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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL TAX AGREEMENTS AMENDMENT BILL (No. 2) 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, the Hon Wayne Swan MP)

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Glossary

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

Abbreviation	***Definition***
Agreement	the existing Agreement as amended by the Protocol
Agreements Act 1953	*International Tax Agreements Act 1953*
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
existing Agreement	*Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* and its Protocol (both signed on 1 July 1999)
GATS	*General Agreement on Trade in Services*
GST	goods and services tax
ITAA 1936	*Income Tax Assessment Act 1936*
MFN	most favoured nation
OECD	Organisation for Economic Co-operation and Development
OECD Model	OECD *Model Tax Convention on Income and on Capital*
OECD Model Commentary	the Commentaries on the Articles of the OECD Model Tax Convention
Protocol	*Protocol amending the Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (signed on 31 March 2008)
UK	United Kingdom of Great Britain and Northern Ireland

General outline and financial impact

What will this Bill do?

This Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to a *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (Protocol), which was signed in South Africa on 31 March 2008.

This Protocol updates the *Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (existing Agreement), which will enhance Australia's relationship with South Africa by assisting trade and investment flows.

Who will be affected by this Bill?

Persons who are residents of Australia and/or South Africa and who derive income, profits or gains from Australia or South Africa will be affected by this Bill.

How is the legislation structured?

The Agreements Act 1953 gives the force of law in Australia to Australia's tax treaties which appear as Schedules to that Act. The provisions of the *Income Tax Assessment Act 1936* (ITAA 1936), the *Income Tax Assessment Act 1997* (ITAA 1997) and the *Fringe Benefits Tax Assessment Act 1986* are incorporated into and read as one with the Agreements Act 1953. The provisions of the Agreements Act 1953 (including the terms of the tax treaties) take precedence over provisions of the:

- ITAA 1936 (other than the general anti-avoidance rules under Part IVA);
- ITAA 1997; and

- *Fringe Benefits Tax Assessment Act 1986* (other than section 67 which is an anti-avoidance rule).

In what way does this Bill change the *International Tax Agreements Act 1953*?

The Agreements Act 1953 is amended to insert the text of this protocol as a Schedule to that Act. Australia's tax treaties appear as Schedules to the above Act, which gives them the force of law in Australia.

When will this Protocol enter into force, and from what date will this Protocol have effect?

The provisions of the Protocol will become law from the date of Royal Assent. The Protocol will enter into force after the date of the last notification by diplomatic notes and once the domestic processes to give this protocol the force of law in the respective countries have been completed. In Australia, enactment of this Bill giving the force of law to this Protocol is the prerequisite to such notification.

Once it enters into force this Protocol will apply as follows

Application in Australia

For withholding taxes, on income derived:

- on or after the first day of the second month following the date on which the Protocol enters into force.

For other Australian taxes, on income, profits or gains:

- any year of income beginning on or after 1 July in the calendar year next following the date on which the Protocol enters into force.

Application in South Africa

For taxes withheld at source, on amounts paid or credited:

- from the day after the date on which the Protocol enters into force.

For other South African tax:

- in respect of years of assessment beginning on or after 1 January next following the date on which the Protocol enters into force.

The financial impact of this Bill

Treasury has estimated the impact of the first round effects on forward estimates as negligible.

Compliance costs

No significant additional compliance costs are expected to result from entry into force of this Protocol.

Chapter 1
The Protocol with South Africa

Outline of chapter

1.1 This Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953). This chapter explains the rules that apply in the *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (Protocol), which amends the existing tax treaty with South Africa — the *Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (existing Agreement).

Context of amendments

1.2 This Protocol was signed in South Africa on 31 March 2008.

1.3 The existing Agreement contains most favoured nation (MFN) obligations with respect to the inclusion of a *Non-Discrimination* Article to protect taxpayers from tax discrimination. These obligations were triggered by the entry into effect in 2003 of the renegotiated United Kingdom (UK) tax treaty. The Protocol addresses Australia's MFN obligations by amending the existing Agreement to include rules that protect taxpayers of one country operating in the other country from discriminatory tax practices.

1.4 The Protocol also updates other areas of the existing Agreement. The Protocol aligns withholding tax rate limits for dividends and royalties more closely with the Organisation for Economic Co-operation and Development (OECD) practice, and provides certain exemptions from interest withholding tax. The Protocol also aligns the capital gains treatment more closely with international practice and Australia's domestic law, and improves integrity measures within the existing Agreement; in particular, by extending the scope of the existing exchange of information provisions and introducing provisions which provide for cross-border collection of tax debts.

Summary of new law

Main features of the amended agreement

1.5 The main features of the Agreement (as revised by the Protocol) are as follows:

- Dividends, interest and royalties may generally be taxed in both countries, but there are limits on tax that the country in which the dividend, interest or royalty is sourced may charge on such income flowing to residents of the other country who are the beneficial owners of the income ***[New Articles 10 to 12 of the Agreement]***;
- In the case of dividends:
  - a 5 per cent rate limit applies to incorporate dividends where the beneficial owner of the dividend is a company that holds directly at least 10 per cent of the voting power of the company paying the dividend ***[New Article 10, subparagraph 2(a) of the Agreement]***; and
  - a 15 per cent rate limit applies to all other dividends ***[New Article 10, subparagraph 2(b) of the Agreement].***
- Source country taxation on interest is limited to 10 per cent ***[New Article 11, paragraph 2 of the Agreement].*** However, exemptions from source country taxation have been provided for certain interest paid to:
  - government bodies ***[New Article 11, subparagraph 3(a) of the Agreement]***; and
  - financial institutions ***[New Article 11, subparagraph 3(b) of the Agreement].***
- The rate limit on source country taxation of royalties is 5 per cent ***[New Article 12, paragraph 2 of the Agreement].***
- The definition of 'royalty' has also been amended to include payments or credits in respect of the use of, or right to use, some or all of the radiofrequency spectrum specified in a spectrum licence, and to exclude payments or credits in respect of the use of, or right to use, industrial, commercial or scientific equipment ***[New Article 12, paragraph 3 of the Agreement].***

- Rules have been included to ensure the integrity of the reduction in the rate of dividend, interest and royalty withholding tax, by ensuring that no relief is available in certain arrangements that have been designed with a main purpose of taking advantage of those reduced rates.

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

- Rules have been included to protect nationals and businesses from tax discrimination in the other country and to provide them with private rights of appeal. However, these rules do not preclude either country from applying its anti-avoidance rules (including thin capitalisation, dividend stripping, transfer pricing and controlled foreign companies measures), rebates or credits for dividends paid by resident companies, research and development concessions, consolidation rules or capital gains deferral rules ***[New Article 23A of the Agreement].***

- The rules for the consultation and exchange of information between the Australian and South African taxation authorities will be aligned with the 2005 OECD standard, including expanding the range of taxes in respect of which information may be exchanged to cover all Australian federal taxes administered by the Commissioner of Taxation (Commissioner) and all South African taxes administered by the Commissioner for the South African Revenue Service ***[New Articles 2 and 25 of the Agreement].***

- Rules have been included to ensure the integrity of the tax system by providing for the mutual assistance in collection of tax debts. This would allow the Australian Taxation Office (ATO), in certain circumstances, to seek assistance from South African authorities to collect Australian taxation debts in respect of all Australian federal taxes administered by the Commissioner, and vice versa ***[New Articles 2 and 25A of the Agreement].***

Comparison of key features of new law and current law

New law	***Current law***
Updates certain Articles of the Agreement, having regard to Australian, South African and OECD tax treaty developments since the existing Agreement was entered into.	Not applicable.
Updates the list of taxes to which the new treaty arrangements apply. In the case of South Africa these taxes now include: • the withholding tax on royalties. However, a broader range of taxes apply to certain Articles. In the case of Australia, the taxes are: • taxes of every kind and description for Article 23A (*Non-Discrimination*); and • taxes of every kind and description imposed under the federal law of Australia and administered by the Commissioner for Article 25 (*Exchange of Information*) and Article 25A (*Assistance in the Collection of Taxes*). In the case of South Africa, the taxes are: • taxes of every kind and description for Article 23A (*Non-Discrimination*); and • taxes of every kind and description imposed under the tax laws administered by the Commissioner for the South African Revenue Service for Article 25 (*Exchange of Information*) and Article 25A (*Assistance in the Collection of Taxes*).	No equivalent.

New law	***Current law***
The residency definition in the Agreement has been supplemented. In particular, the Protocol: • includes additional tie-breaker rules for allocating individual residency between the two countries.	Provides for more limited tie-breaker rules for determining how residency shall be allocated.
Limits the treaty benefits that a country is obliged to provide where income, profits or gains of temporary resident individuals are exempted.	No equivalent.
Updates the definition of 'permanent establishment'. In particular, the Protocol provides that a building site or construction or installation project constitutes a permanent establishment where it lasts for more than six months. Furthermore, an enterprise is deemed to have a 'permanent establishment' if: • it carries on supervisory or consultancy activities connected with a building site or construction or installation project for a period or periods exceeding in the aggregate 183 days in any 12-month period; • it carries on activities (including the operation of substantial equipment) in the exploration for or exploitation of natural resources for a period or periods exceeding in the aggregate 90 days in any 12-month period; or • it operates substantial equipment (including in natural resource activities) for a period or periods exceeding in the aggregate 183 days in any 12-month period. Integrity provisions are included to prevent related parties from circumventing the permanent establishment time thresholds by splitting contracts.	A building site or construction, installation or assembly project which exists for more than 12 months is included in the list of examples of a permanent establishment. In addition, an enterprise is deemed to have a permanent establishment if: • it carries on supervisory activities in that State for more than 12 months in connection with a building site, or a construction, installation or assembly project; or • substantial equipment is being used for or under contract with the enterprise.

