THE NEED FOR A NEW AUSTRALIA-SINGAPORE TAXATION TREATY

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The 1969 Australia-Singapore Taxation Treaty was the 6th bi-lateral taxation treaty entered into by Australia[1] and the 5th bi-lateral taxation treaty entered into by Singapore after Singapore became an independent nation.[2] Amendments or substitutions affecting 15 articles in the treaty were made by a protocol in 1989. A further protocol in 2009 replaced Article 19 of the 1969 treaty. Notwithstanding the two protocols the treaty still retains several features that were characteristic of bi-lateral tax treaties in the 1960s (particularly Australian treaties of the 1960s). Significant changes in the domestic law and in the treaty practice of both countries have taken place since the 1969 treaty entered into force. There have also been significant changes in model taxation treaties culminating in the changes to the OECD Model following on from the Base Erosion and Profit Shifting (BEPS) project. This paper is structured under the following headings:

1. Relevant aspects of Australian and Singapore Tax Law in 1969; 2. Relevant aspects of current Australian and Singapore Tax Law; 3. Trade and investment between Australia and Singapore in 1969; 4. Current trade and investment between Australia and Singapore; 5. Differences From: The 2014 OECD Model Convention; the 2017 OECD Model Convention; Recent Australian Tax Treaties; and A Recent Singaporean Tax; 6. Australia's adoption of the Multilateral Instrument; 7. Singapore's adoption of the Multilateral Instrument; 8. Assessment of the effects of the Multilateral Instrument on the 1969 Treaty; 9. Conclusions and Recommendations.

Emphasis will be placed on articles most relevant to bi-lateral trade and investment between Australia and Singapore.

1. Relevant aspects of Australian and Singapore Tax Law in 1969

It would not be possible within the space available to trace every significant change in tax law in Singapore and Australia since the 1969 Treaty was concluded. Contrasting relevant aspects of Singapore and Australian tax law in 1969 with Singapore and Australian tax law today will demonstrate more clearly the need for a new treaty between the countries.

a. The Singapore Tax Regime In 1969

The corporate tax rate in Singapore was 40%. The Singapore rate of tax on dividends received by non-residents was 40%. Singapore operated a dividend imputation system with the dividend being grossed up for corporate tax paid and with shareholders being entitled to a credit for the corporate tax paid.

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[1] The earlier Australian Tax Treaties were: United Kingdom 1946; United States 1953; Canada 1957; New Zealand 1960; and United Kingdom 1967.

[2] The earlier Singaporean Tax Treaties were: Norway 1966; Sweden 1968; United Kingdom 1966; and Malaysia 1968. Prior to independence Singapore had a 1948 Tax Treaty with the United Kingdom and a 1961 Tax Treaty with Japan. Singapore also through accession was a party to tax treaties the United Kingdom had with Norway, Sweden and Denmark.

This, in effect, meant that dividends paid by a Singapore resident company to a non-resident shareholder were exempt from further Singapore tax.[3] The deduction in Singapore of expenses (other than interest paid to a foreign resident) relevant to deriving dividend income would mean that credit for Singapore tax paid at the corporate level resulted in a refund of Singaporean corporate tax being paid to the non-resident.[4] Capital gains were not taxable but dividends funded from capital profits were taxable to shareholders. Liquidator's distributions and returns of capital, irrespective of the source from which they were funded, were regarded as non-taxable capital receipts to the shareholder and bonus issues involving a transfer from the company's profit and loss account to its share capital account were not regarded as income to the shareholder.[5] No undistributed profits tax as such was levied but under s30 of the Singapore *Income Tax Act* income could be regarded as being distributed in certain circumstances.[6]

Under s2 of the Singapore *Income Tax Act* a company was resident in Singapore where the control and management of its business was exercised in Singapore. Magney noted in 1975 that, in practice, Singapore tax authorities looked to the place where directors' meetings were actually held in determining where a company was resident.[7]

Section 10(1) of the Singapore *Income Tax Act* was regarded as taxing on a remittance basis with foreign source income only being taxable when it was remitted to Singapore.[8] Non-residents were only taxable on income which had been accrued in or derived from Singapore.[9] Statutory rules for determining the geographic source of income were contained in s12 of the Singapore *Income Tax Act*.[10]

In 1969 Singapore relied on facts and circumstances tests to determine the source of interest. Relying on case law from other Commonwealth countries Singapore accepted that where the loan contract was entered into and funds were advanced outside Singapore the interest on the loan did not have a Singapore source even where the funds were subsequently brought into Singapore and the interest was paid from profits derived in Singapore.[11] Although a 40% withholding tax applied to interest paid

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[3] This was the combined effect of ss29, 44 and 46 of the Singapore *Income Tax Act*. The operation of the provisions is discussed in T W Magney, 'Australia-Singapore Taxation Aspects of Carrying On Business In Singapore: Part III' [1975] *Australian Tax Review* 133 at 140 to 145.

[4] See the discussion in T W Magney, *supra* note 3 at 145-146.

[5] T W Magney, *supra* note 3 at 139 – 140.

[6] Section 30 of the Singapore *Income Tax Act* at the time is discussed in T W Magney, *supra* note 1 at 146-147.

[7] T W Magney, 'Australia-Singapore Taxation Aspects Of Carrying On Business In Singapore: Part II' [1975] *Australian Tax Review* 67 at 82.

[8] The interpretation of s10(1) of the Singapore *Income Tax Act* was discussed by T W Magney, *supra* note 3 at 134.

[9] T W Magney, *supra* note 3 at 133ff.

[10] The rules at the time are discussed in Magney, *supra* note 3 at 136.

[11] T W Magney, 'Australia-Singapore Taxation Aspects Of Carrying On Business In Singapore: Part IV [1975] *Australian Tax Review* 187 at 188.

to a non-resident that was otherwise chargeable to Singapore tax[12] this obligation did not, at the time, apply where the interest did not have Singapore source under the facts and circumstances test.[13] Interest paid by a Singapore resident to a non-resident was deductible in determining the profits of the Singapore resident that were subject to Singapore income tax.[14] Interest paid by a non-resident to another non-resident in deriving Singapore sourced income was only deductible if it had been subject to Singapore withholding tax.[15]

In 1969 Singapore also relied on facts and circumstances tests set out in case law from other Commonwealth countries to determine the source of royalty payments. In the case of royalties in the ordinary meaning the place of registration of the patent or copyright determined the source of the royalty.[16] In the case of supplies of 'know how' source was determined by the place where the contract was entered into and the information provided.[17] In the case of a supply of services there was support in some authorities for the place of contract being the determining factor while other authorities gave prominence to the place of performance.[18] Where a 'royalty' payment to a non-resident had a source in Singapore the payment was taxed at the rate of 40%. There was no formal withholding tax imposed on the Singapore payer but tax could be enforced by regarding the Singapore payer as an agent of the foreign payee.[19]

Amounts of foreign source income remitted to Singapore were subject to Singapore income tax but some relief from double taxation was allowed where foreign tax had been imposed by another Commonwealth country. The relief provided was a credit equal to the lesser of the rate imposed by the other Commonwealth country and half the relevant rate of Singapore tax.[20]

b. The Australian Income Tax Regime In 1969

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[12] *Singapore Income Tax Act* s45 as it stood in 1969.

[13] T W Magney, *supra* note 11 at 188. Magney notes that the problem was resolved in Singaporean domestic law by amendments in 1973.

[14] *Singapore Income Tax Act* s14(a) discussed in Magney, *supra* note 11 at 192-193.

[15] This was the effect of the combined operation of ss15(i) and 45 of the *Singapore Income Tax Act* as it then stood. The point is discussed in more detail in Magney, *supra* note 11 at 193-194.

[16] T W Magney, *supra* note 11 at 196.

[17] T W Magney, *supra* note 11 at 197.

[18] T W Magney, *supra* note 11 at 197.

[19] T W Magney, *supra* note 11 at 196.

[20] The relief was provided under s48 of the *Singapore Income Tax Act*. The provisions are discussed in Magney, *supra* note 11 at 205-206. The relief provided appears to have been based on the system of 'Dominion Income Tax Relief' used by the United Kingdom and some Commonwealth countries between 1920 and 1945. For a discussion of Dominion Income Tax Relief see C John Taylor, Taylor C J, 'Send a strong man to England - capacity to put up a fight more important than intimate knowledge of income tax acts and practice': Australia and the development of the dominion income tax relief system of 1920', (2014) 12 *e Journal of Tax Research* pp 74-86.

Subject to significant exceptions, discussed below, Australia taxed residents on their worldwide income. A resident of Australia was defined as:

(a) a person, other than a company, who resides in Australia and includes a person:
    (i) whose domicile is in Australia unless the Commissioner is satisfied that his permanent place of abode is outside Australia;
    (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia;
    (iii) who is an eligible employee for purposes of the *Superannuation Act* 1976 or is the spouse or a child under 16 years of age of such a person; and;

(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia.[21]

In the case of corporate residence Australian court decisions had followed and applied United Kingdom authorities on the meaning of the expression 'central management and control' finding that this was a question of fact to be determined and did not depend on purely formal considerations such as the location of board meetings.[22] Australian court decisions had been interpreted as holding that if the business of a company carried on in Australia consisted of or included its central management and control it was carrying on business in Australia and hence was an Australian resident.[23]

Although Australia nominally taxed Australian residents on their worldwide income[24] foreign source income (other than dividends) which was not exempt from income tax or had been subject to royalty payment or export duty in the country where it was derived was exempt income to an Australian resident.[25] Resident companies received a rebate of tax, at the average rate applying to that company, on domestic and foreign source dividends that it received.[26] Australian residents received a credit for foreign tax, for which they were personally liable, on dividends received from a foreign resident company to the extent that they were funded from foreign source income.[27] In practice the credit did not operate where dividends were received by a resident company as the intercorporate rebate on dividends meant that no Australian tax against which the credit could be applied was payable.

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21 *ITAA* 1936 s6(1) definition of 'resident' or 'resident of Australia'.

22 *Koitaki Para Rubber Estates Ltd v FCT* (1940) CLR 241; *Malayan Shipping Co Ltd v FCT* (1946) 71 CLR 156; *North Australian Pastoral Co Ltd v FCT* (1946) 71 CLR 623.

23 This view was taken in the headnote to *Malayan Shipping Co Ltd v FCT* (1946) 71 CLR 156 and was quoted in J A L Gunn, O E Berger and M Maas, *Gunn's Commonwealth Income Tax, Law And Practice,* 7th ed., Butterworths, Sydney, 1963 at [156].

24 *ITAA* 1936 former s25(1)(a).

25 *ITAA* 1936 former s23q

26 *ITAA* 1936 former s46.

27 *ITAA* 1936 former s45.

Australian High Court decisions had considered the interaction of systems of corporate-shareholder taxation similar to the Singapore system with the credit provision in *Income Tax Assessment* Act 1936 s45 in *Hughes v FCT* (1958) 98 CLR 345 (concerning the Malayan ordinance), *FCT v Brohier (No1)* (1959) 103 CLR 632 and *FCT v Brohier (*No2) (1965-66) 115 CLR 235 (concerning the Ceylon ordinance). The effect of the High Court decisions was that the amount actually received by the shareholder (indirectly through a trust in the *Brohier* cases) was the amount included in the shareholder's assessable income under *ITAA* 1936 s44(1) and that a credit was not available under s45 for the tax deducted by the company as the tax deducted was paid in respect of the paying company's own tax liability and the shareholder had not paid the tax either directly or by deduction.

Australia in 1969 operated a classical corporate-shareholder tax system. The corporate rate that applied to a resident non-private companies was 40% on the first $AUD10,000 and 45% thereafter. The corporate rate that applied to non-resident non-private companies was 30% on the first $AUD10,000 of dividend income, 40% on the first $AUD10,000 of other income and 45% on dividend income in excess of $AUD10,000 and on other income in excess of $AUD10,000. Undistributed profits tax at the rate of 50% applied to private companies which did not make a sufficient distribution.

In the absence of a bi-lateral tax treaty Australia asserted the right to tax Australian source business profits of foreign residents irrespective of whether or not the foreign resident had a permanent establishment or fixed base in Australia.[28] Non-Australian source income of a foreign resident was exempt from Australian tax.[29]

Australia largely determined the geographic source of income using a 'facts and circumstances' approach relying on Australian and Commonwealth case law with few statutory source rules.[30]

Withholding tax at the rate of 30% was levied on dividends paid to non-residents.[31] Interest withholding tax at the rate of 10% was levied on interest paid to non-residents.[32] Royalties paid to non-residents were still taxed on a net basis. Where the royalties were derived from an Australian source the payer was obliged to deduct tax on a net basis before making payment to the non-resident.[33]

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28 *ITAA* 1936 former s25(1)(b).

29 *ITAA* 1936 former s23(r).

30 *ITAA* 1936 former s25(2) deemed interest on money secured by any property in Australia to have an Australian source.

31 Dividend withholding tax had been imposed under *ITAA* 1936 s128B(1) on a gross basis from 1 January 1968. Prior to that date tax on dividends funded from Australian source profits paid to non-residents had been taxed on a net assessment basis with obligations being imposed on the payer to deduct tax on a net basis when paying the dividend.

32 Interest withholding tax had been imposed under *ITAA* 1936 s128B(2) on a gross basis from 1 January 1968. Prior to that date tax on interest derived from Australian sources had been taxed on a net assessment basis with obligations being imposed on the payer to deduct tax on a net basis when paying the interest.

33 *ITAA* 1936 s255. In addition former s256 required the payer of a royalty to a non-resident to furnish the Commissioner with a statement of the amount of the royalty and to ascertain from the

Australia did not have any Thin Capitalisation rules, did not have any statutory debt and equity rules, did not have any controlled foreign company (CFC) rules and did not have any foreign investment fund (FIF) rules. Australia did have a general anti-avoidance rule[34] but successive court decisions were widely regarded as having significantly reduced the effectiveness of that provision.[35] Australia did not have any formal transfer pricing rules but former s136 of *Income Tax Assessment Act* 1936 gave the Commissioner power to determine the taxable income of a business controlled directly or indirectly by non-residents where it appeared to the Commissioner that the business produced either no taxable income or less taxable income than might be expected from that business.

Prior to entering into the 1969 Australia-Singapore Tax Treaty, Australia had only entered into comprehensive bi-lateral income tax treaties with: the United Kingdom 1946 and 1967; the United States 1953; Canada 1957; and New Zealand 1960. The first Australian bi-lateral tax treaty with Japan was signed in 1969 shortly before the 1969 Australia – Singapore Tax Treaty was signed. Although the 1967 Australia – United Kingdom Tax Treaty was influenced in some respects by the 1963 Draft OECD Model Tax Treaty, it and earlier Australian tax treaties contained several differences from the 1963 Draft OECD Model. All Australian bi-lateral tax treaties in operation at the time the 1969 Australia – Singapore Tax Treaty was signed limited Australian tax on dividends paid to a resident of the treaty partner country to a rate of 15% of the gross amount of the dividends. The rate of Australian tax on interest paid to a resident of a treaty partner country was limited to 10% of the gross amount of the interest while the rate of Australian tax on royalties was limited to 10% of the gross amount of the royalties.

