration panel.

[Protocol, Chapter II, Part V, paragraph 2]

- 1.401 Arbitration and the MAP cases will be terminated where there is a material breach of a non-disclosure agreement by the person, or their advisers, at any time after the request for arbitration has been made and before the arbitration decision is delivered to the competent authorities.

[Protocol, Chapter II, Part V, paragraph 2]

Costs of arbitration proceeding

- 1.402 The competent authorities are to mutually agree as to how to bear the fees and expenses of the arbitration panel members and any costs incurred in connection with the arbitration proceedings.

[Protocol, Chapter II, Part VII]

- 1.403 If there is no such mutual agreement, then each Contracting State bears the following:

- their own costs;
- the fees and expenses for the panel member that the Contracting State appointed;
- half of the fees and expenses of the Chair of the arbitration panel; and
- half of all other expenses associated with the conduct of the arbitration proceedings.

[Protocol, Chapter II, Part VII]

Application

- 1.404 Mandatory binding arbitration only applies to issues arising under Articles 5 (Permanent establishment), 7 (Business profits), and 9 (Associated enterprises). However, there are some exclusions.

[Protocol, Chapter II, Part IX]

Excluding issues previously subject to arbitration

- 1.405 Any unresolved issue arising from a MAP case that falls within scope of a case previously considered by the arbitration panel (or similar body) set up in accordance with a bilateral or multilateral convention, cannot be submitted for mandatory binding arbitration under the Protocol.

[Protocol, Chapter II, Part VIII]

- 1.406 This is to avoid potential duplication of efforts in resolving an issue arising from a MAP that was previously subject to arbitration under a provision of an international agreement.

Excluding cases concerning items of income that are not taxed by a Contracting State

1.407 Mandatory binding arbitration is also unavailable for cases concerning items of income which are not subject to tax in a Contracting State because they are, under the domestic law of that Contracting State:

- not included in the tax base,
- subject to an exemption, or
- subject to a zero tax rate.

[Protocol, Chapter II, Part IX, paragraph a)]

1.408 This is consistent with Portugal's reservations to the MLI.

Excluding cases involving conduct of person that has been subject to a tax penalty

1.409 Mandatory binding arbitration is also unavailable where a case involves the conduct of a person who, by final ruling from legal or administrative proceedings, has been subject to a penalty for:

- tax fraud or evasion;
- failure to take reasonable care, recklessness or intentional disregard;
- wilful default or gross negligence; or
- promotion and implementation of schemes.

[Protocol, Chapter II, Part IX, paragraph b)]

1.410 This is consistent with Portugal's reservations to the MLI.

Excluding cases involving the application of Part IVA of the ITAA 1936, section 67 of the FBT Act and Portugal's domestic general anti-avoidance rules

1.411 Mandatory binding arbitration is unavailable for any cases involving the application of Australia's general anti-avoidance rules that apply to income tax and FBT. These include Part IVA of the ITAA 1936 and section 67 of the FBT Act. Mandatory binding arbitration is also unavailable for any cases involving the application of Portugal's general anti-avoidance rules. These include Articles 38 and 39 of LGT (Lei Geral Tributária) enacted by the Decree Law 398/98, of 17 December 1998. Any subsequent provisions replacing, amending or updating these anti-avoidance rules would also be comprehended.

[Protocol, Chapter II, Part IX, paragraph c)]

1.412 This approach is consistent with Australia's practice of applying its general anti-avoidance rules despite any obligation in its bilateral tax agreements, which is reflected in the ordering rules contained in subsections 4(2), 4(3) and 4AA(2) of the Agreements Act.

Minor amendments

- 1.413 The amendments update notes to definitions in the Agreements Act which set out where the text of certain treaty agreements and protocols may be accessed, so the information is accurate as of 2024. The text of any treaty in force for Australia is published in the Australian Treaty Series, accessible from the Australian Treaties Database on the Department of Foreign Affairs and Trade website (www.dfat.gov.au) or through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).
[Schedule 1, items 3 to 5, subsections 3(1) and 3AAA(1) of the Agreements Act]

Commencement, application, and transitional provisions

- 1.414 The amendments commence on the day after Royal Assent. However, the Convention itself must first enter into force before it can take effect. For entry into force, Australia and Portugal must notify each other in writing through the diplomatic channel that domestic requirements have been completed.