

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

- - EXCERPTS - -

Australia and the Federal Republic of Germany,

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

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

Have agreed as follows:

ARTICLE 1

Persons Covered

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

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

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ARTICLE 4

Resident

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3 Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the State in which its place of effective management is situated. If the

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

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ARTICLE 5

Permanent Establishment

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

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

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

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

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

- (a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or

- (b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

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

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

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

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

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

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

ARTICLE 7

Business Profits

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

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

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ARTICLE 9

Associated Enterprises

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

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

ARTICLE 10

Dividends

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2 However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other

Contracting State, the tax so charged shall not exceed:

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

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

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

- (a) has its principal class of shares listed on a recognised stock exchange specified in sub-subparagraph 1(m)(i) or (ii) of Article 3 and regularly traded on one or more recognised stock exchanges;
- (b) is owned directly or indirectly by one or more companies (provided that where the beneficial owner company is so owned indirectly, each intermediate company is a resident of a Contracting State or a company referred to in sub-subparagraph (ii)):
 - (i) whose principal class of shares is listed on a recognised stock exchange specified in sub-subparagraph 1(m)(i) or (ii) of Article 3 and regularly traded on one or more recognised stock exchanges; or
 - (ii) each of which, if it directly held the shares in respect of which the dividends are paid, would be entitled to equivalent benefits in respect of such dividends under a tax treaty between the State of which that company is a resident and the Contracting State of which the company paying the dividends is a resident; or
- (c) does not meet the requirements of subparagraphs (a) or (b) of this paragraph but the competent authority of the first-mentioned Contracting State determines that the conditions of paragraph 2 of Article 23 are not met. The competent authority of the first-mentioned Contracting State shall consult the competent authority of the other Contracting State before refusing to grant benefits of this Agreement under this subparagraph.

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ARTICLE 13

Alienation of Property

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4 Income, profits or gains derived by a resident of a Contracting State from the

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

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ARTICLE 23

Limitation of Benefits

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

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

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

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ARTICLE 25

Mutual Agreement Procedure

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

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

3 The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination

of double taxation in cases not provided for in the Agreement.

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

5 Where,

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

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

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PROTOCOL

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

(1) For the purposes of paragraph 3 of Article 23 and paragraph 5 of Article 25, provisions of the laws of a Contracting State which are designed to prevent evasion or avoidance of taxes include:

- (a) measures designed to prevent improper use of the provisions of tax agreements;
- (b) measures designed to address thin capitalisation, dividend stripping and transfer pricing;
- (c) in the case of Australia, controlled foreign company, transferor trusts and foreign investment fund rules; and
- (d) measures designed to ensure that taxes can be effectively collected and recovered, including conservancy measures.

(2) If the application of the foregoing provisions results in double taxation, the competent authorities of the Contracting States shall consult each other pursuant to Article 25 to find an appropriate solution.