2. Relevant Aspects of current Australian and Singaporean Tax Law

a. The Current Australian Tax Regime

The Australian income tax base includes income under ordinary concepts (*ITAA* 1997 s6-5), statutory income (*ITAA* 1997 s6-10) and net capital gains (*ITAA* 1997 s102-5). Subject to numerous exceptions and reliefs, Australian capital gains tax applies where a CGT event occurs in relation to a CGT asset acquired after 19th September 1985.

The current Australian corporate rate is 27.5% for companies with a turnover for the year of income of less than $AUD 50 million with 80% or less of their assessable income being 'base rate passive income'. For all other companies the current corporate rate is 30%.[36]

Commissioner the amount, if any, to be retained in respect of tax due, or which might become due, by the non-resident.

[34] *ITAA* 1936 former s260.

[35] The interpretation by Australian courts of *ITAA* 1936 former s260 and its progenitors is discussed in J Passant, 'Tax Avoidance in Australia: Results and Prospects' (1994) 22 *Federal Law Review* 492.

[36] Not-for-profit companies are not taxed on the first $416 of taxable income and are thereafter taxed at the rate of 55% until their average rate of tax equals the tax rate of 27.5% or 30% that applies to companies with their level of turnover and percentage of passive income.

The domestic law definition of 'resident of Australia' has not been changed in the statute since the 1969 Treaty but the statutory provisions have been interpreted in several cases and in ATO Rulings. Most recently the Australian High Court has reaffirmed that, in the case of corporate residence, whether a company is an Australian resident on the ground that its central management and control is in Australia is a question of fact that is not conclusively determined by formal matters such as where board meetings are held.[37]

<u>Australian Taxation of Residents</u>

Australia nominally taxes residents on their worldwide income including net capital gains which are included in assessable income (*ITAA* 1997 s6-5 and s6-10) but this rule is subject to many exceptions (discussed below).

Foreign source non-portfolio dividends funded from income which has not previously been attributed to Australian controllers under Australia's Controlled Foreign Company (CFC) rules in *ITAA* 1936 Part X is non-assessable non-exempt (NANE) income to an Australian resident company.[38] Profits of foreign permanent establishments that pass an active income test are non-assessable non-exempt (NANE) income to Australian resident companies.[39] Foreign source income received by Australian residents that does not fall within these or other exemptions receives a foreign income tax offset (foreign tax credit) for any foreign income tax (including withholding tax) paid.[40] Except where the income of a foreign company has been attributed to its Australian controllers under Australia's CFC rules, shareholders only receive a foreign income tax offset for foreign withholding tax on dividends not for underlying foreign corporate tax.[41] Foreign income tax is not considered to be paid to the extent that the person claiming a foreign income tax offset is entitled to either: (a) a refund of the

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37 *Bywater Investments Limited & Ors v FCT; Hua Wang Bank Berhad v FCT* [2016] HCA 45. In response to this decision the ATO issued *Draft Taxation Ruling TR 2017/D2 - Foreign Incorporated Companies: Central Management and Control test of residency.*

38 *ITAA* 1997 Sub-div 768-A. Following the introduction of Australia's hybrid mismatch provisions in 2018, subject to an exception for distributions by foreign collective investment vehicles, s 768-7 applies where all or part of a 'foreign equity distribution' gives rise to a 'foreign income tax deduction'. When s768-7(1) applies the consequence will be that the distribution will not be NANE, even where foreign withholding tax has been paid on the distribution. In that circumstance the recipient Australian corporate tax entity would be entitled to foreign income tax offset for the foreign withholding tax. In these circumstances net Australian corporate tax will be payable where the foreign withholding tax liability was lower than the Australian corporate tax on the foreign non-portfolio dividend.

39 *ITAA* 1936 s23AH. This is subject to Australia's hybrid mismatch provisions introduced in 2018. Under *ITAA* 1936 s23AH(4A) foreign income derived by the company where the foreign income is 'branch hybrid mismatch income' not be NANE to the Australian company. The consequence will be that the branch profits will be included in the assessable income of the Australian company which will receive a foreign income tax offset for foreign tax paid on those profits.

40 Australia's foreign income tax offset rules are contained in *ITAA* 97 Division 770.

41 *ITAA* 1997 s770-10 provides a credit for foreign tax paid. *ITAA* 1997 s770-130 has the effect of treating withholding tax deducted at source as having been paid by the recipient of the dividend. Where Australia's CFC rules attribute foreign source income to Australian controllers s770-135 allows a foreign income tax offset for underlying foreign corporate tax paid. No other provision allows a foreign income tax offset for underlying corporate tax.

foreign tax; or (b) any other benefit determined by reference to the amount of the foreign income tax (other than a reduction in the amount of the foreign income tax).[42]

In general resident taxpayers are taxed on their worldwide post 19th September 1985 capital gains on CGT assets acquired after that date. Resident individual taxpayers and resident trust estates receive a 50% discount on capital gains on CGT assets acquired on or after 21 September 1999. Complying superannuation funds receive a 33 1/3 % discount on capital gains on CGT assets acquired on or after 21 September 1999.[43] Where the CGT asset was acquired before 21 September 1999 resident individual taxpayers and resident trust estates have the option of choosing a 50% discount on capital gains or choosing indexation of cost to inflation frozen at 30 September 1999 while complying superannuation funds can choose a 33 1/3 % discount. Companies obtain indexation of cost in relation to pre 21 September 1999 assets frozen as at 30 September 1999 but do not receive a discount in relation to capital gains or losses on assets acquired on or after 21 September 1999.

CGT event I1 occurs when an individual or company ceases to be an Australian resident.[44] CGT event I1 gives rise to a deemed capital gain where the market value of the taxpayers post 19th September 1985 assets, other than 'taxable Australian property' (see discussion below), exceeds the cost base of those assets and a deemed capital loss in the reverse circumstances. Individual taxpayers can elect to disregard the deemed capital gain or deemed capital loss on the condition that all the taxpayers assets are thereafter treated as 'taxable Australian property' until the taxpayer disposes of them or the taxpayer again becomes an Australian resident.[45]

Although Australia taxes residents on their worldwide capital gains important participation exemptions apply for certain capital gains on non-portfolio shareholdings and on capital gains made through a foreign permanent establishment. *ITAA* 1997 Subdivision 768-G reduces the capital gain on a non-portfolio shareholding in a foreign company that an Australian company or a CFC derives. The reduction is the percentage that the value of the foreign company's active business assets represents of the total assets of the foreign company. Capital losses are reduced in the same manner.

Subject to exceptions, capital gains made by a foreign permanent establishment are non-assessable non-exempt income.[46] The exceptions are: capital gains on tainted assets (in the case of permanent establishments situated in unlisted countries for CFC purposes);[47] or capital gains on tainted assets where the gain is eligible designated concession income (in the case of permanent establishments in

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[42] *ITAA* 1997 s770-140.

[43] The effect of ordering rules which apply in calculating net capital gains, and net capital losses is that the discount also halves the value of a taxpayer's capital losses.

[44] The details of CGT event I1 are set out in *ITAA* 97 s104-50. CGT event I2 applies similar principles when a trust ceases to be an Australian resident trust.

[45] This is the effect of *ITAA* 97 s104-165.

[46] *ITAA* 1936 s23AH(3) and (4).

[47] *ITAA* 1936 s23AH(8) excludes the operation of s23AH(3) and (4) where a permanent establishment in an unlisted country fails the active income test and the gains and losses relate to tainted assets.

listed countries for CFC purposes).[48] Where the permanent establishment fails the active income test then,[49] in the case of a permanent establishment located in an unlisted country, the adjusted tainted income of the permanent establishment is included in the assessable income of the Australian company[50] with a foreign income tax offset being allowed for any foreign tax paid on that income.[51] Where the permanent establishment is situated in a listed country only adjusted tainted income that is eligible designated concession income will be included in the assessable income of the Australian company[52] with a foreign income tax offset again being allowed for any foreign tax paid on that income.

Australia's controlled foreign company (CFC) rules in *ITAA* 1936 Part X can attribute passive and certain related party sales and services income to Australian controllers. [53] Where the CFC is resident in any one of seven listed countries (the United Kingdom, the United States, Canada, New Zealand, France, Germany and Japan) only passive and related party sales and services income that has received preferential tax treatment (known as eligible designated concession income) is attributed. Where income of a foreign company has been attributed to Australian controllers they receive a foreign income tax offset for both foreign withholding tax and for foreign underlying corporate tax.[54] Where the rate of foreign tax on the attributed income is below the Australian rate the combined effect of the foreign income tax offset rules and the Australian dividend imputation system is that net Australian tax will be payable. Where the controller is an Australian resident company the payment of Australian tax will generate Australian franking credits.

Currently Australia operates a dividend imputation system for Australian resident companies and for New Zealand companies that elect to join the Australian imputation system. Payments of Australian corporate tax generate franking credits for Australian resident companies. Australian resident companies may attach franking credits to dividends that they pay. Australian resident shareholders gross up dividends received by the amount of the attached franking credit[55] and are entitled to a tax offset equal to the franking credit attached to the dividend.[56] Resident individuals and superannuation

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48 *ITAA* 1936 s23AH(6) excludes the operation of s23AH(3) and (4) where a permanent establishment in a listed country fails the active income test and the gains and losses are from tainted assets where any gain arising would be eligible designated concession income. The listed countries are the countries listed in the *Income Tax Regulations* 1936 (Cth) and are currently: The United Kingdom; The United States; Canada; New Zealand; Germany; France and Japan.

49 The active income test is set out in *ITAA* 1936 s23AH(12). In broad terms a permanent establishment will fail the active income test if the ratio of the 'gross tainted turnover' (broadly passive income and certain related party sales and services income) to the 'gross turnover' of the permanent establishment is equal to or greater than 0.05.

50 *ITAA* 1936 s23AH(7) excludes the operation of s23AH(2) in the circumstances discussed in the text.

51 The foreign income tax offset would be available under the rules set out in *ITAA* 1997 Division 770.

52 *ITAA* 1936 s23AH(5) excludes the operation of s23AH(2) in the circumstances discussed in the text.

53 Australia's CFC rules are set out in *ITAA* 1936 Part X.

54 *ITAA* 1997 s770-135.

55 *ITAA* 1997 s207-20(1).

56 *ITAA* 1997 s207-20(2).

funds are entitled to a full refund of excess franking credits. Resident companies convert an excess franking credit into a tax loss which may be carried forward.

Australian Thin Capitalisation rules apply to inbound and outbound investment and are triggered where there is a required level of control of an Australian entity by a foreign entity or where there is a required level of control by an Australian entity of a foreign entity. Australia's outbound Thin Capitalisation rules only apply to limit interest deductions that would otherwise be obtained for Australian tax purposes in relation to offshore investments by Australian companies. Subject to the limits in the outbound Thin Capitalisation rules, *ITAA* 97 s25-90 allows a deduction for Interest incurred in relation to gaining or producing foreign non-portfolio dividends that are non-assessable non-exempt income to an Australian resident company under *ITAA* 1997 s768-5.

Australian Taxation of Foreign Residents

Australia taxes foreign residents on their Australian source income (*ITAA* 1997 s6-5 and s6-10) and on capital gains (CGT) on 'taxable Australian property'. Taxable Australian property is: real property situated in Australia (including leasehold interests) ; indirect Australian real property interests (interests greater than 10% in an entity where more than 50% of the market value of the entity's assets is attributable to Australian real property) ; assets used in carrying on business in Australia through permanent establishment; options and rights to acquire any of the preceding items; mining, quarrying or prospecting rights where the minerals, petroleum or quarry materials are situated in Australia; and assets covered by CGT event I1 (which, as discussed above, applies where a resident individual, on becoming a foreign resident, choses to defer (through *ITAA* 1997 104-165) capital gains tax liability that would otherwise arise by electing to continue to be taxed the taxpayer's worldwide capital gains). As from 8th May 2012 foreign residents no longer receive a CGT discount. As from 1 July 2016, purchasers from foreign vendors of taxable Australian property are required to withhold 12.5% from the purchase price as a non-final withholding tax.[57] A Bill was introduced into Federal Parliament in 2018 which will mean that, subject to certain exceptions, foreign residents are not entitled to a CGT main residence exemption after 9 May 2017. At the time of writing the Bill had not passed either House of Federal Parliament.

The franked portion of a dividend paid by an Australian resident company to a foreign resident shareholder is except from Australian dividend withholding tax under *ITAA* 1936 s128B(3)(ga) and is exempt from Australian tax on an assessment basis under *ITAA* 1936 s128D. Dividends are also exempt from withholding tax where a foreign resident carries on business (other than as trustee) at or through a permanent establishment in Australia.[58] In these circumstances dividends are taxed on an assessment basis.[59]

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[57] The provisions are contained in Subdivision 14-D of Schedule 1 to the Taxation Administration Act 1953. The foreign vendor is required to lodge a return reporting the CGT event and receives a credit for the withholding tax paid by the purchaser. The regime does not apply to assets with a market value of less than $AUD750,000 immediately after the CGT event and does not apply to transactions on a listed stock exchange.

[58] *ITAA* 1936 s128B(3E).

[59] Dividends within the s128B(3E) exemption are not included in the list of items that are exempt from taxation on an assessment basis under *ITAA* 1936 s128D.

The unfranked portion of a dividend paid to a foreign resident is subject to withholding tax at the rate of 30% in the absence of a bi-lateral tax treaty.[60] In Australian tax treaties the rate of withholding tax on portfolio dividends is usually reduced to 15% while the rate on non-portfolio dividends in post 2001 Australian tax treaties is reduced to 5% with a further reduction of zero in the case of dividends paid to an 80% or greater corporate shareholder in some treaties.

So much of the unfranked portion of a dividend paid to a foreign shareholder by an Australian company as is declared to be 'conduit foreign source income' is exempt from dividend withholding tax and is not taxed on an assessment basis. Conduit foreign source income typically will include income that : (a) is non-assessable non-exempt income under either *ITAA* 97 Sub-division 768-A or *ITAA* 36 s23AH; (b) has effectively been freed from Australian tax by the foreign income tax offset system; (c) represents capital gains on non-portfolio shares in a foreign company or on assets of a foreign permanent establishment to the extent that they have not been subject to Australian tax; (d) conduit foreign source income that is distributed to the company by another Australian company.

Subject to a 1.5 to 1 Thin Capitalisation rule (discussed below) Australia currently allows interest to be deducted in determining taxable income. With some exceptions (for example, interest paid in respect of widely held debentures) Australia imposes a 10% withholding tax on interest paid to foreign residents and typically does not reduce the rate of interest withholding tax in its bilateral tax treaties.