New law	***Current law***
Dividend withholding tax is limited to: • 5 per cent of the gross amount of the dividends if the beneficial owner of those dividends is a company which holds directly at least 10 per cent of the voting power in the company paying dividends; or • 15 per cent of the gross amount of the dividends in all other cases.	Inter-corporate dividends paid out of profits that have borne the normal rate of company tax (which, in the case of Australia, means that the dividends are fully 'franked') are exempt from dividend withholding tax, where the company that is beneficially entitled to the dividends holds directly at least 10 per cent of the capital of the paying company. The rate of dividend withholding tax is limited to 15 per cent in all other cases.
Reduces the rate of interest withholding tax from a maximum of 10 per cent to zero where certain interest is paid to: • government bodies and central banks; or • financial institutions.	No equivalent.
Reduces the rate of royalty withholding tax from a maximum of 10 per cent to 5 per cent of the gross royalty payment and extends the meaning of royalty to include spectrum licences. Leasing of industrial, commercial or scientific equipment will no longer constitute a royalty.	The rate of royalty withholding tax is limited to 10 per cent of the gross payment. Definition of 'royalties' includes payments for use of industrial, commercial and scientific equipment.
Modifies Article 13 (*Alienation of Property*) to provide that gains of a capital nature from the alienation of property not otherwise dealt with in Article 13 are taxable only in the Contracting State of which the alienator is a resident.	The sweep-up provision enables each country to tax, according to its domestic law, any gains of a capital nature derived by its own residents or by a resident of the other country from the alienation of any property not specified in Article 13.
Inserts a new Article 23A (*Non-Discrimination*) preventing discrimination in relation to tax laws.	No equivalent.

New law	*Current law*
Closely aligns Article 25 (*Exchange of Information*) to the 2005 OECD standard. The effect of the changes is to expand the range of taxes to which the Article applies and to clarify that bank secrecy laws or the requirement of a domestic tax law interest in the information do not limit the exchange of information.	The existing rules apply to a narrower range of taxes.
Inserts a new Article 25A (*Assistance in the Collection of Taxes*) into the Agreement which authorises and requires Australia and South Africa to provide assistance to each other in the collection of cross-border tax debts.	No equivalent.

Detailed explanation of new law

Article 1 of the Protocol

Substitutes a new Article 2 (Taxes Covered) into the Agreement

1.6 Article 1 of the Protocol substitutes a new Article 2 (*Taxes Covered*) for Article 2 in the existing Agreement.

1.7 In the case of Australia, the taxes to which the Agreement applies, as in the existing Agreement, are the Australian income tax, including the resource rent tax in respect of offshore petroleum projects and any identical or substantially similar taxes imposed under the federal law of Australia. ***[New Article 2, paragraphs 1 and 2 of the Agreement]***

1.8 Although Australia considers the petroleum resource rent tax to be encompassed by the term ‘income tax’, a specific reference to this has been included in this Protocol to put beyond doubt that it is a tax covered.

1.9 However, the range of taxes covered for the purposes of the *Non-Discrimination*, *Exchange of Information* and *Assistance in the Collection of Taxes* Articles are expanded by the Protocol.

1.10 New paragraphs 3 and 4 of Article 2 specify the taxes to which Article 23A (*Non-Discrimination*), Article 25 (*Exchange of Information*) and Article 25A (*Assistance in the Collection of Taxes*) will apply. In the case of Australia, the taxes to which Article 23A applies are taxes of every kind and description (including State and local taxes). The Australian taxes to which Articles 25 and 25A apply are taxes of every kind and

description imposed under the federal law of Australia and administered by the Commissioner. ***[New Article 2, paragraphs 3 and 4 of the Agreement]***

1.11 As in the existing Agreement, it is specifically stated in paragraphs 1, 2 and 4 of new Article 2 that the Agreement applies only to taxes imposed under the federal law of Australia. This is to ensure that, except with respect to non-discrimination, the Agreement does not bind Australian states and territories and applies only to federal taxes. ***[New Article 2, subparagraph 1(a) and paragraphs 2 and 4 of the Agreement]***

1.12 For South Africa, the taxes to which the Agreement applies have been expanded to include the South African withholding taxes on royalties. Hence, the South African taxes to which the Agreement, as amended by the Protocol, applies are:

- the normal tax;
- the secondary tax on companies;
- the withholding tax on royalties; and
- any identical or substantially similar taxes, including any taxes that may be introduced in the future on dividends.

[New Article 2, subparagraph 1(b) and paragraph 2 of the Agreement]

1.13 The treaty is intended to apply to South African dividend withholding tax when announced changes to South Africa's domestic law occur to replace the existing secondary tax on companies with a dividend withholding tax.

1.14 The range of South African taxes are also expanded by the Protocol for the purposes of Article 23A (*Non-Discrimination*), Article 25 (*Exchange of Information*) and Article 25A (*Assistance in the Collection of Taxes*). The South African taxes to which Article 23A applies are taxes of every kind and description. The South African taxes to which Articles 25 and 25A apply are taxes of every kind and description imposed under the tax laws administered by the Commissioner for the South African Revenue Service. ***[New Article 2, paragraphs 3 and 4 of the Agreement]***

Article 2 of the Protocol

Amends Article 3 (General Definitions) of the existing Agreement

1.15 The Protocol inserts a new subparagraph into Article 3 (*General Definitions*) to define the term 'national'. This term is defined by reference to an individual's nationality or citizenship. A company will be

a national if the company derives its status as a company from the laws of one of the countries, that is, where the company is incorporated. ***[Article 3, new subparagraph 1(j) of the Agreement]***

1.16 The concept of nationality is used in the new subparagraphs 3(b) and (c) of Article 4 (*Resident*), Article 19 (*Government Service*), and Article 23A (*Non-Discrimination*) of the Agreement. ***[New Article 4, subparagraphs 3(b) and (c), and Article 23A of the Agreement]***

Article 3 of the Protocol

Substitutes a new Article 4 (Resident) into the Agreement

1.17 Article 3 of the Protocol substitutes a new Article 4 (*Resident*) for Article 4 in the existing Agreement.

1.18 New Article 4 sets out the basis upon which the residential status of a person is to be determined for the purposes of the Agreement. Residential status is one of the criteria for determining each country's taxing rights and is a necessary condition for the provision of relief under the Agreement. In the case of Australia, the concept of who is a resident is determined according to Australia's taxation law. In the case of South Africa, the concept of who is a resident is determined according to South African law. ***[New Article 4, paragraph 1 of the Agreement]***

Residency of Governments

1.19 New Article 4 of the Agreement specifically provides that the government of a state, political subdivision or local authority are residents of that State for the purposes of the Agreement. This means that the Federal Government, the State Governments and local councils of Australia will be residents for the purposes of the Agreement. This does not necessarily mean that income, profits or gains derived by these bodies from sources in South Africa will be subject to tax in South Africa as sovereign immunity principles may apply. ***[New Article 4, paragraph 1 of the Agreement]***

1.20 The OECD *Model Tax Convention on Income and on Capital* (OECD Model) Commentary notes that it has always been the understanding of member countries that the OECD Model applied to treat governments as residents even in the absence of an express reference to that effect.

Special residency rules

1.21 A person is not a resident of a country (for the purposes of the Agreement) if that person is liable to tax in that country in respect only of income from sources in that country.

1.22 Paragraph 2 of new Article 4 of the Agreement deals with a person who may be considered to be a resident of a state according to its domestic laws but is only liable to taxation on income from sources in that country, such as, foreign diplomatic and consular staff. In the Australian context, this also means that Norfolk Island residents, who are generally subject to Australian tax on Australian source income only, are not residents of Australia for the purposes of the Agreement. Accordingly, South Africa will not have to forgo tax in accordance with the Agreement on income derived by residents of Norfolk Island from sources in South Africa (which will not be subject to Australian tax). ***[New Article 4, paragraph 2 of the Agreement]***

Dual residents

1.23 A revised set of tie-breaker rules is included for determining how residency is to be allocated to one or other of the countries for the purposes of the Agreement if a taxpayer, whether an individual, a company or other taxable unit, qualifies as a dual resident, that is, as a resident of both countries in accordance with paragraph 1 of this Article.

1.24 The tie-breaker rules for individuals apply certain tests, in a descending hierarchy, for determining the residential status (for the purposes of the Agreement) of an individual who is a resident of both countries. These rules, in order of application, are:

- if the individual has a permanent home available to that individual in only one of the countries, the person is deemed to be a resident solely of that country for the purposes of the Agreement;

- if the individual has a permanent home available in both countries or in neither, then the person's residential status takes into account the person's personal or economic relations with Australia and South Africa, and the person is deemed for the purposes of the Agreement to be a resident only of the country with which the person has the closer personal and economic relations;

- residency will be determined on the basis of an individual's nationality where the foregoing test is not determinative;

- if the individual is a national (as defined in new subparagraph 1(j) of Article 3 of the Agreement) of both countries or of neither, the competent authorities will endeavour to resolve the question of treaty residence by mutual agreement.

[New Article 4, paragraph 3 of the Agreement]

1.25 Where a non-individual (such as a company) is a resident of both countries in accordance with paragraph 1, the entity will be deemed for the purposes of the Agreement to be resident only in the country in which its place of effective management is situated. ***[New Article 4, paragraph 4 of the Agreement]***

1.26 In relation to Australia, a dual resident remains a resident for the purposes of Australian domestic law. Accordingly, that person remains liable to tax in Australia as a resident, insofar as the Agreement allows.