Under Australia's inbound Thin Capitalisation rules a safe harbour debt to assets ratio of 1.5 to 1 currently applies for general inward investing entities. Higher ratios apply for financial entities and banks.[61] Alternatively maximum allowable debt for Thin Capitalisation purposes can be determined using an arm's length debt test or a worldwide gearing test.[62] Where the maximum allowable debt is exceeded then the effect of the Thin Capitalisation rules is that interest deductions are reduced by the same proportion as the entity's excess debt bears to its total debt.[63]

<u>Australian Transfer Pricing Rules</u>

The current Australian transfer pricing rules are contained in ITAA97 Subdivs 815-B (transfer pricing between separate entities) and 815-C (transfer pricing between a permanent establishment and the rest of a single entity). These rules apply from the year commencing 1 July 2013 in both treaty and non-treaty situations. Under ITAA97 s 815-115(1), if an entity obtains a 'transfer pricing benefit' from conditions that operate between the entity and another entity in connection with their commercial or financial relations, then, instead of those conditions operating, 'arm's length conditions' are taken to operate. An entity is regarded as obtaining a 'transfer pricing benefit' from so operating where: (a)

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60 *ITAA* 36 s128B(1), s128B(4) and *Income Tax (Dividends, Interest and Royalties Withholding Tax*) Act 1974 Cth.

61 Currently a ratio of 15: 1 applies for financial entities.

62 Currently interest up to 100% of the entity's worldwide gearing may be deducted.

63 More technically the reduction is calculated using the following formula set out in *ITAA* 97 s 820-220: Debt deduction x Excess debt/Average debt.

the conditions differ from arm's length conditions; (b) the actual conditions satisfy the 'cross border test';[64] and (c) if arm's length conditions had operated instead of the actual conditions,[65] then either:
(i) the amount of the entity's taxable income would be greater;
(ii) the amount of the entity's loss of a particular sort for an income year would be less;
(iii) the amount of the entity's tax offsets for an income year would be less; or
(iv) the amount of the withholding tax payable in respect of interest or royalties by the entity would be greater.

In identifying arm's length conditions, s 815-125(2) requires the use of the method, or the combination of methods, that is the most appropriate and reliable having regard to all relevant factors. The subsection provides the following inclusive list of factors:

(a) the respective strengths and weaknesses of possible methods when applied to the actual conditions;
(b) the circumstances, functions performed, assets used, and risks borne by the entities;
(c) the availability of reliable information needed to apply a particular method; and
(d) the degree of comparability between the actual circumstances and the comparable circumstances including the reliability of adjustments to eliminate material differences.

The identification of arm's length conditions is required to be based on the commercial and financial relations in which the actual conditions (such as price) operate having regard to both the substance and form of those relations. Where the form of relations is inconsistent with their substance, the form is to be disregarded. Section 815-135 provides that the identification of arm's length conditions (such as price) should be done in a way which best achieves consistency with: (a) the OECD Transfer Pricing Guidelines (except those that are expressly excluded by the Regulations); and (b) a document or part of a document prescribed by the Regulations. Treasury Laws Amendment (Combatting Multinational Tax Avoidance) Act 2017 added the requirement that the identification of arm's length conditions should be done in a way that best achieves consistency with: (aa) the Aligning Transfer Pricing

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[64] A table in s 815-120(3) explains when the actual conditions satisfy the 'cross border' test. The conditions refer to both purchases and sales. The conditions deal with the situation where one of the parties is either: (a) an Australian entity; (b) a foreign entity that does not have an Australian permanent establishment; (c) an foreign permanent establishment of an Australian entity; and (d) a foreign entity which has an Australian permanent establishment. Where the transaction only involves dealings between two foreign entities (for example, where an Australian permanent establishment of a foreign entity sells to a foreign entity that does not have an Australian permanent establishment) there will only be a transfer pricing benefit if there is some connection with Australia (for example if the profit on the sale would have had an Australian source).

[65] ITAA97 s 815-125(1) provides that arm's length conditions are the conditions that might be expected to operate between independent entities dealing wholly independently with each other in comparable circumstances. s 815-125(3) requires that, in identifying comparable circumstances, all relevant factors, including the following, must be taken into account: (a)the functions performed, assets used and risks borne by the entity; (b) the characteristics of any property or services transferred; (c) the terms of any relevant contracts between the parties; (d) the economic circumstances; (e) the business strategies of the entities. Circumstances are still regarded as comparable if differences from actual circumstances either do not materially affect a condition (eg, a price) or if a reasonably accurate estimate can be made to eliminate the effect of the difference on a condition that is relevant to the method for determining arm's length conditions.

Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports, of the Organisation for 10 Economic Cooperation and Development, published on 11 5 October 2015.

Australian Anti Avoidance Rules

The current Australian general anti avoidance provision, *ITAA* 1936 Part IVA was introduced in 1981 and operates in relation to schemes entered into after 27 May 1981 wholly or partly in Australia. There is now extensive jurisprudence on Part IVA discussion of which would be beyond the scope of this report, This section of this report will be confined to outlining the circumstances in which Part IVA may be triggered and the effects of its operation.

Part IVA gives the Australian Commissioner of Taxation power to cancel a tax benefit and make compensating adjustments where the dominant purpose of a person who entered into or carried out a scheme was to obtain a tax benefit for a taxpayer. Examples of tax benefits include: not having an amount included in income; obtaining a deduction not otherwise obtainable; incurring a capital loss that would not otherwise have been incurred; obtaining a foreign income tax credit not otherwise obtainable; and not being liable to pay withholding tax which would otherwise be payable. Following unsuccessful attempts to apply Part IVA in cross border corporate re-construction cases, [66]significant amendments were made to Part IVA in 2013.[67]

Australia amended Part IVA by adding a 'Multinational Anti Avoidance Law' or (MAAL) with effect from 1 January 2016 and then further amended Part IVA by adding a 'Diverted Profits Tax' or (DPT) with effect for years commencing after 1 July 2017. Both the MAAL and the DPT only apply to 'significant global entities' (broadly entities with a global revenue of $AUD 1 billion or greater) and the trigger for both depends on finding that a principal purpose of a person who entered into or carried out a scheme was to enable a taxpayer to obtain a tax benefit or to obtain a tax benefit and reduce foreign tax.

The MAAL is primarily directed at attempts to avoid PE status and, subject to the conditions noted above, will apply where a foreign entity derives ordinary or statutory income (some or all of which is

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[66] Most notably in *RCI Pty Ltd v FCT* 2011 ATC 20-275. The scheme in question involved a series of transactions associated with the disposal of shares in a subsidiary company. The Commissioner argued that the effect of the scheme was to lower the value of the shares in the subsidiary thus significantly reducing the capital gain that would otherwise have accrued on the disposal of the shares in the subsidiary. The Full Federal Court held that Part IVA did not apply as it was not a reasonable expectation that in the absence of the scheme the taxpayer would have disposed of the shares in the foreign subsidiary in a manner which produced such a large capital gain. Rather it would be reasonable to assume that the taxpayer would either have done nothing or would have chosen another course that did not expose it to such a large capital gain.

[67] The most significant amendment was arguably the insertion of *ITAA* 1936 s177CB(4)(b) which requires that in determining for the purposes of s177CB(3) whether a postulate is a reasonable alternative any result in relation to *ITAA* 1936 or *ITAA* 1997 that would be achieved by the postulate for any person is to be disregarded. This was regarded in the Explanatory Memorandum that accompanied the amendments as countering the 'would have done nothing' argument relied on in *RCI Pty Ltd v FCT*. This and other aspects of the 2013 amendments to Part IVA are discussed in to Part IVA are discussed in Gordon Cooper and Tim Russell, The new "improved" Part IVA – with extra tax benefit! (2013) 42 *Australian Tax Review* 234.

not attributable to an Australian permanent establishment of the foreign entity) from supplies to Australian residents and activities in connection with the supply are undertaken in Australia by a subsidiary of the foreign entity or by a permanent establishment of another foreign entity. Where conditions or the operation of the MAAL are triggered the powers of the Commissioner under the GAAR come into operation with the result that the Commissioner can cancel the tax benefit and make compensating adjustments.

The DPT is likely to be most relevant in transfer pricing situations and subject to the conditions noted above for the DPT to apply a foreign entity associate of the relevant taxpayer must either enter into the scheme or be otherwise connected with the scheme. The DPT will not apply where any of the following tests are passed: the Equal To Or Less Than $AUD 25 million test; the Sufficient Foreign Tax test; or the Sufficient Economic Substance test.[68] Where the conditions for the operation of the DPT are triggered the Commissioner issues a notice of assessment of Diverted Profits Tax at the rate of 40% and the taxpayer is required to pay within 21 days of the notice of assessment. A 12 month review period follows in which the taxpayer has the opportunity to provide the Commissioner with additional information in support of an argument that the assessment should be reduced or eliminated. Following the review period a taxpayer dissatisfied with the assessment or an amended assessment can appeal to the Federal Court.

In addition, although they are not part of the GAAR mention should be made of Australia's hybrid mismatch rules enacted in response to recommendations of the OECD BEPS project. Effective from 1 January 2019 Australian hybrid mismatch rules will apply to hybrid financial instrument mismatches, hybrid payer mismatches, reverse hybrid mismatches, branch hybrid mismatches, deducting hybrid mismatches or imported hybrid mismatches. While the detail of the hybrid mismatch rules is beyond the scope of this report the general effect of the rules is to neutralise the mismatch by either disallowing a deduction or by including an amount in assessable income.

b. The Current Singapore Tax Regime

Subject to exceptions, Singapore taxes Singaporean sourced income and taxes foreign income on a remittance basis.[69]

The statutory test for residence of a company remains one of whether the control and management of its business is exercised in Singapore.[70] The IRAS takes a range of factors (such as the articles of association, the location of the general meeting, the location of board meetings and minutes of board meetings) in applying the test of residence.

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68 Additional factors are listed for determining purpose under the DPT. These are: quantifiable non-tax financial benefits (disregarding tax results under Australian or foreign law) expected to result from the scheme; the result in relation to foreign law that would be achieved by the scheme; and (c) the amount of the tax benefit concerned.

69 Singapore *Income Tax Act* s10. An extended meaning to 'received in Singapore' is given by s10(25).

70 Singapore *Income Tax Act* s2(1) paragraph (b) of the definition of 'resident of Singapore'.

The current corporate rate is 17%[71] with a 75% exemption applying for the first $SG10,000 of normal chargeable income a 50% exemption on the next $SG290,000 of normal chargeable income.[72] Subject to conditions a full exemption is granted for the first $SG100,000 of the normal chargeable income and a 50% exemption for the next $S100,000 of normal chargeable income of start-ups.[73] SMEs receive a rebate of 20% of the corporate tax payable subject to a ceiling of $SG10,000. Singapore provides numerous tax incentives in the form of reduced rates, exemptions, or tax holidays for a specified period.[74]

The Singapore tax base includes ordinary income[75] but does not include capital gains and Singapore does not have a general capital gains tax. Singapore operates a single tier corporate tax system under which dividends are exempt to shareholders.[76]

Foreign source dividends are exempt from Singapore taxation along with foreign branch profits from a trade or business (other than non-trade or business income such as interest or royalties) provided the income was subject to foreign tax at a rate of at least 15%.[77] Where the conditions for exemption are not met a unilateral foreign tax credit is provided.[78] A credit for foreign underlying tax is available for intercorporate dividends on shareholdings equal to or greater than 25%.[79] A direct credit is available in other cases.

Singapore does not impose withholding tax on dividends paid to non-residents. Subject to exceptions Singapore does impose withholding tax on interest (15% rate where not attributable to a trade, business or vocation carried on in Singapore and not effectively connected with a PE of the non-resident in Singapore)[80] and royalties paid to non-residents (10% domestic law rate but 17% on net royalties or 10% of gross royalties where not attributable to a trade, business or vocation carried on in Singapore and not effectively connected with a PE of the non-resident in Singapore) and on rent

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[71] Singapore *Income Tax Act* s43(1).

[72] Singapore *Income Tax Act* s43(6A).

[73] Singapore *Income Tax Act* s43(6D).

[74] Most incentives are provided under either the Singapore *Income Tax Act* or under the Singapore *Economic Expansion Incentives Act*. A list of examples of incentives provided can be found at https://www.iras.gov.sg/irashome/Businesses/Companies/Working-out-Corporate-Income-Taxes/Using-PIC-and-Other-Schemes/Applying-for-Tax-Incentives/

[75] Singapore *Income Tax Act* s10(1)(g).

[76] Under s13(1)(za) of the Singapore *Income Tax Act* any dividends paid by a Singapore resident company after 1 January 2008 are exempt from tax. The imputation system described in 1(a) applied until 31 December 2002. Transitional provisions applied between 1st January 2003 and 31 December 2007.

[77] Singapore *Income Tax Act* s13(8) and 13(9).

[78] For countries with which Singapore has a Taxation Treaty the credit is available under Singapore *Income Tax Act* s50. A unilateral credit is available under Singapore *Income Tax Act* s50A.

[79] Where a Taxation Treaty does not provide for an indirect credit for underlying corporate tax s50A(3) provides that a Singapore resident holding not less than 25% of the issued shares in the foreign company paying the dividend is entitled a credit for foreign underlying tax.

[80] Singapore *Income Tax Act* combined effect of s12(6), s43(3) and s45(1).

(15% final withholding tax where derived from operations carried on outside Singapore but at the Singapore corporate rate of 17 % otherwise) and fees for technical services and management fees paid to non-residents (non-final withholding tax at relevant domestic rate but not levied where service provided wholly outside Singapore).

3. Trade and investment between Australia and Singapore in 1969

Trade in Goods and Services

Australian published statistics for 1969 do not provide separate data for trade and investment relations between Australia and Singapore. Data was published for trade and investment between Australia and ASEAN in 1969 and this data has been used in this report. In 1968/69 Australian exports to ASEAN totalled $AUD 404 million and represented 12% of total Australian exports.[81] Australian imports from ASEAN totalled $AUD 10,791 million and represented 7% of total imports.[82] By 1988/89 Australian exports to ASEAN totalled $AUD 10,791 million and represented 24.5% of Australian exports. In 1988/89 Australian imports from ASEAN totalled $AUD7931 million and represented 16.9% of Australian imports.

Direct and Portfolio Investment

Australian published statistics for 1969 do now show a breakdown of sources and destinations of foreign investment by country. The overall level of foreign investment in Australian, including official investment, in 1969 was $AUD7,665 million. Of this $AUD 1007 million was portfolio investment while $AUD 1747 million was official investment.[83] The overall level of Australian investment abroad, including official investment, in 1969 was $AUD 1884 million of which $AUD 37 million was portfolio investment and $AUD 1421 was official investment.[84]

4. Current trade and investment relations between Australia and Singapore

In 2016-2017 Singapore was Australia's eighth largest two way trading partner with two way trade in goods and services between Australia and Singapore valued at $AUD 24,693 million and representing 3.4% of total Australian two way trade in goods and services.[85] In 2016-2017 Singapore was Australia's

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81 R A Foster, *Australian Economic Statistics 1949-50 to 1994-95*, Reserve Bank of Australia, Occasional Paper No.8, Sydney, 1996, Table 1.2 at p.9.

82 Foster, *supra* note 7, Table 1.6 at p.13.

83 Foster, *supra* note 7, Table 1.20a at p.50.

84 Foster, *supra* note 7, Table 1.20b at p.51.

85 Australian Government, Department of Foreign Affairs and Trade, *Australia's Trade In Goods And Services By Top 15 Partners*, http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Documents/australias-goods-services-by-top-15-partners-2016-17.pdf and and Australian Government, Department of Foreign Affairs and Trade, *Fact Sheet: Singapore* https://dfat.gov.au/trade/resources/Documents/sing.pdf

ninth largest export market with exports of goods and services to Singapore valued at $AUD 11,216 million which represented 3% of total Australian exports.[86]

As at December 2016 Singapore was the 6th largest source of foreign investment in Australia with total investments $AUD 98,908 million. Of this $AUD 31,242 million was direct investment and $AUD 26,971 million was portfolio investment.[87] As at 31 December 2017 Australia was the 6th largest destination of Singaporean direct investment abroad concentrated mainly in the financial and insurance sectors and in the information and communications sectors.[88] As at 31 December 2017 Australian sourced direct investment in Singapore totalled $SGD 16.6 billion. Australian investment in Singapore was mainly concentrated in the finance and insurance sectors.[89]

5. Differences From: The 2014 OECD Model Convention; The 2017 OECD Model Convention; Recent Australian Tax Treaties; and A Recent Singaporean Tax Treaty

This section will note differences between: (a) the 1969 Australia – Singapore Taxation Treaty ('the 1969 Treaty') and the 2014 version of the OECD Model; (b) the 1969 Treaty and the 2017 version of the OECD Model implementing BEPS changes; (c) recent Australian tax treaties (where Australian practice varies from the 2014 or 2017 OECD Model in a manner different from the variations present in the 1969 Treaty); and (d) the 2015 Singapore – South Africa Tax Treaty (where the treaty varies from the 2014 or 2017 OECD Model in a manner different from the variations present in the 1969 Treaty).[90] The section will identify those variations which were in the original 1969 Treaty and those that were introduced in the 1989 Protocol and those that were introduced by the 2009 Protocol. In the case of variations that date from the original 1969 Treaty this section, where possible, will identify those variations that were included at the request of Australian and those variations that were included at the request of Singapore. This will be done through an analysis of the Australian Taxation Office file relating to the negotiation of the original 1969 Treaty[91] and analysis of files of other Australian Government Departments relating to the negotiation of the original 1969 Treaty.[92] To the

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86 Ibid.

87 Australian Government, Department of Foreign Affairs and Trade, *Statistics on Who Invests in Australia,* https://dfat.gov.au/trade/resources/investment-statistics/Pages/statistics-on-who-invests-in-australia.aspx and Australian Government, Department of Foreign Affairs and Trade, *Fact Sheet: Singapore* https://dfat.gov.au/trade/resources/Documents/sing.pdf

88 Department of Statistics, Singapore, *Singapore's Direct Investment Abroad 2017* , March 2019 https://www.singstat.gov.sg/-/media/files/publications/trade_and_investment/sia2017.pdf

89 Department of Statistics, Singapore, *Foreign Direct Investment In Singapore 2017*, January 2019 https://www.singstat.gov.sg/-/media/files/publications/trade_and_investment/fdi2017.pdf

90 The 2015 Singapore – South Africa Tax Treaty was chosen as a recent Singapore tax treaty with a common law, British Commonwealth country.

91 The file is held at National Archives of Australia, Canberra (hereafter 'NAA'). The file details are: 'Double Taxation Agreement: Singapore', Series Number A7073 (A7073/6), Control Symbol J245/69 Parts 2 and 3. Hereafter referred to as 'ATO file' Part 2 or 3 as the case may be.

92 The following addition files at the National Archives of Australia were also accessed in writing this paper: 'Singapore - Economic relations with Australia - Double taxation agreement', Series Number A1838, Control Symbol, 751/1/3 PART 1. Hereafter referred to as 'External Affairs file, Part 1'.

extent that it is possible using published and publically available archival materials an attempt will be made to identify the original reasons why variations from the OECD Model were introduced.

Variation from Preamble to 2017 OECD Model

The Preamble to the 1969 Treaty after the title to the treaty and the names of the Contracting States merely says:

> Desiring to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

By contrast, the Preamble to the 2017 OECD Model implemented a BEPS recommendation and says:

> Intending to conclude a Convention 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 Convention for the indirect benefit of residents of third States)

Omission of Article 1(2) and Article 1(3) of 2017 OECD Model

Aricles 1(2) and 1(3) dealing with transparent entities (Article 1(2)) and preserving the right of a contracting state to tax its own residents (Article 1(3)), were added to the 2017 OECD Model as a consequence of the BEPS project. No equivalent to Articles 1(2) and 1(3)

Omission of or variations to OECD Article 2(1)

The 1969 Australia – Singapore Tax Treaty does not contain OECD Article 2(1). The initial Singapore draft of October 1967[93] did not contain an equivalent to OECD Article 2(1). The initial Australian draft of August 1968[94] did not contain an equivalent to OECD Article 2(1).

The only currently operative Australian tax treaties that contain OECD Article 2(1) are the 1982 Australia – Italy Tax Treaty, the 2013 Australia – Switzerland Tax Treaty and the 2015 Australia – Germany Tax Treaty. The 1967 Australia – United Kingdom was the first Australian tax treaty entered into after the publication of the 1963 Draft OECD Model to contain this variation. The 2010 Australia – Turkey Tax Treaty is the most recent Australian tax treaty to contain this variation. The UN Model does not contain this variation.

Singapore's most recent tax treaties all contain OECD Article 2(1) but omit the reference to 'and capital'. This practice is also followed in recent Australian tax treaties as seen, for example, in Article 21 of the 2013 Australia – Switzerland Tax Treaty.

Omission of or variations to OECD Article 2(2)

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[93] The Singapore Draft of October 1967 is contained in External Affairs File, Part 1.

[94] The Australian draft of August 1968 is contained in ATO File, Part 2.

The 1969 Australia – Singapore Tax Treaty does not contain OECD Article 2(2). The initial Singapore draft of October 1967 did not contain an equivalent to OECD Article 2(2). The initial Australian draft of August 1968 did not contain an equivalent to OECD Article 2(2).

The only currently operative Australian tax treaties that contain OECD Article 2(2) are the 2013 Australia – Switzerland Tax Treaty and the 2015 Australia – Germany Tax Treaty. The 1967 Australia – United Kingdom was the first Australian tax treaty entered into after the publication of the 1963 Draft OECD Model to contain this variation. The 2010 Australia – Turkey Tax Treaty is the most recent Australian tax treaty to contain this variation. The equivalent article in the UN Model is substantially identical to the OECD Model article.

Singapore's most recent tax treaties all contain part of OECD Article 2(2) but vary it significantly. Article 2(2) of the 2015 Singapore – South Africa Tax Treaty is a typical variation from the OECD Model:

> There shall be regarded as taxes on income all taxes imposed on total income or on elements of income, including taxes on gains from the alienation of movable or immovable property.

Article 2(1) 1969 Treaty

Article 2(1**)** contains a definition of 'profits of a Singapore enterprise' and 'profits of an Australian enterprise' in terms which exclude particular categories of income.

Article 2(1)(k) of the Singapore draft of October 1967 contained a definition of 'profits of a Singapore enterprise' which excluded particular categories of income but differed from the definition in Article 2(1) of the 1969 treaty in several matters of detail. Article 3(1) of Australian draft of August 1968 contained a definition of 'industrial or commercial profits' with a similar structure with sub-paragraphs (i) to (iv) being virtually identical to those in the 1969 Treaty with there being a small variation in (iv) in that it referred to 'income' rather than 'profits'. Article 2(1) in the form that it takes in the 1969 Treaty is in the initialled draft dated 2nd October 1968. This draft was developed during the initial negotiations in Canberra in October 1968.[95] The drafting of this aspect of Article 2(1) was evidently not contentious and no mention of it is made in the Australian Tax Office memorandum listing 'Outstanding Points' following the October 1968 negotiations.[96]

This variation appears to be a legacy of the 'Colonial Model' which influenced Australian tax treaty practice prior to Australia joining the OECD. The intent of the exclusions was to take the excluded items out of the business profits article and to have distribution of taxing rights determined by other distributive rules. In the event of no other distributive rule being applicable to the excluded item the absence of an other income article in Australian tax treaties in this period was regarded by Australia as meaning that full source country taxing rights were retained in relation to the excluded items. It is likely that Australia would want to abandon this approach in a new tax treaty with Singapore.

The 1969 Australia – Singapore Tax Treaty is the most recent currently operative Australian tax treaty to contain this variation from the OECD Model. The approach taken in Article 2(1) of the 1969 Treaty is not adopted in the UN Model. This variation is not contained in the Singapore – South Africa Tax Treaty.

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[95] The initialed draft is located in ATO File, Part.2.

[96] The memorandum is contained in ATO File No.2.

Omission of 2017 OECD Article 3(1)(i) Definition of 'recognised pension fund'

A definition of 'recognised pension fund' is included in the 2017 OECD Model. No equivalent definition is contained in the 1969 Treaty. The definition is contained in the 2019 Australia – Israel Tax Treaty but is not contained in any other currently operative Australian tax treaty. An equivalent definition is not contained in the 2016 Singapore – South Africa Tax Treaty.

Variation from Article 4(1) – Article 3(1) in 1969 Australia – Singapore Tax Treaty

Only the 2013 Australia – Switzerland Tax Treaty exactly applies the definition of 'resident' in Article 4(1) of the OECD Model. Generally Australian tax treaties define a 'resident of Australia' as being a person who is a resident of Australia for the purposes of Australian tax and typically define a resident of relevant treaty partner country as being a person who is a resident of that country for the purposes of that country's tax.

The 1969 Australia – Singapore Tax Treaty varies from this pattern somewhat in that Article 3(1)(c) defines a 'Singapore resident' as meaning 'a Singapore company and any person (other than a company) who is a resident of Singapore'. Article 3(1)(d) defines an 'Australian resident' as meaning 'an Australian company and any person (other than a company) who is a resident of Australia'. Article 3(1)(a) defines an 'Australian company' as meaning 'any company which being a resident of Australia – (i) is incorporated in Australia and has its centre of administrative or practical management in Australia whether or not any person outside Australia exercises or is capable of exercising or overriding control or direction of the company or of its policy or affairs in anyway whatsoever; or (ii) is managed and controlled in Australia'. A Singapore company is defined as meaning 'any company which is managed and controlled in Singapore and which is not an Australian company'.

The definition of resident, and the definition of 'Australian company' in Article 3 is unique among Australian tax treaties. By not referring to a person who is a resident 'for the purposes of Australian tax' the definition of 'resident' leaves open the question of what tests of residence are to apply. The principal effects of the definition of 'Australian company' would appear to be to limit the scope of the effect of the definition of resident company in Australian domestic law in *ITAA* 1936 s6(1) and in *ITAA* 1997 s995-1 under which a company incorporated in Australia is deemed to be an Australian resident.

The most recent Australian tax treaty to follow normal Australian practice in definition 'resident was the 2010 Australia-Turkey Tax Treaty. The 2009 Australia – New Zealand Tax Treaty and the 2015 Australia – Germany Tax Treaty differ from both the OECD Model and prior Australian tax treaty practice by stating that a resident of Australia 'means any person who is liable to tax as a resident of Australia'.

Article 4(1) in the UN Model is identical to Article 4(1) of the OECD Model.

The definition of resident in the 2015 Singapore – South Africa Tax Treaty, unlike the definitions in the 1969 Treaty (as discussed above), broadly corresponds to the definition in the OECD Model. Article 4(1) of the 2015 Singapore – South Africa Tax Treaty omits the final sentence of OECD Article 4(1). Also the tiebreaker for dual residents other than individuals in Article 4(3) differs from OECD Article 4(3) as it proposes that dual residence be resolved via the mutual agreement procedure and not on the basis of the place of effective management. This variation, however, is consistent with Article 4

of the Multilateral Instrument and with the revisions to the OECD Model arising from the BEPS project. As noted below, Australia did make a reservation on Article 4 of the Multilateral Instrument, but, subject to compliance with that reservation, should be prepared to agree to the use of the mutual agreement procedure as a tiebreaker in these cases.

The definition of resident does not include the post 1995 reference in the OECD Model 'to that State and any political subdivision or local authority thereof'. Eleven of Australia's 19 post 1995 tax treaties contain this variation but the 2000 Australia – Russia Tax Treaty is the most recent Australian tax treaty to contain it. The 2015 Singapore – South Africa Tax Treaty does not contain this variation.

Variation from OECD Article 4(3) 2014 and 2017 OECD Models – Aritcle 3(3) 1969 Treaty

The residence tiebreaker for persons other than individuals in the 1969 Treaty was where the person was 'managed and controlled'. By contrast, the tiebreaker in the 2014 treaty was place of effective management. In the 2017 OECD Model the tiebreaker is:

> 3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine bymutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective 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 entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.

Prior to the 2015 Australia – Germany Tax Treaty the corporate residence tiebreaker in Australian tax treaties generally was 'place of effective management' although the 1982 Australia – United States Tax Treaty does not contain a corporate residence tiebreaker. The previous pattern was varied in the 2015 Australia – Germany Tax Treaty by providing that if place of effective management could not be determined or was in neither state then the competent authorities were to determine residence based on place or incorporation, place of effective management and other relevant factors. The corporate residence tiebreaker in the 2019 Australia – Israel Tax Treaty is identical to Article 4(3) of the 2017 OECD Model. The corporate residence tiebreaker in the 2016 Singapore – South Africa Tax Treaty requires settlement by mutual agreement and states that in the absence of such agreement the entity will be considered to be outside the scope of the treaty except for Article 24.

Variation from OECD Article 5(3) - Article 4(2) in 1969 Australia – Singapore Tax Treaty

The opening words of Article 4(2) of the 1969 Australia – Singapore Tax Treaty vary from OECD Article 5(2) by stating 'includes but is not limited to' in contrast to the OECD wording 'includes especially'. The current language was inserted by the first Protocol in 1989. The original language used in the 1969 Treaty was simply 'The term "permanent establishment" includes'. This language was used in the initial Australian draft of August 1968 and in the initialled draft following the October 1068 negotiations in Canberra. The Singapore draft of October 1967 had stated, 'a permanent establishment shall include especially'. Recent Australian tax treaties, such as the 2015 Australia – Germany Tax Treaty adopt the 'includes especially' language as does the 2015 Singapore – South Africa Tax Treaty.

All currently operative Australian tax treaties, except the 1969 Treaty and the 2010 Australia – Turkey Tax Treaty include 'agricultural, pastoral or forestry property' in the list of examples of permanent establishments in Article 5(2). This variation from the OECD Model is not contained in the 2015 Singapore-South Africa Tax Treaty. While the most recent Australian tax treaty practice in the 2015 Australia – Germany Tax Treaty is to include this phrase in the list of examples of permanent establishments, income from the exploitation of land for primary production is nonetheless taxed under Article 6 (income from immovable property) under that treaty. Similarly in the 2019 Australia – Israel Tax Treaty while the phrase is included in the examples of permanent establishments, usufruct from immovable property is taxed under Article 6 of that treaty.

Article 4(2) further varies OECD Article 5(2) by including: in paragraph (d), ' a store or other sales outlet' (an insertion by the 1989 Protocol); in paragraph (g) 'a warehouse except where it is used solely for any of the purposes mentioned in paragraph (4)' (an insertion by the 1989 Protocol); and in paragraph (i) by including that paragraph in Article 4(2) rather than is a separate paragraph as per Article 5(3) of the OECD Model and by including a reference to an 'assembly project'. Paragraph 4(2)(i) also varies OECD Article 5(3) by referring to 'a combination of' a building site, or a construction, installation or assembly project that continues for a period 'aggregating more than 6 months in a 12 month period'. By contrast, OECD Article 5(3) does not refer to a 'combination of' and requires that the building site or construction of installation project last for 12 months. The equivalent provision in the original 1969 Treaty was Article 4(2)(d) which required that the building site or the various specified projects exist for more than 6 months and did not refer to 'a combination' of the activities.