Limitation of relief

1.27 Where an individual is a temporary resident of a country and is, for that reason, exempt from tax in that country on certain income, profits or gains in that country, then the other country will not be required to provide any relief specified in the Agreement in respect of such income, profits or gains. ***[New Article 4, paragraph 5 of the Agreement]***

Article 4 of the Protocol

Substitutes a new Article 5 (Permanent Establishment) into the Agreement

1.28 Article 4 of the Protocol substitutes a new Article 5 (*Permanent Establishment*) for Article 5 in the existing Agreement.

1.29 The application of various provisions of the Agreement (principally Article 7 relating to *Business Profits*) is dependent upon whether a person who is a resident of one country carries on business through a permanent establishment in the other country, and if so, whether income derived by that person is attributable to, or assets of that person are effectively connected with, that permanent establishment.

1.30 The definition of the term ‘permanent establishment’ corresponds generally with definitions of the term in Australia’s more recent tax treaties. ***[New Article 5 of the Agreement]***

Meaning of permanent establishment

1.31 The primary meaning of ***permanent establishment*** is expressed as being a fixed place of business through which the business of an enterprise is wholly or partly carried on. To be a permanent establishment within the primary meaning of that term, the following requirements must be met:

- there must be a place of business;
- the place of business must be fixed (both in terms of physical location and in terms of time); and
- the business of the enterprise must be carried on through this fixed place.

[New Article 5, paragraph 1 of the Agreement]

1.32 Other paragraphs of Article 5 of the Agreement elaborate on the meaning of the term by giving examples (by no means intended to be exhaustive) of what may constitute a permanent establishment — for example:

- an office;
- a factory; or
- an agricultural, pastoral or forestry property.

[New Article 5, paragraph 2 of the Agreement]

1.33 Consistent with Australia's modern treaty practice, the definition also extends to places relating to the exploration for and exploitation of natural resources.

1.34 As paragraph 2 of this Article is subordinate to paragraph 1, the examples listed will only constitute a permanent establishment if the primary definition in paragraph 1 is satisfied. ***[New Article 5, paragraph 2 of the Agreement]***

Agricultural, pastoral or forestry activities

1.35 Most of Australia's tax treaties include as a permanent establishment an agricultural, pastoral or forestry property. This reflects Australia's policy of retaining taxing rights over exploitation of Australian land for the purposes of primary production. This approach ensures that the arm's length profits test provided for in Article 7 (*Business Profits*)

applies to the determination of profits derived from these activities. ***[New Article 5, subparagraph 2(g) of the Agreement]***

Building site or construction or installation project

1.36 A building site or construction or installation project constitutes a permanent establishment only if it lasts more than six months. In this regard, the Protocol reduces the period from 12 to six months. The provision is also relocated to a separate paragraph which aligns with the OECD Model formatting and ensures that sites or projects which last less than six months will not constitute a permanent establishment.

1.37 The term 'building site or construction or installation project' includes not only the construction of buildings but also the construction of roads, bridges or canals, the renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals, the laying of pipelines and excavating and dredging. Planning and supervision are considered part of the building site if carried out by the construction contractor. However, planning and supervision carried out by another unassociated enterprise will not be taken into account in determining whether the construction contractor has a permanent establishment in Australia. ***[New Article 5, paragraph 3 of the Agreement]***

Deemed permanent establishment

Supervisory and consultancy activities

1.38 Supervisory and consultancy activities carried on for more than 183 days in any 12-month period in connection with a building site or a construction or installation project are deemed to be performed through a permanent establishment, unless the activities are of a type described in paragraph 6 and are of a preparatory or auxiliary nature. ***[New Article 5, subparagraph 4(a) of the Agreement]***

Natural resource activities

1.39 Where an enterprise carries on activities (including the operation of substantial equipment) in the exploration for, or exploitation of, natural resources within a country for a period or periods aggregating more than 90 days in any 12-month period, it will be deemed to have a permanent establishment in that country through which those activities are performed (unless the activities are of a type described in paragraph 6 and are of a preparatory or auxiliary nature). ***[New Article 5, subparagraph 4(b) of the Agreement]***

Substantial equipment

1.40 If an enterprise operates substantial equipment in a country for longer than 183 days in any 12-month period, the activity will be deemed to be performed through a permanent establishment (unless the activities are of a type described in paragraph 6 and are of a preparatory or auxiliary nature). Any time during which the substantial equipment was used in the exploitation of or exploration for natural resources, is also counted for the purpose of computing the number of days in this paragraph. ***[New Article 5, subparagraph 4(c) of the Agreement]***

1.41 Subparagraphs 4(b) and (c) together reflect Australia’s reservation to the OECD Model concerning the use of substantial equipment. Australia’s experience is that the permanent establishment provision in the OECD Model may be inadequate to deal with high value mobile activities involving the use of such equipment.

1.42 The terms ‘operation’ and ‘operates’ have been included to clarify that only active use of substantial equipment assets will be captured by subparagraphs 4(b) and (c). This means 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.

1.43 However, if that other person operates the substantial equipment for or on behalf of the enterprise, the enterprise would be considered to operate the equipment in the country. For example, if a South African enterprise itself operates a mobile crane at an Australian port for more than 183 days in a 12-month period, the South African enterprise would be deemed to have been a permanent establishment in Australia under subparagraph 4(c). If, however, that South African 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 South African enterprise would not be deemed to have a permanent establishment in Australia under subparagraph 4(c).

1.44 The meaning of the term ‘substantial’ depends on the relevant facts and circumstances of each individual case. Factors such as size, quantity, or value of the equipment, or the role of the equipment in income producing activities are relevant in determining whether the equipment is substantial. However, some examples of substantial equipment would include:

- large industrial earthmoving equipment or construction equipment used in road building, dam building or powerhouse construction;

- manufacturing or processing equipment used in a factory; or
- grain harvesters and other large agricultural machinery.

Anti-avoidance provision

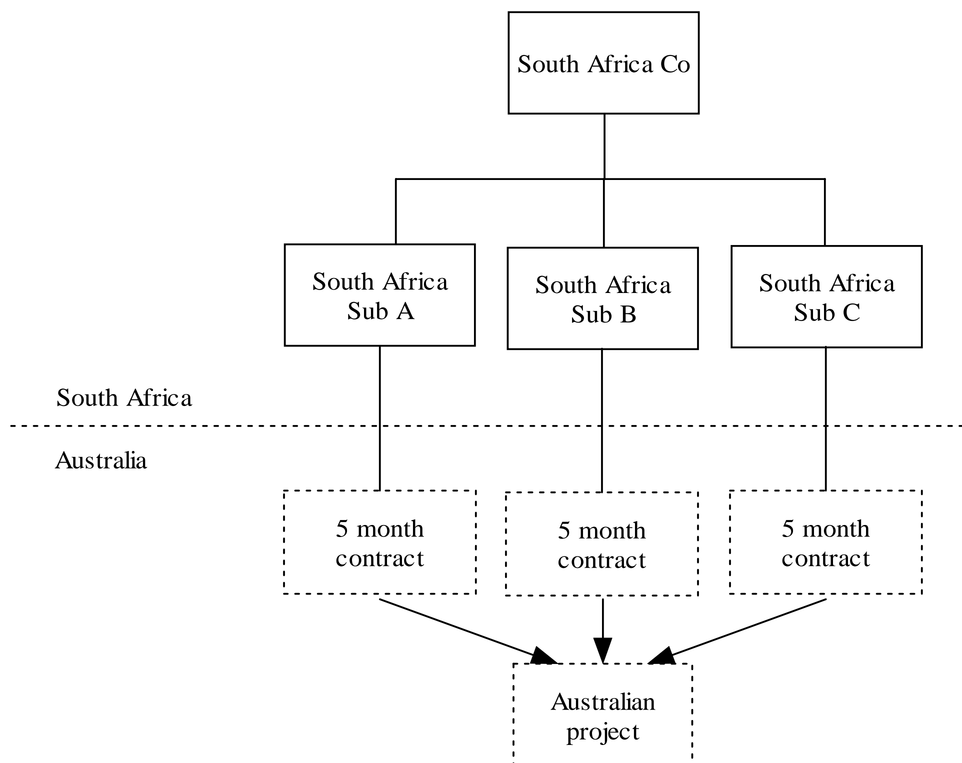
1.45 Given that Article 5 of the Agreement contains certain time frames, an anti-avoidance rule is included to ensure that where associated enterprises carry on connected activities, the periods will be aggregated in determining whether an enterprise has a permanent establishment in the country in which the activities are being carried on. Activities will be regarded as connected where, for example, different stages of a single project are being carried out by different subsidiaries within a group of companies or where the nature of the work carried on by the associated enterprises in respect of such a project, is the same.

1.46 This provision is an anti-avoidance measure aimed at counteracting contract splitting for the purposes of avoiding the application of the permanent establishment rules.

1.47 The Commentaries on the Articles of the OECD Model Tax Convention (OECD Model Commentary) recognises that time thresholds in Article 5 may give rise to abuses and notes that countries concerned with this issue may adopt solutions in bilateral negotiations to prevent such abuse.

1.48 The Agreement provides that an enterprise shall be deemed to be associated with another enterprise if one enterprise is controlled directly or indirectly by the other or if both are controlled directly or indirectly by a third person or persons. It also provides that a period of concurrent activities by such associated enterprises is only counted as one period for aggregation purposes. ***[New Article 5, paragraph 5 of the Agreement]***

Example 1.1



In the above diagram, each of the subsidiaries may conduct similar connected activities, for example, supervisory activities at a single building site. In determining whether the 183-day time threshold has been met, the time spent by each of the enterprises would be aggregated. However, any period during which more than one of the subsidiaries were carrying on activities concurrently would be counted only once. Where the time threshold is met, each of the subsidiaries would be deemed to have a permanent establishment through which its activities with respect to the project are conducted. Only the profits derived by each subsidiary from its own activities would be attributed to each company's permanent establishment.

Preparatory and auxiliary activities

1.49 Certain activities do not generally give rise to a permanent establishment (eg, the use of facilities solely for storage, display or delivery other than where such delivery is undertaken regularly as part of the normal business activities of the enterprise).

1.50 Generally these activities are of a preparatory or auxiliary character and are unlikely to give rise to substantial profits. The necessary

economic link between the activities of the enterprise and the country in which the activities are carried on does not exist in these circumstances.

1.51 Unlike the OECD Model, which provides only that the listed activities are deemed not to constitute a permanent establishment, the Agreement provides that the activities will be deemed not to constitute a permanent establishment only if the activities are, in relation to the enterprise, of a preparatory or auxiliary character. This is to prevent the situation where enterprises structure their business so that their activities fall within the exceptions with a view to avoiding taxation in that country. It also means that where the listed activities are not preparatory or auxiliary in relation to the enterprise but instead constitute core business activities of the enterprise, the enterprise will not be excluded from having a permanent establishment if it satisfies the primary meaning in paragraph 1. ***[New Article 5, paragraph 6 of the Agreement]***

Dependent agents

1.52 A person who acts on behalf of an enterprise of another country is deemed to constitute a permanent establishment of that enterprise if that person has and habitually exercises an authority to substantially negotiate or conclude contracts on behalf of the enterprise.

1.53 Consideration will be given to all the relevant facts and circumstances in determining whether a person has authority or not to substantially negotiate or conclude contracts.

1.54 The term ‘substantially negotiate’ has been included to remove any doubt as to the existence of a permanent establishment where contracts that have been negotiated in one country by an agent are formally concluded in the other country by signature in that other country.

1.55 Activities of a dependent agent will not give rise to a permanent establishment where that agent’s activities are limited to the preparatory and auxiliary activities mentioned in paragraph 6. ***[New Article 5, subparagraph 7(a) of the Agreement]***

Manufacturing or processing on behalf of others

1.56 Consistent with Australia’s reservation to the OECD Model, where a person acts on behalf of another in manufacturing or processing the other’s goods, this will give rise to a deemed permanent establishment unless the activities are of a preparatory or auxiliary character. An example is the situation where a mineral plant refines minerals at cost, so that the plant operations produce no Australian profits. Title to the refined product remains with the mining consortium and profits on sale are realised mainly outside of Australia.

1.57 The refining activities performed for the enterprise through such a plant are deemed to be carried on through a permanent establishment of the enterprise because the manufacturing or processing activity (which gives the processed minerals much of their value) is conducted in Australia on behalf of the enterprise. Accordingly, Australia should have taxing rights over the business profits attributable to the processing activity carried on in Australia. This subparagraph prevents an enterprise from escaping tax in that country where that enterprise carries on substantial manufacturing or processing activities in a country through an intermediary operating on its behalf.

1.58 A similar provision is in the previous version of the Article. The inclusion of this subparagraph is insisted upon by Australia in its tax treaties and is consistent with Australia's policy of retaining taxing rights over profits from manufacturing or processing on behalf of others including, importantly, in the exploitation of Australia's mineral resources. ***[New Article 5, subparagraph 7(b) of the Agreement]***

1.59 Manufacturing or processing activities will not give rise to a permanent establishment where the activities are limited to the preparatory and auxiliary activities mentioned in paragraph 6.

Independent agents

1.60 Business carried on through an independent agent will not, of itself, give rise to a permanent establishment, provided that the independent agent is acting in the ordinary course of that agent's business as such an agent. ***[New Article 5, paragraph 8 of the Agreement]***

Subsidiary companies

1.61 Generally, a subsidiary company will not be a permanent establishment of its parent company. A subsidiary, being a separate legal entity, would not usually be carrying on the business of the parent company but rather would be conducting its own business activities. However, a permanent establishment would arise if the subsidiary permits the parent company to operate from its premises such that the tests in paragraph 1 of new Article 5 are met, or acts as an agent such that a dependent agent permanent establishment is constituted. ***[New Article 5, paragraph 9 of the Agreement]***

Other Articles

1.62 The principles set down in new Article 5 are also to be applied in determining whether a permanent establishment exists in a third country or whether an enterprise of a third country has a permanent establishment in Australia (or South Africa) when applying the source rule contained in:

- paragraph 7 of new Article 11 (*Interest*); and
- paragraph 5 of new Article 12 (*Royalties*).

[New Article 5, paragraph 10 of the Agreement]

Article 5 of the Protocol

Substitutes a new Article 10 (Dividends) into the Agreement

1.63 Article 5 of the Protocol substitutes a new Article 10 (*Dividends*) for Article 10 in the existing Agreement.

1.64 This Article allocates taxing rights in respect of dividends flowing between Australia and South Africa. It provides that:

- dividends will be subject to a maximum 5 per cent rate of source country tax where the beneficial owner of those dividends is a company which holds directly at least 10 per cent of the voting power in the company paying the dividends;
- a maximum 15 per cent rate of source country tax may be applied on all other dividends; and
- 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*) or Article 14 (*Independent Personal Services*); and
- the extra-territorial application by either country of taxing rights over dividend income is not permitted.

1.65 However, no relief under this Article is available in cases that have been designed with a main purpose of taking advantage of the Article.

Permissible rate of source country taxation

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

1.67 The 5 per cent rate for non-portfolio dividends will apply for all dividends paid in respect of company shareholdings where the beneficial owner of those dividends is a company which holds directly at least 10 per cent of the voting power in the company paying the dividends. ***[New Article 10, subparagraph 2(a) of the Agreement]***

1.68 The 5 per cent rate replaces the exemption from dividend withholding tax provided in the existing agreement for non-portfolio inter-corporate dividends that are paid out of fully taxed profits. New subparagraph (a) of paragraph 2 is broadly consistent with the OECD Model Article 10, and has been included to accommodate proposed changes to South Africa's system of taxing corporate profit.

1.69 Where the 5 per cent rate limit does not apply, for example where dividends are paid in respect of a portfolio interest or to an individual, the source country will generally limit its tax to 15 per cent of the gross amount of the dividend. In the case of Australia, this will mean that the domestic rate of withholding tax imposed on unfranked dividends will be reduced from 30 per cent to 15 per cent. ***[New Article 10, subparagraph 2(b) of the Agreement]***

1.70 Although the provisions described above would allow Australia to impose withholding tax on both franked and unfranked dividends in the specified circumstances, the dividend withholding tax exemption provided by Australia under its domestic law for franked dividends paid to non-residents will continue to apply.

Dividends effectively treated as business profits or independent personal services income

1.71 The limitation imposed on the tax of the country in which the dividend is sourced does not apply to dividends derived by a resident of the other country who has a permanent establishment in the source country from which the dividends are derived, if the holding giving rise to the dividends is effectively connected with that permanent establishment. The limitation imposed on that tax of the country in which the dividend is sourced also does not apply to dividends derived by a resident of the other country who performs independent personal services from a fixed base

situated in the source country from which the dividends are derived, and the holding in respect of which the dividends are paid is effectively connected with that fixed base.

1.72 Where the holding is so effectively connected, the dividends are to be treated as business profits or as income from personal services and therefore subject to the full rate of tax applicable in the country in which the dividend is sourced in accordance with the provisions of Article 7 (*Business Profits*) or Article 14 (*Independent Personal Services*) as the case may be of the Agreement.

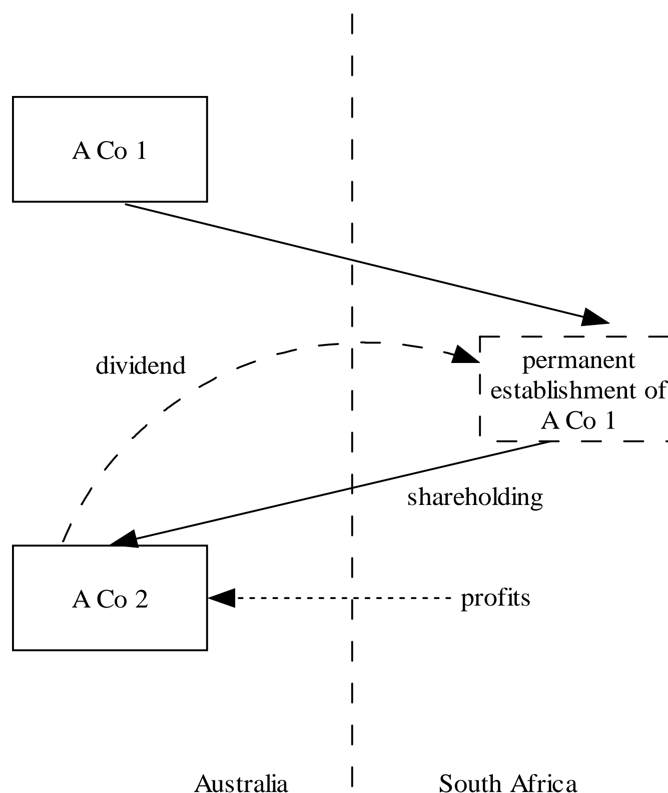
1.73 Franked and unfranked dividends paid by an Australian company will be included in the assessable income of a non-resident company or individual where the dividends are attributable to a permanent establishment or fixed base situated in Australia. Expenses incurred in deriving the dividend income are allowable as a deduction from that income when calculating the taxable income of the non-resident. Further, a non-resident company or individual may be entitled to tax offsets in respect of any franked dividends under Australia's domestic law.
[New Article 10, paragraph 4 of the Agreement]

Extra–territorial application precluded

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

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

Example 1.2



In the diagram above, paragraph 5 would, but for the exception preclude South Africa from taxing the dividend paid by A Co 2 to A Co 1 out of profits derived from South African sources. However, as the dividends relate to the Australian shareholder's permanent establishment in South Africa with which the holding is effectively connected, South Africa may tax the dividends.