The Singapore draft of October 1967 referred to 'a building site or construction or assembly project which exists for more than six months'. The Australian draft of August 1968 referred to a 'building site or a construction, installation or assembly project which exists for more than six months'. The Australian drafting of this provision was adopted in the October 1968 initialled draft.

All currently operative Australian tax treaties, other than the 2013 Australia – Switzerland Tax Treaty, the 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty, include a reference to an 'assembly project'. The most recent Australian tax treaty to include a reference to an 'assembly project' was the 2010 Australia – Turkey Tax Treaty. Article 5(3)(a) includes a reference to an 'assembly project'. The 2015 Singapore – South Africa Tax Treaty includes a reference to an 'assembly project'.

Most currently operative Australian tax treaties vary OECD Article 5(3) by shortening the period for which the building site, construction, installation or assembly project is required to last with the most recent shortening of the time period occurring in the 2010 Australia – Turkey Tax Treaty where the required time period corresponds to the period set out in Article 4(2)(i) of the 1969 Australia – Singapore Tax Treaty as amended by the 1989 Protocol. Of currently operative Australian tax treaties only Article 4(2)(i) refers to 'a combination' of the activities referred to in the paragraph. The 1967 Australia – United Kingdom Tax Treaty was the first Australian tax treaty to shorten the required period to 6 months and, as noted above, the original 1969 Australia – Singapore Tax Treaty simply required that the building site or relevant project exist for 6 months. Shortening of the time period is consistent with Article 5(3)(a) of the UN Model which refers to a 6 month period.

Further Variations From OECD Article 5 – Article 4(3) Australia – Singapore Tax Treaty

Article 4(3) of the 1969 Australia – Singapore Tax Treaty is a further variation from the definition of permanent establishment in the OECD Model. Article 4(3) deems an enterprise of a Contracting State to have a permanent establishment and to carry on trade or business through that permanent establishment if: (a) it carries on supervisory activities for a period or periods aggregating 6 months in a 12 month period in connection with a building site or a construction, installation or assembly project or any combination of them being undertaken in the other State; or (b) substantial equipment is being used in that other State, for or under contract with the enterprise. The reference to a period or periods aggregating 6 months in a 12 month period was a variation made in the 1989 Protocol.

The equivalent provision (Article 4(4)) in the original 1969 Treaty simply required that the activities be carried on for more than 6 months.

The Singapore draft of October 1967 deemed supervisory activities carried on for more than six months in connection with a construction, installation or assembly project' to be a permanent establishment. The Singapore draft of October 1967 did not contain a provision deeming the use of substantial equipment to be a permanent establishment. The Article 4(4) of the Australian draft of August 1968 was substantially similar to Article 4(4) of the original 1969 Treaty but included paragraph 4(b) which referred to public entertainers and cross referenced to Article 12. In the Australian draft of August 1968 the substantial equipment provision was contained in Article 4(4)(c). In the initialled draft of October 1968 Article 4(4)(b) was the same as Article 4(3)(b) in the 1969 Treaty and Article 4(3)(b) of that draft corresponded with Article 4(4)(b) of the 1969 Treaty. The drafting of Article 4(4)(b) of the initialled October 1968 draft does not appear to have been contentious and is not mentioned in the list of outstanding points.

All currently operative Australian tax treaties, with the exception of the 2013 Australia – Switzerland Tax Treaty, the 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty, contain some provision deeming there to be a permanent establishment when 'connected supervisory activities' are undertaken. The first Australian tax treaty to contain a provision of this nature was the 1967 Australia – United Kingdom Tax Treaty. In the 2013 Australia – Switzerland Tax Treaty, in the 2015 Australia – Germany Tax Treaty, and in the 2019 Australia – Israel Tax Treaty 'supervisory or consultancy activities' connected with a building site, or a construction or installation project are not of themselves deemed to be a permanent establishment but are deemed to be carried on through a permanent establishment (such as the building site) that the enterprise has in the source state. The 2016 Singapore – South Africa Tax Treaty deems a building site, a construction, assembly or installation project or supervisory activities carried on in connection with the site or project for specified time period to be a permanent establishment. This is consistent with Singapore's reservation on OECD Article 5(3) and with article 5(3)(a) of the UN Model.

With the exception of the 1992 Australia – Indonesia Tax Treaty all currently operative Australian tax treaties contain a provision deeming (subject to conditions in some tax treaties[97]) the use, operation or installation of substantial equipment to be a permanent establishment. The provision had its origins

[97] For example, in the 2015 Australia – Germany Tax Treaty, Article 5(4)(b) refers to activities (including the operation of substantial equipment) in the exploration for or exploitation of natural resources for an aggregate of 90 days in any 12 month period. Article 5(4)(c) refers to operating substantial equipment (including as provided in Art 5(4)(b)) for 183 days in any 12 month period.

in the 1953 Australia – United States Tax Treaty where it appears that it was inserted at Australia's request.[98] From the 2006 Australia – Finland Tax Treaty onwards the deeming has been confined to situations where the substantial equipment is 'operated'.[99] This is consistent with the Australian reservation to Article 5(1) from 2008 onwards and reflects a view that the deeming does not extend to a passive 'use' of substantial equipment.[100] No equivalent provision is contained in the UN Model. No equivalent provision is contained in the 2015 Singapore – South Africa Tax Treaty.

Article 5(5) in the 2015 Australia – Germany Tax Treaty and in the 2019 Australia – Israel Tax Treaty add to time periods in which the enterprise of the Contracting State has carried on the activities referred to in Article 5(3) 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.' Article 5(10) of the 2015 Australia – Germany Tax Treaty and of the 2019 Australia – Israel Tax Treaty contain a definition of 'closely related enterprise'. Article 5(5) is an 'anti-fragmentation' provision with similar effect to but with different language from the alternative provision set out in paragraph 52 of the Commentary on the 2017 OECD Model and with Article 14 of the Multilateral Instrument. On signing the Multilateral Instrument Australia only chose to reserve the right for the entirety of the entirety of the Article not to apply to provisions of its Covered Tax Agreements relating to the exploration for or exploitation of natural resources. On signing the multilateral instrument Singapore reserved the right for the entirety of Article 14 to not apply to its Covered Tax Agreements. The 2015 Singapore – South Africa Tax Treaty does not contain an equivalent provision to MLI Article 14 or OECD Commentary alternative provision in paragraph 52.

Another reservation by Singapore to 2017 OECD Article 5(3) states that Singapore:

> 'reserves the right to treat an enterprise as having a permanent establishment if the enterprise furnishes services through employees or other personnel engaged by the enterprise for such purpose but only where the employees or other personnel are present in the State for the same project or a connected project for a period or periods aggregating more than a period to be negotiated.'

Although Australia has not lodged a similar reservation to 2017 OECD Article 5, provisions to a similar effect appear in some Australian tax treaties such as the Australia – India Tax Treaty (as amended by the 2013 Protocol) and in the 2010 Australia – Turkey Tax Treaty. A 'service permanent establishment' provision is contained in Article 5(3)(b) of the UN Model.

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98 See the discussion in C John Taylor, 'The Negotiation and Drafting of the First Australia-United States Double Taxation Treaty of 1953' in Peter Harris and Dominic De Cogan, *Studies in the History of Tax Law*, Volume 7, Hart Publishing, Oxford and Portland Oregon, 2015, pp 213 to 252 at 225-226.

99 The Australian treaty language immediately prior to the 2006 Finland Tax Treaty in R J Vann, 'Hill on Tax Treaties and Interpretation' (2013) 28 *Australian Tax Forum* 87.

100 Explanatory Memorandum paragraph 1.123. The pre 2006 history of relevant Australian tax treaty provisions is discussed in M Brabazon, 'International taxation of cross-border equipment leasing' (2006) 35 *Australian Tax Review* 127. R J Vann, 'Hill on Tax Treaties and Interpretation' (2013) 28 *Australian Tax Forum* 87 at note 49 observes that the current treaty language and the current form of the reservation are consistent with the argument that the Commissioner unsuccessfully put in *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67, (2005) 142 FCR 134, 59 ATR 360, 2005 ATC 4398.

Variation from OECD Article 5(4)(a) and 5(4)(e) – Article 4(4)(a) and 4(4)(e) Australia –Singapore Tax Treaty 1969

Article 4(4)(a) of the 1969 Australia – Singapore Tax Treaty varies the equivalent provision in the OECD Model by omitting reference to 'delivery of goods'. This variation from the OECD Model was inserted by the 1989 Protocol along with the variations discussed above which inserted Article 4(2)(d) and Article 4(2)(g) with the obvious intention that storage and warehousing activities would constitute a permanent establishment. The 1989 Protocol was the first instance of this variation appearing in an Australian tax treaty but an equivalent variation subsequently appeared in Australian tax treaties with Argentina, Indonesia and Norway with the most recent instance of the variation being in the 2006 Australia – Norway Tax Treaty. This variation from the OECD Model is consistent with the UN Model. The 2015 Singapore – South Africa Tax Treaty does not contain this variation. Given the limited instances in which Australia has previously agreed to this variation, with the latest being in 2006, Australia would be unlikely to request this variation in a renegotiated tax treaty with Singapore.

Article 4(4)(e) varies the equivalent OECD Model article by providing examples of activities which have a preparatory or auxiliary character. The first Australian tax treaty to contain examples of activities which have a preparatory or auxiliary character was the 1967 Australia – United Kingdom Tax Treaty. The same examples were contained in Article 3(3)(e) of the Australian draft of August 1968. The Singapore draft of October 1967 did not contain examples of preparatory or auxiliary activities. The same examples were contained in Article 4(3)(e) of the initialled draft of October 1968. Again the drafting does not appear to have been contentious and the issue is not mentioned in the memorandum on 'outstanding issues.

All currently operative Australian tax treaties with the exception of the treaties with Finland, Hungary, South Africa, Norway, New Zealand, Japan, the UK and Germany contain this variation from the OECD Model. The most recent Australian tax treaty to contain this variation was the 2013 Australia – Switzerland Tax Treaty. No equivalent variation from the OECD Model is contained in the UN Model.

Although the 2015 Australia – Germany Tax Treaty did not contain examples of preparatory or auxiliary activities it did restrict the scope of the exemption by removing references to 'preparatory or auxiliary character' from Articles 5(6)(e) to (f) [the equivalents of 2017 OECD Article 5(4)(e) to (f)] and adding, consistently with 2017 OECD Article 5(4) the proviso that all the activities in the paragraph or the overall activity of the fixed place of business is 'of a preparatory or auxiliary character'. A similar approach had previously been taken in the Australia – Finland, Australia – New Zealand, and Australia – South Africa Tax Treaties. The approach is consistent with Article 13(2) of the Multilateral Instrument. On signing the Multilateral Instrument Australia adopted Article 13(2) subject to reserving the right to not apply Article 13(2) to the three prior Covered Agreements that contained an equivalent provision. On signing the Multilateral Instrument Singapore only reserved its position on Article 13(4). Hence, as set out below, the 1969 Treaty will be modified by the inclusion of MLI Article 13(2).

Variations from OECD Article 5(5) - Article 4(5)(b) and Article 4(5)(d) 1969 Australia – Singapore Treaty

Under Article 4(5)(b) of the 1969 Treaty a dependent agent without authority to conclude contracts but who habitually maintains a stock of goods is deemed to be a permanent establishment. This variation was also contained in the original 1969 text of the Treaty in Article 4(5)(b). This variation was also contained in Article 2(1)l(v) of the Singapore draft of October 1967. Provisions to this effect

were also contained in Article 3(5) of the Australian draft of August 1968. This variation, in the form that it takes in the 1969 Treaty, was in the October 1968 initialled draft. Again the drafting does not appear to have been contentious and this aspect of the definition is not mentioned in the Outstanding Issues memorandum.

The same variation from the 2014 OECD Model is also contained in Australia's current tax treaties with Fiji, India, Indonesia, Kiribati, Malaysia, the Philippines, Papua New Guinea, Russia, Sri Lanka, Thailand and Turkey. The most recent instance of this variation, with equivalent language, from the OECD Model appearing in an Australian tax treaty is in the 2010 Australia – Turkey Tax Treaty. Article 5(5)(b) of the UN Model is an equivalent provision.

The 2015 Australia -Germany Treaty varies the language of 2014 OECD Article 5(5)(a) by referring in Art 5(8) to a person who 'habitually concludes contracts, or habitually plays the principal role in the conclusion of contracts that are routinely concluded without material modification by the enterprise, and the contracts are:

> a) in the name of the enterprise; or b) 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 c) for the provision of services by that enterprise'

The provision in the 2015 Australia – Germany Tax Treaty reflects the OECD BEPS Final Recommendations. Article 12(1) of the Multilateral Instrument is an equivalent provision, however, at the time of signing the Multilateral Instrument Australia reserved its position on the whole of Article 12. Singapore also reserved its position on the whole of Article 12 in the MLI. Corresponding changes were made to Article 12(5) in the 2017 version of the OECD Model. Australia did not reserve its position on Article 12(5) in the 2017 version of the OECD Model. Singapore reserved the right to use the pre 2017 version of Article 12(5). It is arguable that the inclusion of 2017 OECD Model Article 5(5) in an Australian tax treaty will have the effect of narrowing the scope of operation of Australia's multinational anti avoidance law (the MAAL) in *Income Tax Assessment Act* 1936 s177DA.[101] If so then Singapore might consider whether it is in the interest of Singaporean businesses to agree to the inclusion of 2017 OECD Article 5(5) on the basis that to do so might reduce the likelihood of an assessment under *Income Tax Assessment Act* 1936 Part IVA based on s177DA.

The 2015 Australia – Germany Tax Treaty also varies Article 5(6) of the 2014 OECD Model in a manner consistent with MLI Article 12 and 2017 OECD Article 5(6). Australia has not reserved its position on 2017 OECD Article 5(6). Singapore has reserved the right to use the pre 2017 version of OECD Article 5(6).

Article 4(5)(d) is an additional provision included in the 1969 Australia – Singapore Tax Treaty which deems a dependant agent who, in that capacity, manufactures or processes in the relevant State for the enterprise goods or merchandise belonging to the enterprise. Article 4(5)(c) was an identical provision in the original 1969 version of the Treaty which also contained an additional Article 4(8) which extended the deeming beyond the dependant agent situation direct or indirect control of or by the relevant enterprise. This variation was not contained in the Singapore draft of October 1967 but it was contained in the Australian draft of August 1968. Article 3(8) of the Australian draft of August

[101] See the argument to this effect in C John Taylor, 'The 2015 Australia-Germany Tax Treaty, BEPS, and the Multilateral Instrument' (2017) 46 *Australian Tax Review* 149 at 169.