1.75 These restrictions do not apply when the company is, for tax purposes, a resident of both Australia and South Africa under the respective laws of the two countries. ***[New Article 10, paragraph 5 of the Agreement]***

Branch profits tax

1.76 Paragraph 6 recognises each country's right to impose branch profits tax on the profits of permanent establishments in their country but limits the rate of tax to a rate of tax not exceeding more than 5 percentage points of that country's company tax rate.

1.77 As Australia does not currently impose branch profits tax, the paragraph is presently only applicable to South Africa. There will be no

immediate effect for South Africa whilst its normal company tax rate remains at 29 per cent and its branch profits tax rate under its domestic law is 34 per cent. The paragraph operates to ensure that any branch profits tax imposed by South Africa will continue to exceed the company tax rate by no more than 5 per cent. ***[New Article 10, paragraph 6 of the Agreement]***

Definition of dividends

1.78 The term 'dividends' in the new Article 10 means income from:

- shares or other rights which participate in profits and are not debt-claims; and
- other amounts that are subject to the same taxation treatment as income from shares in the country of which the distributing company is resident.

[New Article 10, paragraph 3 of the Agreement]

Limitation of benefits

1.79 The source country rate limits available under the Article will not apply where an assignment of dividends, or a creation or assignment of shares or other rights in respect of which dividends are paid, has been made with the main objective, or one of the main objectives, of accessing the relief otherwise available under the Article. ***[New Article 10, paragraph 7 of the Agreement]***

Article 6 of the Protocol

Substitutes new Article 11 (Interest) into the Agreement

1.80 Article 6 of the Protocol substitutes a new Article 11 (*Interest*) for Article 11 in the existing Agreement.

1.81 New Article 11 allocates taxing rights in respect of interest flows between Australia and South Africa. It provides that:

- an exemption from source country tax applies to certain cross-border interest flows to:
  - government bodies or central banks; or
  - financial institutions;
- a maximum 10 per cent rate of source country tax may be applied on all other interest income;

- interest paid on an indebtedness which is effectively connected with a permanent establishment or a fixed base shall be subject to Article 7 (*Business Profits*) or Article 14 (*Independent Personal Services*);
- interest payments are deemed to have an Australian source (and may therefore be taxed in Australia) where:
  - the interest is paid by an Australian resident to a South African resident; or
  - the interest is paid by a non-resident to a South African resident and it is an expense of the payer in carrying on business in Australia through a permanent establishment or a fixed base; and
- relief will be restricted to the gross amount of interest which would be expected to be paid on an arm's length dealing between independent parties.

1.82 However, no such relief is available in cases that have been designed with a main purpose of taking advantage of this Article.

Permissible rate of source country taxation

Ten per cent rate limit

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

Exemptions for interest paid to government bodies and central banks

1.84 The exemption in new Article 11 for interest paid to the government of a Contracting State reflects the principle of sovereign immunity and will apply to interest derived by South Africa, or any political or administrative subdivision or local authority in South Africa, in addition to any other South African body exercising governmental functions, or South Africa's central bank.

1.85 It will not extend to interest derived by a government body from the conduct of a trade or business. ***[New Article 11, subparagraph 3(a) of the Agreement]***

Exemptions for interest paid to financial institutions

1.86 The exemption for interest paid to financial institutions recognises that the agreed 10 per cent withholding tax rate on gross interest can be excessive given their cost of funds. The exemption will also broadly align the treatment of interest paid to South African financial institutions with the Australian domestic law exemption for interest paid on widely distributed arm's length corporate debenture issues (section 128F of the *Income Tax Assessment Act 1936* (ITAA 1936)). ***[New Article 11, subparagraph 3(b) of the Agreement]***

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

1.88 The exemption will not be available for interest paid as part of an arrangement involving back-to-back loans or other arrangement that is economically equivalent and structured to have a similar effect. The denial of the exemption for these back-to-back loan type arrangements is directed at preventing related party and other debt from being structured through financial institutions to gain access to a withholding tax exemption. The exemption will only be denied for interest paid on the component of a loan that is considered to be back-to-back. ***[New Article 11, paragraph 4 of the Agreement]***

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

- a South African financial institution receives or is credited with an item of interest arising in Australia; and
- the financial institution pays an equivalent interest to another person who is a resident of South Africa, and, if the resident received the interest directly from Australia, would not be entitled to similar benefits with respect to that interest.

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

Definition of interest

1.91 For the purposes of Article 11 the term 'interest' is defined to include income from:

- government securities;

- bonds and debentures;
- any other forms of indebtedness; and
- income which is subjected to the same taxation treatment as income from money lent by the law of the Contracting State in which the income arises.

[New Article 11, paragraph 5 of the Agreement]

Interest effectively treated as business profits or independent personal services income

1.92 Interest derived by a resident of one country which is paid in respect of an indebtedness which is effectively connected with a permanent establishment of that person in the other country, will form part of the business profits of that permanent establishment and be subject to the provisions of Article 7 (*Business Profits*). Interest derived by a resident of one country will be subject to Article 14 (*Independent Personal Services*), instead of new Article 11 (*Interest*) where the indebtedness is effectively connected with a fixed base, through which independent personal services are performed, situated in the other country. Accordingly, the rate limitation of 10 per cent and the exemption for financial institutions do not apply to such interest in the country in which the interest is sourced. ***[New Article 11, paragraph 6 of the Agreement]***

Deemed source rules

1.93 The source rules which determine where interest arises for the purposes of Article 11 are set out in paragraph 7. They operate to allow Australia to tax interest paid by a resident of Australia to a resident of South Africa who is the beneficial owner of that interest. Australia may also tax interest paid by a non-resident, being interest which is beneficially owned by a South African resident, if it is an expense incurred by the payer of the interest in carrying on a business in Australia through a permanent establishment or fixed base.

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

1.95 In determining whether a permanent establishment or fixed base exists in a third country, the principles set out in Article 5 (*Permanent Establishment*) and Article 14 (*Independent Personal Services*) apply respectively. ***[New Article 5, paragraph 10 of the Agreement; Article 14, paragraph 1 of the Agreement]***

Related persons

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

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

- who controls the payer (whether directly or indirectly);
- who is controlled by the payer; or
- who is subordinate to a group having common interests with the payer.

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

Limitation of benefits

1.99 The source country rate limit and exemptions available under this new Article 11 will not apply where an assignment of interest, or a creation or assignment of the indebtedness in respect of which interest paid, has been made with the main objective, or one of the main objectives, of accessing the relief otherwise available under this Article. ***[New Article 11, paragraph 9 of the Agreement]***

Article 7 of the Protocol

Substitutes new Article 12 (Royalties) into the Agreement

1.100 Article 7 of the Protocol substitutes a new Article 12 (*Royalties*) for Article 12 in the existing Agreement. New Article 12 allocates taxing

rights in respect of royalties paid or credited between Australia and South Africa. The new Article provides that:

- a maximum 5 per cent rate of source country tax may be levied on the gross amount of the royalties;
- royalties paid in respect of a right or property which is effectively connected with a permanent establishment or fixed base are subject to Article 7 (*Business Profits*) or Article 14 (*Independent Personal Services*);
- equipment royalties are not included within the definition of royalties and are taxed in accordance with either Article 7 (*Business Profits*) or Article 8 (*Ships and Aircraft*);
- royalties include payments for spectrum licences;
- royalties are deemed to have an Australian source (and may therefore be taxed in Australia) where:
  - the royalties are paid by an Australian resident to a South African resident; or
  - the royalties are paid by a non-resident to a South African resident and are an expense of the payer in carrying on business in Australia through a permanent establishment or fixed base; and
- relief will be restricted to the gross amount of royalties which would be expected to be paid on an arm's length dealing between independent parties.

1.101 However, no such relief is available in cases that have been designed with a main purpose of taking advantage of this Article.

Permissible rate of source country taxation

1.102 This new Article 12 generally allows both countries to tax royalty flows but limits the tax of the country of source to 5 per cent of the gross amount of royalties beneficially owned by residents of the other country. ***[New Article 12, paragraphs 1 and 2 of the Agreement]***

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

1.104 The 5 per cent rate limitation does not apply to natural resource royalties, which, in accordance with Article 6 (*Income from Real*

(immovable) Property), remain taxable in the country of source without limitation of the tax that may be imposed.