1968 was an equivalent provision to Article 4(8) of the original 1969 Treaty. Article 4(5)(c) of the initialled draft of October 1968 was identical to Article 4(5)(c) of the 1969 Treaty.

The 1957 Australia – Canada Tax Treaty was the first Australian tax treaty to include a provision to this effect and an equivalent provision to Article 4(5)(d) has been included in every subsequent Australian tax treaty with the most recent inclusion being in the 2015 Australia – Germany Tax Treaty. No equivalent provision is contained in the UN Model.

Variations from OECD Article 6 -Article 4A 1969 Australia – Singapore Treaty

Article 4A of the 1969 Treaty differs in several respects from the 2014 or 2017 OECD Article 6. It refers to 'income from real property' rather than to 'income from immovable property'. It defines 'income from real property' in a manner that differs from the definition of 'income from immovable property' in OECD Article 6. In particular, the definition includes rights in respect of minerals, oil, gas and other natural resources. This aspect of the definition is consistent with an Australian reservation on Article 7. Article 4A also includes a rule determining the situs of interests or rights in real property as defined. Paragraph 4 of Article 4A applies the provisions of Article 4A(1) and (2) to income from real property used for the performance of professional services.

More recent Australian tax treaties, such as the 2015 Australia – Germany Tax Treaty, refer to 'income from immovable property' but do vary the OECD definition of 'immovable property' particularly by including rights in respect of minerals, oil, gas and other natural resources. The 2015 Australia – Germany Tax Treaty also includes a rule for determining the situs of interests or rights falling within the definition of 'immovable property'.

Article 6 in the 2015 Singapore – South Africa Tax Treaty follows the OECD Model.

Variations from OECD Article 7 – Article 5 1969 Australia – Singapore Treaty

Article 5 of the 1969 Treaty, like the business profits article in all Australian tax treaties, broadly follows the pre 2010 OECD version of Article 7. Australia has reserved the right to use the pre 2010 version of Article 7 in its tax treaties.

Article 7 in the Singapore – South Africa Tax Treaty follows the pre 2010 version of Article 7 in the OECD Model. Singapore has reserved the right to use the pre 2010 version of Article 7 in its tax treaties.

While it differs in detail from Article 5 in the 1969 Treaty the basic approach is the same. As noted above this is consistent with current Australian tax treaty practice and hence it is likely that Australia would agree to a pre 2010 OECD Model Article 7 being included in a renegotiated tax treaty with Singapore.

Like all currently operative Australian tax treaties (other than the treaty with Denmark) Article 5 does not contain an equivalent to OECD Article 7(4) as it appeared in the pre 2010 version of Article 7 in the OECD Model. The Singapore draft of October 1967 did not contain an equivalent to the pre 2010 OECD Article 7(4). Nor did the Australian draft of August 1968. The initialled draft of October 1968 did not contain an equivalent to the pre 2010 OECD Article 7(4). The UN Model contains an equivalent

provision to the pre 2010 OECD Article 7(4). The 2015 Singapore – South Africa Tax Treaty does not contain an equivalent to pre 2010 OECD Article 7(4).

Article 5(5) is a saving provision for domestic law in situations where information is inadequate to determine the profits to be attributed to a permanent establishment. The Singapore draft of October 1967 did not contain an equivalent provision to Article 5(5) in the 1969 Treaty. Article 4(5) of the Australian draft of August 1968 contained this variation. This variation was also contained in Article 5(5) of the initialled draft of October 1968. Australia reserves the right to include a provision to this effect in Article 7 in its tax treaties. Beginning with the 1946 Australia – United Kingdom Tax Treaty all Australian tax treaties (including the 2019 Australia – Israel Tax Treaty) except the 2015 Australia – Germany Tax Treaty have contained an equivalent provision. A different approach is taken in the 2015 Australia-Germany Tax Treaty which contains a Limitation on Benefits article in the form of a principal purpose test. Paragraph 23(3) provides that, '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.' and goes on to say that in the event of double taxation arising as a result of the application of such provisions the competent authorities will consult under the mutual agreement procedure. Paragraph 7 of the Protocol to the 2015 Australia – Germany Tax Treaty includes transfer pricing rules in the list of provisions designed to prevent evasion or avoidance of taxes. The provision was originally inserted to protect former s136 in *ITAA* 1936. It was subsequently regarded as protecting the Australian Commissioner's discretion in the transfer pricing provisions contained in the now repealed *ITAA* 1936 Division 13. It is arguable that the provision is not necessary to protect the operation of Australia's current transfer pricing rules contained in *ITAA* 1997 Sub-div 815-B and Sub-div 815-C. No equivalent provision is contained in the UN Model. The 2015 Singapore – South Africa Tax Treaty does not contain an equivalent provision.

Along with all but 9 currently operative Australian tax treaties, Article 5 of the 1969 Australia – Singapore Tax Treaty omits the Article 7(6) which appeared in the pre-2010 version of OECD Article 7. The Singapore draft of October 1967 did not contain an equivalent to the pre 2010 OECD Article 7(6). The Australian draft of August 1968 did contain an equivalent to the pre 2010 OECD Article 7(6). The initialled draft of October 1968 did not contain an equivalent to the pre 2010 OECD Article 7(6).The UN Model contains an equivalent provision to the pre 2010 OECD Article 7(6). The 2015 Singapore-South Africa Tax Treaty contains an equivalent to pre 2010 OECD Article 7(6).

Article 5(7) is a saving provision for domestic law relating to profits from insurance with non-residents. An equivalent provision was first included in an Australian tax treaty in the 1946 Australia – United Kingdom Tax Treaty. This variation was not contained in the Singapore draft of October 1967. Article 4(2) of the Australian draft of August1968 contained an equivalent but more specific variation in its provision dealing with Australian taxation of the industrial or commercial profits of a permanent establishment of a Singapore enterprise and explicitly referred to Divisions 14 and 15 of Part III of the Income Tax Assessment Act 1936 (Cth). The Memorandum of Outstanding Points following the first round of negotiations indicated that Singapore was in general agreement but wished the 'safeguard to be expressed in a more general and reciprocal way'. The initialled draft of October 1968 contained a version of this variation which became Article 5(7) of the 1969 Treaty. The precise terms of the current Article 5(7) were inserted by the 1989 Protocol.Equivalent provisions appear in all currently operative Australian tax treaties other than the treaties with Chile. The provision in the treaties with Korea, Switzerland and Germany confine its operation to insurance businesses other than those dealing with life insurance. The most recent Australian tax treaty to contain an equivalent provision

was the 2015 Australia – Germany Tax Treaty. No equivalent provision is contained in the UN Model. Australia has reserved the right to permit its domestic law to apply in relation to the profits from any form of insurance.

Article 5(8) was added by the 1989 Protocol and deems a permanent establishment of an enterprise operated through a trust (other than a trust treated as a company for tax purposes) to be a permanent establishment of the presently entitled beneficiaries of the trust and deems the share of business profits to which the beneficiaries are presently entitled to be attributed to the permanent establishment. An equivalent provision first appeared in the 1986 Australia – Belgium Tax Treaty and equivalent provisions appear in all currently operative Australian tax treaties other than the treaties with Belgium, Denmark, Italy, Ireland, Korea, Malta, the Netherlands, the Philippines, and Sweden. The 2015 Australia – Germany Tax Treaty is the most recent Australian tax treaty in which an equivalent provision appears. No equivalent provision is contained in the UN Model. The 2015 Singapore – South Africa Tax Treaty does not contain an equivalent provision.

Variations from OECD Article 8 – Article 7 1969 Australia – Singapore Tax Treaty

Article 7(1) varies from 2014 OECD Article 8(1) by not referring to the place of effective management of the enterprise. Rather the reference is to profits derived by a resident of a Contracting State which means that the scope of the rule will be determined by the definition of 'resident' in Article 3 as discussed above. This variation from the OECD Model had its origins in the 1967 Australia-United Kingdom Tax Treaty and was based on a United Kingdom draft of September 1966. The same approach is taken in all Australian tax treaties other than the Australia – Romania Tax Treaty with the most recent instance of it being in the 2015 Australia – Germany Tax Treaty. The current form of Article 7(1) was introduced by the 1989 Protocol. This variation was contained in Article 6(1) of the Australian draft of August 1968.

The 2015 Singapore – South Africa Tax Treaty contains a similar variation from the OECD Model in that the right to tax lies with the state of residence of the person carrying on an enterprise.[102] As a consequence neither the 1969 Treaty, all currently operative Australian tax treaties (other than the treaty with Romania) nor the 2015 Singapore – South Africa Tax Treaty contains an equivalent to OECD Article 8(3). Article 7(1) of the 1969 Treaty differs from the OECD Model by not referring to 'in international traffic'. Article 8(1) in recent Australian and Singaporean tax treaties includes the reference to ''in international traffic''.

The shipping and aircraft profits article in the Singapore draft of October 1967 (Article V) differed significantly from both the OECD Model and from the final version of Article 8 in the 1969 Treaty. The Singapore draft provided that shipping and aircraft of an enterprise of one of the Contracting States could be taxed in the Other State where they were attributable to sources in that State subject to reduction of 50% in the tax charged by the source state. Taxation of shipping and aircraft profits was one of the contentious issues in the negotiation of the 1969 Treaty. In initialling the October 1968 draft the Australian delegation undertook to remit to the Australian Government for consideration that source taxation of shipping profits be reduced by one half and that aircraft profits be taxed by

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[102] The combined effect of Articles 8(1) and 3(1)(h) of the 2015 Singapore – South Africa Tax Treaty.

the country of residence of the operator. This was reflected in the initialled draft of October 1968. When negotiations resumed in Singapore in December 1968 the Singapore delegation initially resisted residence basis taxation of aircraft profits but eventually agreed to it coupled with an ability for either State to terminate the Treaty by giving notice on or before 30 June in any calendar year.[103] This was reflected in the 1969 Treaty.

Significant variations from the 2014 OECD Model also occur in Articles 7(2) and 7(5). Article 7(2) permits taxation of profits of ships and aircraft operations confined solely to places within the source state. Article 7(5) in effect defines profits from operations of ships or aircraft confined solely to places in the source State. Equivalent provisions to Article 7(2) appear in all Australian tax treaties with the exception of the treaties with the exception of the treaties with Italy, Korea, the Philippines, Romania and the United States. An equivalent article to Article 7(2) first appeared in the 1967 Australia-United Kingdom Tax Treaty and appeared most recently in the 2015 Australia-Germany Tax Treaty. All currently operative Australian tax treaties permit the source state to tax shipping and aircraft profits where the shipping and discharge occur in that State although there are differences in the language used in some treaties. The current form of Article 7(2) was introduced by the 1989 Protocol.

An equivalent article to Article 7(5) also first appeared in the 1967 Australia-United Kingdom Tax Treaty and equivalent articles appear in all currently operative Australian tax treaties other than the treaties with Korea, the Philippines, Russia, Switzerland and Germany. The most recent Australian tax treaty to contain an equivalent article was the 2010 Australia – Turkey Tax Treaty. Article 7(4) which deems certain interest to be profits from the operation of ships and aircraft appears to be unique among Australian tax treaties. Article 7(4) was introduced by the 1989 Protocol. The UN Model does not contain equivalent provisions to Articles 7(2), 7(4) and 7(5).

None of the above variations were contained in the Singapore draft of October 1967.

Subject to relatively minor drafting differences all of these variations (relating to taxation of shipping solely within the source state) were contained in Article 6 of the Australian draft of August 1968. Articles 7(1) and (2) of the initialled draft of October 1968 allowed for source taxation of shipping and aircraft profits confined solely to places in the Source State. Article 7(4) of the initialled draft of October 1968 defined profits from a voyage or flight or a ship or aircraft confined solely to places within a Contracting State. The definition was substantially similar to the definition in the current Article 7(4) which was inserted by the 1989 Protocol, but, in the case of Australia, included flights and voyages to the Territory of Papua and the Trust Territory of New Guinea. The treatment of flights and voyages within a Source State does not appear to have been a problematic issue in the negotiations and is not mentioned in the memorandum of outstanding issues.

The 2015 Singapore – South Africa Tax Treaty does not contain equivalent provisions to Articles 7(2), 7(4) or 7(5) of the 1969 Treaty. It is likely that Australia would argue for the inclusion of a provision equivalent to Article 7(2) in a renegotiated tax treaty with Singapore.

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[103] Article 22 of the 1969 Treaty. In the initialed draft of October 1968 the words 'after 1972' followed 'any calendar year' in Article 22. A cable dated 13 December 1968 from O'Reilly to Cain contained in ATO File No.3 indicated that Singapore had agreed to taxation of aircraft profits on a residence basis that the reference to 1972 in Article 22 be deleted so as to avoid a commitment to extend residence basis taxation of aircraft profits beyond Singapore's proposed renegotiation with the British in 1971.

Article 8(2) of the 2015 Singapore -South Africa Tax Treaty varies from the 2014 OECD Model by specifically including bareboat leasing and profits from containers used for transportation of goods or merchandise. This variation is not present in the 1969 Treaty or in other currently operative Australian Tax Treaties.

Article 8(4) of the 2015 Australia – Germany Tax Treaty varies from the OECD Model by dealing with container leasing. An equivalent provision is not contained in the 1969 Treaty or in the 2015 Singapore -South Africa Tax Treaty.

Variations from OECD Article 9 – Article 6 1969 Australia – Singapore Treaty

Like all currently operative Australian tax treaties (including the 2019 Australia – Israel Tax Treaty) other than the 2015 Australia – Germany Tax Treaty Article 6(2) of the 1969 Australia – Singapore Tax Treaty is a savings provision preserving the operation of domestic law in instances where there inadequate information to determine the income to be attributed to the enterprise. As noted above in the 2015 Australia – Germany Tax Treaty the operation of domestic anti avoidance laws, including transfer pricing rules, is preserved through the principal purpose test in the Limitation on Benefits article. The origins of provisions preserving the operation of domestic law in instances where information is inadequate can be traced to the 1946 Australia – United Kingdom Tax Treaty. The provision was originally inserted to protect former s136 in *ITAA* 1936. It was subsequently regarded as protecting the Australian Commissioner's discretion in the transfer pricing provisions contained in the now repealed *ITAA* 1936 Division 13. It is arguable that the provision is not necessary to protect the operation of Australia's current transfer pricing rules contained in *ITAA* 1997 Sub-div 815-B and Sub-div 815-C. No equivalent provision is contained in the UN Model. No equivalent provision is contained in the 2015 Singapore – South Africa Tax Treaty.

This variation was not contained in the Singapore draft of October 1967. This variation was contained in Article 5(3) of the Australian draft of August 1968.

The original 1969 Treaty contained a deemed source rule in Article 6(2). An identical deemed source rule was contained in Article 5(2) of the Australian draft of August 1968 but was not contained in the Singapore draft of October 1967. A deemed source rule was not included in the version of Article 6 substituted by the 1989 Protocol.

Article 6(3) corresponds with OECD Article 9(2) which, being introduced in the OECD Model in 1977, was not present in the OECD Model in 1969. Article 6(3) was added by the 1989 Protocol. Australian practice in more recent tax treaties varies with the 2010 Australia – Turkey Tax Treaty and the 2015 Australia – Germany Tax Treaty containing an equivalent to OECD Article 9(2) while the 2013 Australia – Switzerland Tax Treaty does not. The 2015 Singapore – South Africa Tax Treaty contains an equivalent to OECD Article 9(2).

Variations from OECD Article 10(1) – Article 8 1969 Australia – Singapore Treaty

Article 8(1) contains a requirement that dividends be 'dividends to which a resident of the other Contracting State is beneficially entitled'. The expression 'beneficially entitled' appeared in Articles 7(1) and 7(2) of the Australian draft of August 1968. The expression 'beneficially entitled' did not appear in Article VI of the Singapore draft of October 1967. The initialled draft of October 1968 corresponded with the Australian draft in this respect.

Either this requirement or a requirement that dividends be 'beneficially owned' by a resident of the other Contracting State or that a resident of the other Contracting State be the 'beneficial owner' of the dividends appears in all currently operative Australian tax treaties. The phrase 'beneficially owned' first appeared in the 1946 Australia-United Kingdom Tax Treaty but did not appear in other Australian tax treaties prior to the 1967 Australia – United Kingdom Tax Treaty. The 1969 Australia-Singapore Tax Treaty was the first Australian Tax Treaty to contain the phrase 'beneficially entitled'. A beneficial ownership requirement is contained in Article 10(2) of the UN Model. A beneficial ownership requirement was inserted in the OECD Model in Article 10(2) in 1977 and the requirement was modified to the current OECD language in 1995. Article 10(2) of the Singapore – South Africa Tax Treaty follows the OECD Model in this respect as do more recent Australian tax treaties. It is likely that in a re-negotiated tax treaty Australia would follow the OECD format in this respect and agree to the beneficial ownership requirement being in Article 10(2) rather than in Article 10(1).

Variations from OECD Article 10(2) – Articles 8(1) and 8(2) 1969 Australia – Singapore Tax Treaty

Under Article 8(1) of the 1969 Treaty a rate of 15% applies for portfolio dividends paid by an Australian company but under Article 8(2) a zero of 0% applies for a dividend paid by a Singaporean or Malaysian company out of Singaporean profits. Several other Australian tax treaties apply different rates for portfolio dividends paid by foreign companies to the rate applying to portfolio dividends paid by Australian companies. The most recent instance of differential treatment was the 1984 Australia – Malta Tax Treaty.

Article 8(2) and Article 8(3) were variations from the OECD Model to accommodate distinctive features of the Singapore corporate – shareholder tax system at the time. Article 7 of the Australian draft of August 1968 was substantially the same as Article 8 of the 1969 Treaty. The dividend article (Article VI) in the Singapore draft of October 1967 differed significantly from Article 8 of the 1969 Treaty. Article VI(1) of the Singapore draft would have limited Australian taxation of dividends paid by an Australian company to a Singapore parent company to 10% of the gross dividend. Article VI(3) of the Singapore draft defined 'parent company' as one that owned not less than 25% of the share capital of the subsidiary company. Article VI(4) of the Singapore draft would have prevented the levying of undistributed profits tax by a source country.

Article 8(2) of the initialled draft of October 1968 followed the Australian draft in so far as it permitted Australian taxation of dividends at source at the rate of 15%. It is clear from subsequent Australian cabinet submission that this was agreed in the initial negotiations in 1968. The initialled draft of October 1968 contained Article 8(2)(b) which corresponded to Article 8(4) in the 1969 Treaty. The subsequent Australian cabinet submission at least strongly implies that this insertion was at the request of Australia. Neither the initialled draft nor the 1969 treaty limit Australian taxation of dividends paid to a 'parent company' to 10% of the gross amount of the dividends. Nor, understandably, do they contain a definition of 'parent company'.

Australia's six most recent tax treaties all limit source taxation of non-portfolio dividends to 5% of the gross amount of the dividend. The 2015 Singapore – South Africa Tax Treaty also sets an upper limit of 5% source taxation of non-portfolio dividends. The 2015 Singapore – South Africa Tax Treaty exempts from South African tax dividends paid by a South African company to the Government of Singapore as defined in the treaty.

The 2009 Australia – New Zealand Tax Treaty, the 2013 Australia – Switzerland Tax Treaty and the 2015 Australia – Germany Tax Treaty, subject to conditions which vary somewhat between these treaties, provide for zero source country taxation of dividends where the beneficial owner of the dividends is a company which holds 80 per cent or more of the voting power of the company paying the dividends. No equivalent provision is contained in the 2019 Australia – Israel Tax Treaty. As Singapore does not levy withholding tax on dividend and as Australia does not levy withholding tax on the franked portion of dividends paid by Australian companies the exemption from source country taxation of dividends would principally be relevant where an Australian company was paying unfranked or partially franked dividends to a Singaporean company that owned 80% of the paying company.

Article 10(2)(b) of the Singapore – South Africa Tax Treaty imposes an upper limit of source taxation of portfolio dividends of 10% on the gross amount of the dividend. The upper limit in the OECD Model is 15%. Australian tax treaties generally following the OECD Model and impose an upper limit of 15% on portfolio dividends.

As noted above, current Australian domestic law does not apply withholding tax to the franked portion of dividends paid by Australian companies and does not tax that portion of such dividends on an assessment basis. As Singapore does not normally impose a withholding tax on dividends, the upper limits for source country taxation of portfolio dividends would only come into operation in those situations (such as the unfranked portion of a dividend paid by an Australian company) where tax is levied under Australian or Singaporean domestic law.

Other Variations from OECD Article 10 – Article 8 1969 Australia – Singapore Tax Treaty

Uniquely among currently operative Australian tax treaties Article 8 of the 1969 Australia-Singapore Tax Treaty does not contain a definition of dividend. Neither the Australian draft of August 1968 nor the Singapore draft of October 1967 contained a definition of 'dividend' nor was a definition of 'dividend' contained in the initialled draft of October 1968.

Not including definition of 'dividend' was Australian tax treaty practice in 1969 and had originated with the 1946 Australia – United Kingdom Tax Treaty. From the 1972 Australia – Germany Tax Treaty onwards Australian tax treaties have contained a definition of dividend but vary the definition in the OECD Model by omitting the reference to omit 'jouissance shares or jouissance rights, mining rights, founders shares' and by a slight variation in the description of the final set of rights referred to. The most recent Australian tax treaty to contain this variation on the definition of dividend in the OECD model was the 2015 Australia – Germany Tax Treaty. The 2019 Australia – Israel Tax Treaty also varies the OECD definition but only by omitting the reference to 'jouissance shares or jouissance rights' and by slight variations in the final set of rights referred to. The 2015 Singapore – South Africa Tax Treaty contains a definition of 'dividend' which differs from the OECD Model in a similar manner.

The 1969 Australia – Singapore Tax Treaty is also the only currently operative Australian tax treaty that does not contain an equivalent of OECD Article 10(5). The Singapore draft of October 1967 did contain OECD Article 10(5). The Australian draft of August 1968 contained Articles 7(4) and (5) which gave exemption treatment for dividends paid to third country residents. Article 8(6) of the 1969 Treaty appears to be an amalgam of Articles7(4) and (5) of the Australian draft of August 1968. The amalgamation appears to have occurred during the initial negotiations and can be seen in Article 8(4)

of the initialled draft of October 1968. Commencing with the 1946 Australia – United Kingdom Tax Treaty it was common for Australian tax treaties not to include an equivalent to OECD Article 10(5) and, in some instances such as in the 1946 Australia – United Kingdom Tax Treaty to contain provisions that expressly allowed Australia to levy undistributed profits tax. The last Australian tax treaty to not contain an equivalent to OECD Article 10(5) was the 1972 Australia – Germany Tax Treaty. The 2015 Singapore – South Africa Tax Treaty contains an equivalent to OECD Article 10(5).

Other variations from OECD Article 10 in 2015 Singapore – South Africa Tax Treaty

Articles 10(4) and (5) of the 2015 Singapore – South Africa Tax Treaty have no equivalent in the OECD Model. Article 10(4) exempts from South African tax dividends paid by a South African company to the Government of Singapore. Article 10(5) is an inclusive definition of the 'Government of Singapore' for the purposes of Article 10(4). No equivalent articles are found in currently operative Australian tax treaties.

The 'main purpose' test in Article 10(8) has no direct equivalent in the 2014 OECD Model and is not found in the dividend article in recent Australian tax treaties. The 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty contain a 'principal purpose' test in Article 23 and Article 22 respectively.

Variations from OECD Article 11 – Article 9 1969 Australia – Singapore Tax Treaty

Neither the Australian draft of August 1968 nor the Singapore draft of October 1967 contained a definition of 'interest'. The definition of 'interest' in the 1969 Treaty was included in the initialled draft of October 1968. The definition in the 1969 Treaty differs in several respects from the OECD Model. Recent Australian tax treaties, such as the 2015 Australia – Germany Tax Treaty also differ from the OECD Model but to a lesser degree. The definition of 'interest' in the 2015 Singapore – South Africa Tax Treaty follows the OECD Model.

The 1969 Australia – Singapore Tax Treaty is the only currently operative Australian tax treaty to not contain an equivalent to OECD Article 11(5). However, Article 17(2) contains a deemed source rule for interest which, while similar, to differs in some respects from the rule in OECD Article 11(5). The Singapore draft of October 1967 did not contain an equivalent to OECD Article 11(5) but Article XVII(2) of the Singapore draft contained a deemed source rule for interest which would have had substantially the same effect as OECD Article 11(5). The Australian draft of August 1968 did not contain an equivalent of OECD Article 11(5). Article 17(3)(c) of the Australian draft of August 1968 contained a deemed source rule for interest and royalties for purposes of the credit article. The deemed source rule in the Australian draft of August 1968 differed significantly from the deemed source rule in the Treaty as signed in 1969 which is reflected in Article 17 of the initialled draft of October 1968. The deemed source rule in the initialled draft of October 1968 and in the Treaty as signed in 1969 applied 'for the purposes of this agreement' not just for the purposes of the credit article, but unlike the current deemed source rule in Article 17 was not expressed to be 'for the purposes of ….the laws of the respective Contracting States relating to tax'. The current deemed source was inserted by the 1989 Protocol. The last Australian tax treaty to not contain an equivalent of OECD Article 11(5) was the 1972 Australia – Germany Tax Treaty. The 2015 Singapore – South Africa Tax Treaty contains an equivalent to OECD Article 11(5).

<u>Variations from OECD Article 11 in recent Australian Tax Treaties and in the 2015 Singapore – South Africa Tax Treaty</u>

The 2015 Singapore – South Africa Tax Treaty imposes a maximum level of source taxation of interest of 7.5%. Australian tax treaties follow the OECD Model in this respect and impose a 10% maximum.

Some recent Australian tax treaties, such as 2013 Australia – Switzerland and 2015 Australia – Germany contain articles exempting interest from source basis taxation where it is derived by particular creditors (typically a Contracting State, a financial institution or a pension fund). No equivalent provision is contained in the OECD Model or in the 1969 Treaty. Australian treaties containing this exemption also containing a provision excluding in interest arising under back to back loans from the exemption. The 2019 Australia – Israel Tax Treaty applies a reduced rate of 5% in these circumstances. The 2015 Singapore – South Africa Tax Treaty also exempts interest paid by or to the Government of a Contracting State and interest arising in respect of a debt instrument issued on a recognised stock exchange. The 2015 Singapore – South Tax Treaty also contains provisions defining the term 'Government' and the term 'registered stock exchange'.

The 'main purpose' test in Article 11(8) has no direct equivalent in the 2014 OECD Model and is not found in the dividend article in recent Australian tax treaties. The 2015 Australia – Germany Tax Treaty contains a 'principal purpose' test in Article 23. The 2019 Australia – Israel Tax Treaty contains a 'principal purpose' test in Article 22.

Variations from OECD Article 12 – Article 10 1969 Australia – Singapore Tax Treaty

<u>Permitting source taxation of royalties</u>

As is the case with all currently operative Australian tax treaties Articles 10(1) and (2) of the 1969 Australia – Singapore Tax Treaty varies OECD Article 12(1) by permitting source taxation of royalties. Prior to the 1967 Australia – United Kingdom Tax Treaty, Australian tax treaties did not set upper limits on source taxation of royalties for those royalties where source taxing rights were retained. The rate in the 1969 Australia – Singapore Tax Treaty at 10% is relatively high by the standards of more recent Australian tax treaties which often limit the rate on royalties to 5%. A rate of 10% was included in Articles 9(1) and (2) of the Australian draft of August 1968 and in Articles 9(1) and (2) of the Singapore draft of October 1967.

The 2009 Australia – New Zealand Tax Treaty, the 2013 Australia – Switzerland Tax Treaty and the 2015 Australia – Germany Tax Treaty all limit source taxation of royalties to 5% of the gross amount of the royalty. The 2010 Australia – Chile Tax Treaty limits source taxation of royalties for the use of, or right to use, any industrial, commercial or scientific equipment to 5% of the gross amount of the royalty and limits source taxation of other royalties to 10% of the gross amount of the royalty. The 2010 Australia – Turkey Tax Treaty limits source taxation of all royalties to 10% of the gross amount of the royalty. Although it is not clear that Australia requested the 5% limit on source taxation of royalties in any of these treaties it is clear that Australia is willing to agree to a 5% limit in negotiations.

The 2015 Singapore – South Africa also varies the OECD Model by permitting source taxation of royalties. The maximum rate of source basis taxation of royalties allowed in the 2015 Singapore – South Africa Tax Treaty is 5%.

<u>The definition of 'royalty'</u>

Australian tax treaties commonly vary the definition of 'royalty' in the OECD Model although no truly consistent pattern is observable in the variations. There are relatively fewer variations in the definition in Article 10(3) of the 1969 Australia – Singapore Tax Treaty than there are in some other Australian tax treaties. Total or partial forbearance in respect of the use or supply of any property or right referred to in Article 10(3) is deemed to be a royalty. Unlike some other Australian tax treaties Article 10(3) expressly excludes certain payments in respect of mines or quarries and certain film and videotape payments from the definition of 'royalty'.

Article 9(4) of the Australian draft of August 1968 contained a definition of 'royalty' which, apart from minor differences of phraseology, differed from the definition in the 1969 Treaty by expressly including payments for motion picture films, films or videotapes and by not excluding literary or artistic copyrights. Article VIII(2) of the Singapore draft of October 1967 also contained a similar but differently worded definition of 'royalty' but which had equivalent exclusions to those that appeared in the 1969 Treaty. The definition of 'royalty' in the October 1968 initialled draft was substantially the same as the definition in the 1969 signed version of the Treaty but did not include the words 'or credits, whether periodical or not, and however described or computed' after 'payments' in Article 10(3).

Uniquely among Australian tax treaties the definition of 'royalty' in the 1969 Australia – Singapore Tax Treaty does not include a reference to 'films or tapes used in radio or television broadcasting'. The definition of 'royalty' in Australia's six most recent tax treaties contains similar language with the 2015 Australia – Germany Tax Treaty using the following more generic terminology:

'(d) the use of, or the right to use:

(i) motion picture films;

(ii) films or audio or video tapes or disks, or any other means of image or sound reproduction or transmission for use in connection with television, radio or other broadcasting;

(e) the use of, or the right to use, some or all of a radio frequency spectrum or band as specified in a spectrum licence of a Contracting State, where the payment or credit arises in that State; or

(f) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.'