Definition of royalties

1.105 The definition of ***royalties*** in this new Article 12 reflects most elements of the definition in Australia's domestic income tax law. It includes payments for the supply of scientific, technical, industrial or commercial knowledge or information but not payments for services rendered, except as provided for in subparagraph 3(c). The definition also includes payments for the use of intellectual property stored on various media and used in connection with television, radio or other broadcasting (eg, satellite, cable and Internet broadcasting). ***[New Article 12, paragraph 3 of the Agreement]***

1.106 Payments for the use of, or the right to use industrial, commercial or scientific equipment have been removed from the definition of royalty under new Article 12. Such amounts will either be treated as business profits under Article 7 (*Business Profits*) or as profits from international transport operations (for certain leases of ships, aircraft and containers) under Article 8 (*Ships and Aircraft*). The exclusion of payments for the use of equipment from the *Royalties* Article reflects common international tax treaty practice and recognises that source country taxation on a gross basis may be excessive given low profit margins.

Payments for the supply of know-how versus payments for services rendered

1.107 The OECD Model Commentary deals with the need to distinguish these two types of payments at paragraph 11.3 of the OECD Model Commentary on Article 12 (*Royalties*). The OECD Model Commentary cites the following criteria as relevant for the purpose of making the distinction:

- Contracts for the supply of know-how concern information of the kind described in paragraph 11 (of the OECD Model Commentary) that already exists or concern the supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.

- In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party.

- In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve a much greater level of expenditure by the supplier in order to perform their contractual obligations. For instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to sub-contractors for the performance of similar services.

1.108 Payments for design, engineering or construction of plant or building, feasibility studies, component design and engineering services may generally be regarded as being in respect of a contract for services, unless there is some provision in the contract for imparting techniques and skills to the buyer.

1.109 In cases where both know-how and services are supplied under the same contract, if the contract does not separately provide for payments in respect of know-how and services, an apportionment of the two elements of the contract may be appropriate.

1.110 Payments for services rendered are to be treated under Article 7 (*Business Profits*) or Article 14 (*Independent Personal Services*).

Image or sound reproduction or transmission

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

Spectrum licences

1.112 Under the Agreement, payments made for the use of, or right to use, the radiofrequency spectrum specified in a spectrum licence are treated as royalties. This preserves Australia's ability to tax payments that arise in Australia for the use in Australia of any part of the radiofrequency

spectrum (within the meaning of the *Radiocommunications Act 1992*) specified in such a licence. ***[New Article 12, subparagraph 3(e) of the Agreement]***

Forbearance

1.113 Consistent with Australian tax treaty practice, subparagraph 3(f) of the new Article 12 expressly treats as a royalty, amounts paid or credited in respect of forbearance to grant to third persons, rights to use property covered by this Article. This is designed to address arrangements along the lines of those contained in *Aktiebolaget Volvo v Federal Commissioner of Taxation* (1978) 8 ATR 747; 78 ATC 4316, where instead of amounts being payable for the exclusive right to use the property they were made for the undertaking that the right to use the property will not be granted to anyone else. This provision ensures that such payments are subject to tax as a royalty payment under the terms of the *Royalties* Article. ***[New Article 12, subparagraph 3(f) of the Agreement]***

Other royalties effectively treated as business profits or independent personal services income

1.114 As in the case of interest income, it is specified that the withholding tax rate limitation does not apply to royalties paid in respect of property or rights which are effectively connected with a permanent establishment or fixed base in the country in which the income is sourced. Such income is subject to full taxation under Article 7 (*Business Profits*) or Article 14 (*Independent Personal Services*). ***[New Article 12, paragraph 4 of the Agreement]***

Deemed source rules

1.115 The source rules which determine where royalties arise for the purposes of Article 12 effectively correspond, in the case of Australia, with the deemed source rule contained in section 6C (source of royalty income derived by a non-resident) of the ITAA 1936 for royalties paid to non-residents of Australia. The source rules broadly mirror the source rule for interest income contained in paragraph 7 of the new Article 11 (*Interest*).

1.116 Consistent with Australia’s royalty withholding tax provisions, royalty payments that are an expense incurred by an Australian resident in carrying on a business through a permanent establishment or fixed base outside both Australia and South Africa (ie, the permanent establishment or fixed base is in a third country) will not be subject to tax in Australia. Those royalties are deemed to be sourced in the country in which the permanent establishment or fixed base is situated. ***[New Article 12, paragraph 5 of the Agreement]***

1.117 In determining whether a permanent establishment or fixed base exists in a third country, the principles set out in new Article 5 (*Permanent Establishment*) and Article 14 (*Independent Personal Services*) apply respectively. ***[New Article 5, paragraph 10 of the Agreement; Article 14, paragraph 1 of the Agreement]***

Related persons

1.118 Where a special relationship exists between the payer and the beneficial owner of the royalties, the 5 per cent source country tax rate limitation will apply only to the extent that the royalties are not excessive. Any excess part of the royalty remains taxable according to the domestic law of each country but subject to the other Articles of the Agreement.

1.119 Examples of special relationships have been provided in respect of the corresponding paragraph in new Article 11 (*Interest*). ***[New Article 12, paragraph 6 of the Agreement]***

Limitation of benefits

1.120 The source country rate limit available under this Article will not apply where an assignment of royalties, or a creation or assignment of the rights in respect of which royalties paid or credited, has been made with the main objective, or one of the main objectives, of accessing the relief available under this Article. ***[New Article 12, paragraph 7 of the Agreement]***

Article 8 of the Protocol

Substitutes a new Article 13 (Alienation of Property) into the Agreement

1.121 Article 8 of the Protocol substitutes a new Article 13 (*Alienation of Property*) for Article 13 in the existing Agreement.

1.122 As in the existing Article 13, the reference to 'income, profits or gains' in this Article is designed to put beyond doubt that the alienation of property which in Australia is income or a profit under ordinary concepts, will be taxed in accordance with this Article, rather than Article 7 (*Business Profits*), together with relevant capital gains.

Real property

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

1.124 For the purpose of this Article, the term 'real property' has the same meaning as it has under paragraph 2 of Article 6 (*Income from Real*

(immovable) Property). Where the property is situated is clarified under paragraph 3 of Article 6.

1.125 Real property (which is primarily defined as having the meaning which it has under the domestic law of the country where the property is situated) includes, in the case of Australia:

- a lease of land and any other interest in or over land (including exploration and mining rights); and
- royalties and other payments relating to the exploration for, or exploitation of, mines or quarries or other natural resources or rights in relation thereof.

1.126 In the case of South Africa, real property includes:

- property accessory to immovable property;
- rights to which the provisions of general law respecting landed property apply;
- usufruct of immovable property; and
- royalties and other payments relating to the exploration for, or exploitation of, mines or quarries or other natural resources or rights in relation thereof.

[Article 6, paragraph 2 of the Agreement]

Permanent establishment or fixed base

1.127 Paragraph 2 deals with income, profits or gains arising from the alienation of property (other than real property) forming part of the business assets of a permanent establishment of an enterprise or pertaining to a fixed base of a resident for the purposes of performing independent personal services. It also applies where the fixed base or permanent establishment itself (alone or with the whole enterprise) is alienated. Such income, profits, or gains may be taxed in the country in which the permanent establishment or fixed base is situated. This corresponds to the rules for taxation of business profits contained in Article 7 (*Business Profits*) and of income from independent personal services in Article 14 (*Independent Personal Services*). ***[New Article 13, paragraph 2 of the Agreement]***

Disposal of ships or aircraft

1.128 Income, profits or gains derived by a resident of a country from the disposal of ships or aircraft operated by that resident in international

traffic, or of associated property (other than real property covered by paragraph 1), are taxable only in that country. This rule corresponds to the operation of Article 8 (*Ships and Aircraft*) of the Agreement in relation to profits from the international operation of ships or aircraft. ***[New Article 13, paragraph 3 of the Agreement]***

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

Shares and other interests in land-rich entities

1.130 Paragraph 4 applies to situations involving the alienation of shares or other interests in companies and other entities, where more than 50 per cent of the value of the assets of that company or other entity is derived, whether directly or indirectly through one or more other interposed entities, from real property situated in the other country. Income, profits or gains from the alienation of such shares or interests may be taxed by the country in which the real property is situated. Paragraph 4 complements paragraph 1 of the Article and is designed to cover arrangements involving the effective alienation of incorporated real property, or like arrangements.

1.131 This provision is in line with international practice and ensures that capital gains on a non-resident's indirect, as well as direct, interests in certain targeted assets are taxable by Australia. ***[New Article 13, paragraph 4 of the Agreement]***

Capital gains

1.132 This new Article 13 contains a sweep up provision which reserves the right to tax any capital gains from the alienation of other types of property to the country in which the person deriving the gains is a resident. These would include, for example, gains from the disposal of shares or other interests in an entity (other than a land-rich entity). Such gains derived by Australian residents will be taxable only in Australia, regardless of where the property is situated, and will not be taxed in South Africa. The liability of the Australian resident to taxation on such gains will be determined in accordance with Australia's domestic law. ***[New Article 13, paragraph 5 of the Agreement]***

Article 9 of the Protocol

Inserts a new Article 23A (Non-Discrimination) into the Agreement

1.133 The Protocol inserts new rules into the Agreement to prevent tax discrimination. The Australian tax system is generally non-discriminatory. However, for clarity this Article provides that certain features of the Australian tax system should not be seen as coming within the Article's terms. The measures identified can be characterised as being an integral part of the administration of Australia's economic and tax policy and the collection of its taxes.

Discrimination based on nationality

1.134 Article 23A prevents discrimination on the grounds of nationality by providing that nationals of one country may not be less favourably treated than nationals of the other country in the same circumstances. ***[New Article 23A, paragraph 1 of the Agreement]***

1.135 The discrimination that this Article precludes applies to both taxation and any requirement connected therewith. Accordingly, discrimination in the administration of the tax law is also generally precluded.

1.136 The term ***national*** is defined in new subparagraph (1)(j) of Article 3 (*General Definitions*) of the Agreement and covers both an individual who is a citizen or national of one country or the other, and a company 'deriving its status as such from the laws in force in that Contracting State'. Accordingly, a company that is incorporated in Australia would be a national of Australia while a company that is incorporated under a law of South Africa would be a national of South Africa for the purposes of this paragraph. ***[Article 3, new subparagraph 1(j) of the Agreement]***

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

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

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

1.139 The inclusion of the further clarification 'in particular with respect to residence' makes clear that the residence of the taxpayer is one of the factors that are relevant in determining whether taxpayers are placed in similar circumstances. Therefore, different treatment accorded to a South African resident compared to an Australian resident will not constitute discrimination for the purposes of this Article. A potential

breach of paragraph 1 of this Article only arises if two persons who are residents of the same country are treated differently solely by reason of one being a national of Australia and the other a national of South Africa.

The meaning of 'other' or 'more burdensome'

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

1.141 The phrase is also applicable to administrative or compliance requirements that a taxpayer may be called upon to meet where those requirements differ based on nationality grounds.

Non-residents of Australia/South Africa

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

Non-discrimination and permanent establishments

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

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

1.145 Permanent establishments of non-resident enterprises may be treated differently from resident enterprises as long as the treatment does not result in more burdensome taxation for the former than for the latter. That is, a different mode of taxation may be adopted with respect to non-resident enterprises, to take account of the fact that they often operate in different conditions to resident enterprises. The provision would not affect, for example, domestic law provisions that tax a non-resident by withholding, provided that calculation of the tax payable is not greater than that applying to a resident taxpayer.

Non-resident individuals

1.146 Non-resident individuals do not have to be granted the personal allowances, reliefs or reductions available to residents of the tax treaty countries. ***[New Article 23A, paragraph 2 of the Agreement]***

1.147 This means that Australia will continue to be able to grant certain tax credits or rebates only to resident individuals, such as the tax offset for dependents contained in Division 13 of the *Income Tax Assessment Act 1997*.

1.148 Unlike paragraph 3 of Article 24 (*Non-Discrimination*) of the OECD Model, the new Article is not just limited to those benefits conferred by a country relating to civil status or family responsibilities of the individual. For Australian tax purposes, it also extends, for example, to the tax-free threshold which may be considered not to be based either on civil status or family responsibilities.

Deductions for payments to non-residents

1.149 The treaty partner countries must allow the same deductions for interest, royalties and other disbursements paid to residents of the other country as it does for payments to its own residents. However, the treaty countries are allowed to reallocate profits between related enterprises on an arm's length basis under Article 9 (*Associated Enterprises*) and to limit deductions in accordance with paragraph 8 of new Article 11 (*Interest*), and paragraph 6 of new Article 12 (*Royalties*). ***[New Article 23A, paragraph 3 of the Agreement]***

Companies owned or controlled abroad

1.150 A country must not give less favourable treatment to an enterprise, the capital of which is owned or controlled, wholly or partly, directly or indirectly, by one or more residents of the other country. That is, Australian companies owned or controlled by South African residents may not be given other or more burdensome treatment than locally owned

or controlled Australian companies. ***[New Article 23A, paragraph 4 of the Agreement]***

1.151 Differential tax treatment based on residency is not affected by this paragraph. Nor does the paragraph require the same treatment of non-resident shareholders in the company as resident shareholders. Accordingly, there is no obligation under paragraph 4 or any other provision of this Article to allow imputation credits to non-resident shareholders.

Exclusions

1.152 Certain provisions of the law of both countries that are important for purposes of economic regulation and integrity of the tax system are excluded from the operation of this Article. Although most are generally recognised by the international community as not being discriminatory, the specific exclusion of these provisions will ensure that they can continue to operate for their intended purpose. The provisions of the law of Australia and South Africa to be excluded are those that:

- prevent the avoidance or evasion of taxes;
- defer tax where an asset is transferred out of the jurisdiction;
- provide for consolidation of group entities;
- do not allow tax rebates or credits in relation to dividends paid by a company;
- provide for deductions for research and development expenditure; or
- are agreed in an Exchange of Notes between the two Governments to be unaffected by the Article.

[New Article 23A, paragraph 5 of the Agreement]

Avoidance or evasion provisions

1.153 The operation of domestic measures to combat avoidance and evasion is not affected by this new Article 23A. ***[New Article 23A, subparagraph 5(a) of the Agreement***

1.154 The reference to ‘laws … designed to prevent avoidance or evasion of taxes’ includes thin capitalisation, dividend stripping, transfer pricing, controlled foreign company, transferor trust and foreign investment fund provisions, and collection measures including conservancy. Although it is commonly accepted by most OECD member

countries that such provisions do not contravene *Non-Discrimination* Articles, this outcome is specifically provided for in the Agreement by the exclusion of such rules from the operation of the *Non-Discrimination* Article. ***[New Article 23A, paragraph 6 of the Agreement]***

1.155 The enforcement and operation of the various aspects of the withholding tax provisions relating to non-residents are preserved by this Article. ***[New Article 23A, subparagraph 5(a) and paragraph 6 of the Agreement]***

Capital gains roll-over relief

1.156 This new Article 23A will not affect the operation of any provision of domestic tax legislation which does not permit the deferral of tax arising on the transfer of an asset where the transfer of the asset by the transferee would take the asset beyond the taxing jurisdiction of the country. ***[New Article 23A, subparagraph 5(b) of the Agreement]***

1.157 Under Australia's domestic tax legislation, permanent establishments generally enjoy the same tax treatment as resident enterprises. However, roll-over relief is denied to a permanent establishment where an asset that is taxable Australian property is transferred to a non-resident if the asset is not taxable Australian property in the hands of the transferee. Australia will be able to continue to deny roll-over relief in these circumstances. ***[New Article 23A, subparagraph 5(b) of the Agreement]***

Consolidation

1.158 Domestic law rules which provide for single entity treatment of a group of entities are excluded from the operation of this new Article 23A, provided that there is no discrimination regarding access to consolidation treatment between Australian resident companies on the basis of ownership of the company.

1.159 Australia's consolidation measures are restricted to wholly-owned Australian resident entities. This Article will not apply to these measures, with the result that domestic law provisions continue to operate to preclude permanent establishments of non-resident companies from consolidating with resident entities that may be wholly-owned by a non-resident. ***[New Article 23A, subparagraph 5(c) of the Agreement]***

Rebates or credits paid by a company

1.160 Domestic law rules of either country which allow an inter-corporate dividend rebate or credit are excluded from the operation of this new Article 23A. Dividends paid to non-residents are subject to withholding tax and are not assessable income. Where dividends are fully

franked they are exempt from withholding tax. As no imputation credits arise for non-residents, there is no possibility of excess imputation credits arising. Accordingly, it is not possible for non-residents to offset excess franking credits against their Australian source income or to seek a refund of any excess imputation credits. This Article does not operate to preclude this treatment. ***[New Article 23A, subparagraph 5(d) of the Agreement]***

Research and development expenditure

1.161 The domestic law research and development provisions are excluded from the operation of this new Article 23A. It follows that Australia will be able to continue to apply its domestic law rules concerning access to concessions in respect of research and development expenditure. Currently, these concessions are only available to companies that are incorporated in Australia. ***[New Article 23A, subparagraph 5(e) of the Agreement]***

Power to carry out an Exchange of Notes

1.162 The two Governments may agree in an Exchange of Notes that other domestic law provisions will not be affected by the requirements of this new Article 23A. ***[New Article 23A, subparagraph 5(f) of the Agreement]***

Taxes to which this Article applies

1.163 This new Article 23A applies to the taxes referred to in paragraph 3 of new Article 2 (*Taxes Covered*) of the Agreement. These are, 'taxes of every kind and description imposed on behalf of the Contracting States, or their political subdivisions or local authorities'. ***[New Article 2, paragraph 3 of the Agreement]***

1.164 In the case of Australia, the relevant taxes include the income tax (including the petroleum resource rent tax and tax on capital gains), and the goods and services tax (GST) and fringe benefits tax. The provisions of this Article also apply to taxes imposed by the Australian states and territories.

1.165 In the case of South Africa, the relevant taxes include the normal tax, the secondary tax on companies, the withholding tax on royalties, the value added tax and the inheritance tax. The provisions of this Article also apply to taxes imposed by South Africa's provincial governments.

More favourable treatment

1.166 Nothing in this new Article 23A prevents either country from treating residents of the other country more favourably than its own residents.

Article 10 of the Protocol

Substitutes new Article 25 (Exchange of Information) into the Agreement

1.167 The Protocol aligns the information exchange provisions to the 2005 OECD standard by replacing Article 25 (*Exchange of Information*) of the existing Agreement. The new Article 25 differs from the previous approach in the following ways:

- The scope is expanded to a wider range of taxes.
- The new provision clarifies that the Commissioner is obliged to obtain information for South African tax authorities regardless of whether Australia has a domestic tax interest in the information sought.
- Bank secrecy laws do not limit the exchange of information.

Foreseeably relevant information

1.168 Article 25 authorises and limits the exchange of information by the two competent authorities to information foreseeably relevant to the administration or enforcement of the relevant taxes. The exchange of information is not restricted by Article 1 (*Personal Scope*) of the Agreement, and may therefore cover persons who are not residents of Australia or South Africa.

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

1.170 The change in wording from 'necessary' used in the previous version of the Article to a 'foreseeably relevant' standard reflects the wording in Article 26 (*Exchange of Information*) of the OECD Model and no difference in effect is intended.

Taxes to which this Article applies

1.171 Under the corresponding Article in the existing Agreement, the information that could be requested and obtained between the two countries was limited to information in relation to taxes to which that Agreement applied (generally income taxes).

1.172 Under the new Article 25, the range of taxes for which information may be exchanged has been expanded. The Australian 'competent authority' can now request and obtain information concerning all federal taxes administered by the Commissioner from the competent authority in South Africa. This means, for example, that information concerning Australian indirect taxes (ie, the GST) may be requested and obtained from South Africa. ***[New Article 25, paragraph 1 of the Agreement]***

1.173 Similarly, in the case of South Africa, the South African competent authority can now request and obtain information concerning taxes of every kind and description imposed under South African tax laws, from the Australian competent authority to the extent that the requested information relates to taxes administered by the Commissioner for the South African Revenue Service.

Use of exchanged information

1.174 The purposes for which the exchanged information may be used and the persons to whom it may be disclosed are restricted consistent with the corresponding Article in the existing Agreement and the approach taken in the OECD Model. Any information received by a country must be treated as secret in the same manner as information obtained under the domestic law of that country and can only be disclosed to the persons identified in paragraph 2 of this Article. ***[New Article 25, paragraph 2 of the Agreement]***

No domestic tax interest required

1.175 When requested, a country is required to obtain information under the new Article in the same manner as if it were administering its domestic tax system, notwithstanding that the country may not require the information for its own 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. ***[New Article 25, paragraph 4 of the Agreement]***

Limitations

1.176 The country requested to provide information under this new Article 25 is not obliged to do so where:

- it would be required to carry out administrative measures at variance with the law and administrative practice of either Australia or South Africa; or
- such information is not obtainable under the domestic law or in the normal course of administration. For example, where

information requested by South Africa is not obtainable by the Commissioner, Australia is not obliged to obtain the requested information using other information gathering powers (such as those of a corporate regulator), although information gathered in this way which is already in the possession of the Commissioner may be exchanged.

[New Article 25, subparagraphs 3(a) and (b) of the Agreement]

1.177 Also, in no case is the country receiving the request obliged to supply information under Article 25 that would:

- disclose any trade, business, industrial, commercial or professional secret or trade process; or
- be contrary to public policy.

[New Article 25, subparagraph 3(c) of the Agreement]

Information held by banks, other financial institutions, nominees etc

1.178 Paragraph 5 ensures that paragraph 3 of this new Article 25 cannot be used to prevent the supply of information solely because the information is held by banks, other financial institutions, nominees etc. The inclusion of this paragraph should not be interpreted as suggesting the corresponding Article in the existing Agreement did not cover the exchange of such information. Inclusion of paragraph 5 merely clarifies Australia's existing practice, and reflects the 2005 changes to Article 26 (*Exchange of Information*) of the OECD Model. ***[New Article 25, paragraph 5 of the Agreement]***

Information that exists prior to the entry into force of the Protocol

1.179 This Article will apply to the exchange of information after the date of entry into force, including where the relevant information existed prior to that date.

Article 11 of the Protocol

Inserts a new Article 25A (Assistance in the Collection of Taxes) into the Agreement

1.180 The Protocol inserts new rules into the Agreement to provide for assistance in the collection of taxes. Australia and South Africa 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 (*Personal Scope*) of the Agreement. Assistance must therefore

be provided as regards a revenue claim owed to either country by any person, whether or not a resident of Australia or South Africa. The form of the assistance is set out in paragraphs 3 and 4 of this Article. ***[New Article 25A, paragraph 1 of the Agreement]***

1.181 The term ***revenue claim*** is defined for the purposes of this Article to mean an amount owed in respect of taxes referred to in paragraph 4 of Article 2 (*Taxes Covered*) of the Agreement. A revenue claim may cover any South African tax, or any Australian federal tax administered by the respective Commissioner, but only insofar as the imposition of such taxes is not contrary to the Agreement or any other instrument in force between Australia and South Africa. It also applies to interest, administrative penalties and costs of collection or conservancy related to such amount. ***[New Article 25A, paragraph 2 of the Agreement]***

Enforceable revenue claims

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

1.183 The way in which the revenue claim of the requesting country is to be collected by the requested country is stipulated. Other than in relation to time limits and priority (see paragraphs 1.187 to 1.190), the requested country is required to collect the revenue claim 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. ***[New Article 25A, paragraph 3 of the Agreement]***

1.184 Where a request from South Africa concerns a tax that does not exist in Australia, Australia will follow the procedure applicable to a claim for a similar Australian tax or any other appropriate procedure if no similar tax exists.

Measures of conservancy

1.185 Australia or South Africa 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. 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.

1.186 If requested to do so by South Africa, 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 may apply for a *Mareva* injunction, which would prevent the taxpayer and the taxpayer's associates from dealing with certain assets. ***[New Article 25A, paragraph 4 of the Agreement]***

Time limits

1.187 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. ***[New Article 25A, paragraph 5 of the Agreement]***

1.188 This paragraph follows the OECD provision but has no practical effect in Australia as there is currently no time limit imposed on the collection of a revenue claim.

Priority of claims

1.189 Any rules of Australia and South Africa 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.

1.190 The words 'by reason of its nature as such' in paragraph 5 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 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. ***[New Article 25A, paragraph 5 of the Agreement]***

Restriction on judicial and administrative proceedings

1.191 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 South African revenue claim. ***[New Article 25A, paragraph 6 of the Agreement]***

Change in circumstances

1.192 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. ***[New Article 25A, paragraph 7 of the Agreement]***

1.193 An example of such a situation would be where a request for assistance in collection has been made by South Africa, but the revenue claim ceases to be enforceable in South Africa prior to its collection by Australia.

1.194 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. ***[New Article 25A, paragraph 7 of the Agreement]***

Limitations

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

1.196 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. ***[New Article 25A, subparagraph 8(a) of the Agreement]***

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

1.198 The second limitation provides that the 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 country itself. ***[New Article 25A, subparagraph 8(b) of the Agreement]***

1.199 The third limitation provides that neither country is 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. ***[New Article 25A, subparagraph 8(c) of the Agreement]***

1.200 Either 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. ***[New Article 25A, subparagraph 8(d) of the Agreement]***

1.201 The final limitation allows either 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. ***[New Article 25A, subparagraph 8(e) of the Agreement]***

Article 12 of the Protocol

Removes most favoured nation obligations in the existing Protocol to the Agreement

1.202 Article 12 of the Protocol removes paragraph 1 of the existing Protocol to the Agreement, which imposes MFN obligations on Australia with respect to the inclusion of non-discrimination rules. This reflects the fact that Australia's MFN obligations have been met by the inclusion of a *Non-Discrimination* Article (Article 23A) in the Agreement by Article 9 of this Protocol. ***[Article 12 of the Protocol]***

Article 13 of the Protocol

Date of entry into force of the Protocol

1.203 Article 13 of the Protocol provides for the entry into force of the Protocol. The Protocol will enter into force on the last date on which diplomatic notes are exchanged notifying that the domestic processes to give the Protocol the force of law in the respective countries has been completed. In Australia, enactment of the legislation giving the force of law in Australia to the Protocol along with tabling of the Protocol in Parliament are prerequisites to the exchange of diplomatic notes. ***[Article 13 of the Protocol]***

Date of application for Australian taxes

Withholding taxes

1.204 Once it enters into force, the Protocol will 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 the first day of the second month following the date on which the Protocol enters into force. ***[Article 13, sub-subparagraph 2(a)(i) of the Protocol]***

Other Australian taxes

1.205 This Protocol will first apply to other Australian taxes on income, profits or gains of the Australian year of income beginning on or after 1 July in the calendar year next following the date on which the Protocol enters into force.

1.206 Where a taxpayer has adopted an accounting period ending on a date other than 30 June, the accounting period that has been substituted for the year of income beginning on 1 July in the calendar year next following the date on which the Protocol enters into force will be the relevant year of income for the purposes of the application of such Australian tax. ***[Article 13, sub-subparagraph 2(a)(ii) of the Protocol]***

Date of application in South Africa

Withholding taxes

1.207 In South Africa, the Protocol will apply to income that is taxed by withholding where it is derived on or after the day after the date in which the Protocol enters into force. ***[Article 13, sub-subparagraph 2(b)(i) of the Protocol]***

Other South African taxes

1.208 The Protocol will first apply to other South African taxes applying to income for years of assessment beginning on or after 1 January next following the year the Protocol enters into force. ***[Article 13, sub-subparagraph 2(b)(ii) of the Protocol]***

Exchange of Information application date

1.209 The new Article 25 (*Exchange of Information*) will first apply from the date of entry into force of the Protocol. It applies to requests for exchange of information in respect of taxes of every kind and description imposed under the federal tax laws administered by the Commissioner, received on or after that date. ***[Article 13, subparagraph 2(c) of the Protocol]***

1.210 This means that the information to be exchanged may relate to the income tax affairs of a taxpayer that predates the entry into force of the Protocol.

Assistance in collection of taxes application date

1.211 Article 25A (*Assistance in the Collection of Taxes*) will first have effect from the date agreed in an Exchange of Notes between Australia and South Africa. ***[Article 13, subparagraph 2(d) of the Protocol]***