The 2019 Australia – Israel Tax Treaty omits paragraph (f) in the definition in the 2015 Australia – Germany Tax Treaty but contains the following additional paragraphs:

f) the use of, or the right to use, industrial, commercial or scientific equipment; or

g) not supplying or granting to another person any property or right referred to in this paragraph.

It is highly likely that Australia would request that a similar language to this be used in the definition of 'royalties' in a renegotiated treaty.

Australia's treaties up to the 2003 Australia – United Kingdom Tax Treaty and the Australia – Chile and Australia – Turkey Tax Treaties include payments 'for the use of, or the right to use industrial,

commercial or scientific equipment' in the definition of royalty. Several of most recent tax treaties do not include these words in the definition of royalty. As noted above the practice of including these words in the definition of royalty was revived in the 2019 Asutralia- Israel Tax Treaty. Hence it is possible that Australia would initiate a request for inclusion of these words in the definition of 'royalty' in a renegotiated treaty with Singapore.

The definition of 'royalty' in the 2015 Singapore – South Africa Tax Treaty follows the OECD Model.

<u>The deemed source rule for 'royalties'</u>

Unlike all other currently operative Australian tax treaties the 1969 Australia – Singapore Tax Treaty does not have a rule, within the royalty article, deeming royalties to have a source where they are borne by a permanent establishment or fixed base in one of the Contracting States. The first Australian tax treaty to contain this deemed source rule was the 1969 Australia – Japan Tax Treaty and the most recent Australian tax treaties to contain the rule have been the 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty. Article 12(5) of the UN Model contains an equivalent deemed source rule. The 2015 Singapore – South Africa Tax Treaty contains an equivalent deemed source rule. Recent Australian case law holds that a deemed source rule of this nature in combination with the provisions of s4(2) the *International Tax Agreements Act* 1953 (Cth) can allow Australia to tax a payment which it would not be able to tax under domestic law in the absence of a tax treaty.[104]

The deemed source rule in the 1969 Treaty is contained in Article 17 which was inserted by the 1989 Protocol. Under that rule profits, income or gains of a resident of a Contracting State which may be taxed in the other Contracting State under Article 4A, Article 5 or Articles 7 to 14 are deemed, for the purposes of the credit article, and of the laws of the Contracting States relating to tax to be from sources in the other Contracting State.

Article 17(3)(c) of the Australian draft of August 1968 contained a deemed source rule for interest and royalties for purposes of the credit article. Article XVII(3) of the Singapore draft of October 1967 contained a deemed source rule for the purposes of the Treaty which simply deemed royalties to be derived from sources within the Contracting State where the property mentioned in the royalty article was situated. As noted above, the deemed source rule that was used in the 1969 Treaty as signed was inserted in the initialled draft of 1968. As noted above, the current deemed source rule was inserted by the 1989 Protocol.

Unlike most currently operative Australian tax treaties the 1969 Australia – Singapore Tax Treaty does not have a deemed source rule that applies where royalties are borne by a permanent establishment or fixed base in a third state. A deemed source rule of this nature was not contained in either the

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[104] *Tech Mahindra Limited v Federal Commissioner of Taxation* (2015) 101 ATR 755; [2015] FCA 1082 (Perry J); and *Satyam Computer Services Ltd v FCT* [2018] FCAFC 172 (Federal Court of Australia, Full Court). The taxpayer's appeal from the decision of Perry J was not upheld and the issue of the effect of the deemed source rule was not raised on that appeal. The taxpayer's application in *Tech Mahindra Ltd* for special leave to appeal to the High Court from the decision of the Full Federal Court was unsuccessful. The taxpayer did not raise the issue of the effect of the deemed source rule in applying for leave to the High Court. The taxpayer's application for special leave to appeal to the High Court was also refused in *Satyam Computer Services Ltd.*

Australian draft of August 1968 nor in the Singapore draft of October 1967. Nor was a deemed source rule of this nature contained in the initialled draft of October 1968. Beginning with the 1976 Australia – Netherlands Tax Treaty this rule applies in 35 currently operative Australian tax treaties with the most recent instances of it being in the 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty. It is likely that Australia will request the inclusion of an equivalent deemed source rule in a renegotiated tax treaty with Singapore. No equivalent rule is contained in the UN Model. The 2015 Singapore South Africa Tax Treaty does not contain and equivalent deemed source rule.

<u>Other variations from the OECD Model in the 2015 Singapore – South Africa Tax Treaty</u>

The 'main purpose' test in Article 12(7) has no direct equivalent in the 2014 OECD Model and is not found in the dividend article in recent Australian tax treaties. The 2015 Australia – Germany Tax Treaty contains a 'principal purpose' test in Article 23 and the 2019 Australia – Israel Tax Treaty contains a 'principal purpose' test in Article. 22.

Variations from OECD Article 13 – Article 10A 1969 Australia – Singapore Tax Treaty

The original 1969 Australia – Singapore Tax Treaty (like Australia's earlier tax treaties) did not contain an alienation of property article. Article 10A was inserted by the 1989 Protocol. Although the Australian draft of August 1968 did not contain an alienation of property article, Article X of the Singapore draft of October 1967 was an alienation of property article. Paragraphs 1 and 2 of Article X of the Singapore draft were substantially the same as OECD Articles 13(1) and (2). Article X of the Singapore draft contained additional paragraphs dealing with gains from the alienation of other capital assets and gains from the alienation of shares,

Article 10A(1) varies from OECD Article 13(1) by referring to 'real property' rather than to 'immovable property'. This variation appears in all but five currently operative Australian tax treaties. The variation first appeared in the 1976 Australia – Netherlands Tax Treaty and most recently appeared in the 2010 Australia – Turkey Tax Treaty. The variation does not appear in the 2013 Australia – Switzerland Tax Treaty nor in the 2015 Australia – Germany Tax Treaty nor in the 2019 Australia – Israel Tax Treaty. The variation does not appear in the UN Model. The 2015 Singapore – South Africa Tax Treaty does not contain this variation.

Article 10A(1) also varies from the OECD Model by referring to 'income or gains' rather than merely to 'gains' as in the OECD Model. This variation appears in eleven other currently operative Australian tax treaties. The first instance of this variation occurred in the 1980 Australia – Switzerland Tax Treaty and the most recent instance of it occurring is in the 2015 Australia – Germany Tax Treaty. This variation is not contained in the UN Model. In addition it may be noted that a further 22 Australian tax treaties refer to 'income, profit or gains', a further eight, including the 2019 Australia – Israel Tax Treaty, refer merely to 'income' and that the Australia – Malaysia Tax Treaty refers to 'profits' and not to 'gains'. None of these variations are contained in the UN Model. None of these variations are contained in the 2015 Singapore – South Africa Tax Treaty.

Like 29 other currently operative Australian tax treaties Article 10A(2) refers to 'independent personal services'. This variation first appeared in the 1979 Australia – Philippines Tax Treaty and most recently appeared in the 2013 Australia – Switzerland Tax Treaty. This variation does not occur in the 2015 Singapore – South Africa Tax Treaty.

Consistently with all but 9 currently operative Australian tax treaties, Article 10A(3) does not refer to 'boats engaged in inland waterways transport'. This variation first appeared in the 1976 Australia – Netherlands Tax Treaty and most recently appeared in the 2019 Australia – Israel Tax Treaty. This variation does not appear in the UN Model. This variation does appear in the 2015 Singapore – South Africa Tax Treaty.

Article 10A(4) refers to 'shares or comparable interests in a company' in contrast to OECD Article 13(4) which refers to 'shares'. The Australian tax treaties Norway, Turkey ,the 2015 treaty with Germany and the 2019 treaty with Israel also contain this variation. The 2006 Australia – Finland Tax Treaty refers to 'shares or comparable interests in an entity'. The Australia – Chile Tax Treaty refers to 'shares or other rights'. Twelve Australian tax treaties refer to interests in partnerships, trusts and other entities. The remainder of Australia's currently operative tax treaties refer to 'interests in a company'. The 2019 Australia – Israel Tax Treaty gives 'interests in a partnership or trust' as examples of comparable interests. Although the UN Model refers to interests in partnerships, trusts or other entities it does not contain any other variations from the OECD Model which appear in currently operative Australian tax treaties. None of these variations appear in the 2015 Singapore – South Africa Tax Treaty.

Article 10A(4) also varies from OECD Article 13(4) by referring to 'shares or comparable interests in a company, the assets of which consist wholly or principally of real property' in contrast to OECD Article 13(4) which refers to 'shares deriving 50 per cent or more of their value directly or indirectly from immovable property'. This variation first appeared in the 1976 Australia – Netherlands Tax Treaty and appears in all but eight currently operative Australian tax treaties. The most recent instance of this variation appearing in an Australian tax treaty was in the 2009 Australia – New Zealand Tax Treaty. This variation does not appear in the UN Model although there are parallels as the UM Model refers to 'property of which consists directly or indirectly principally of immovable property'. Article 13(4) of the 2015 Singapore – South Africa Tax Treaty follows the OECD Model.

In common with all but six currently operative Australian tax treaties Article 10A does not contain an equivalent to OECD Article 13(5). This variation first appeared in the 1976 Australia – Netherlands Tax Treaty and most recently appeared in the 2009 Australia – New Zealand Tax Treaty. The variation does not appear in the 2010 Australia – Turkey Tax Treaty, the 2013 Australia – Switzerland Tax Treaty or the 2015 Australia – Germany Tax Treaty. The 2019 Australia – Israel Tax Treaty contains a modified version of Article 13(5) which preserves the taxing rights of the source state where the alienator is not a beneficial owner of the gains. The 2019 Australia – Israel Tax Treaty also preserves the right of the Contracting State to tax gains where the alienator was a resident during the year of income in which the alienation took place or in was in the preceding five years. Hence recent practice shows that Australia will agree to the inclusion of some variants on Article 13(5) in bi-lateral negotiations. The UN Model does not contain this variation. Article 13(5) does appear in the 2015 Singapore – South Africa Tax Treaty.

The definition of 'real property' is contained in Article 4A(2) which, in common with ten other Australian tax treaties includes rights to exploit or explore natural resources. The first Australian tax treaty to contain this variation was the 1976 Australia – Netherlands Tax Treaty and it most recently appeared in the 2010 Australia – Turkey Tax Treaty. The UN Model does not contain this variation. The 2015 Singapore – South Africa Tax Treaty does not contain this variation.

Article 10A(5) varies from OECD Article 13 by preserving the operation of domestic capital gains legislation in relation to transactions other than those referred to in Article 10A. Equivalent provisions are contained in 25 other currently operative Australian tax treaties. An equivalent provision first appeared in the 1988 Australia – China Tax Treaty while the most recent instance of an equivalent provision was in the 2009 Australia – New Zealand Tax Treaty. The UN Model does not contain an equivalent provision. The 2015 Singapore – South Africa Tax Treaty does not contain this variation.

Variations from OECD Article 17 – Article 12(2) and Article 12(3) 1969 Australia – Singapore Tax Treaty

Articles 12(2) and (3) of the 1969 Australia – Singapore Tax Treaty deal with the taxation of public entertainers. Article 12(2) merely functions to exclude remuneration or other income derived by public entertainers from the operation of Article 12(1) which deals with remuneration or other income derived by an individual in respect of personal, including professional, services. This is in contrast to OECD Article 17(1) which gives a positive right to tax to the state of performance. Article 12(3) largely parallels OECD Article 17 (2) but varies from it by adding a deemed source rule and by exempting from tax in the source State the profits of enterprises substantially supported by public funds of a Government of the residence State in connection with those services. The 1963 Draft OECD Model did not contain an equivalent to Article 17(2).

The Singapore draft of October 1967 had two separate paragraphs in Article 12 dealing separately, but in substantially identical terms, with the situation where an individual was a resident of Singapore and where the individual was a resident of (in this case) Australia. Article 12(3) of the Singapore draft of October 1967 dealt with remuneration of public entertainers. Apart from referring to specific types of remuneration, as opposed to the more general 'remuneration or other income' Article 12(3) of the Singapore draft differed from Article 12(2) of the 1969 Treaty by stating that Articles 12(1) and (2) applied to the remuneration only if the visit were substantially supported by the public funds of the State of performance. By contrast Article 12(2) of the 1969 Treaty states that Article 12(1) shall not apply to remuneration of other income derived by public entertainers from their personal activities as such. Article 12(4) of the Singapore draft of October 1967 had substantially similar effect to Article 12(3) of the 1969 Treaty but used some different language and did not contain a deemed source rule. Article 12 in the Australian draft of August 1968 merely deemed the source of income of public entertainers and athletes to be the place of performance and permitted the state of performance to tax that income.

Article 12(2) of the initialled draft of October 1968 was identical to Article 12(2) of the signed 1969 Treaty. Article 12(3) in the initialled draft of October 1968 was substantially similar to Article 12(3) in the signed 1969 Treaty but was punctuated differently and did not include the following final words in Article 12(3): 'shall be exempt from tax in the other Contracting State'.

Australia's six must recent tax treaties all contain articles that exactly correspond with OECD Articles 17(1) and (2). Hence it is likely that Australia would agree to OECD Articles 17(1) and (2) in a renegotiated treaty. Four of Australia's most recent tax treaties contain an additional paragraph exempting from source State taxation income of entertainers and sportspeople where the visit is wholly or mainly supported by public funds of the resident State or a political subdivision thereof. It is likely that Australia would agree to the insertion of a provision to this effect in a renegotiated treaty but, its absence in some recent Australian tax treaties indicates that Australia would not necessarily

require a provision to this effect in a renegotiated tax treaty. The 2015 Singapore – South Africa Tax Treaty contains an equivalent variation from the OECD Model.

Variations from OECD Article 21 – Articles 16 and 16A 1969 Australia – Singapore Tax Treaty

Prior to the 1980 Australia – Canada Tax Treaty Australian tax treaties did not contain an equivalent to OECD Article 21. The Australian view was that this meant that full source country taxing rights were retained in relation to income not expressly mentioned. Between the 1967 Australia – United Kingdom Tax Treaty and the 1980 Australia – Canada Tax Treaty Australian tax treaties contained an equivalent to Article 16 in the 1969 Australia – Singapore Tax Treaty. Article 16 exempts dual residents who are treaty residents of one of the Contracting States from tax in the source State on any income which the person is subject to tax in the residence State from sources in the residence State or outside both the residence and source States. The 1981 Australia – Sweden Tax Treaty was the last Australia tax treaty to contain an equivalent provision. Neither the October 1967 Singapore Draft nor the August 1968 Australian Draft contained equivalent provisions to either OECD Article 21 or Article 16 of the 1969 Treaty. The initialled draft of October 1968 did not contain an equivalent to OECD Article 21 of the OECD Model but did include Article 16 in identical terms to Article 16 of the signed 1969 Treaty. Article 16 is identical to Article 18 in the 1967 Australia – United Kingdom Tax Treaty. Article 16 of the 1967 Australia – United Kingdom Tax Treaty had been included at the request of Australia in substitution for the equivalent to OECD Article 21.[105] No other currently operative Australian tax treaty contains an equivalent to Article 16 of the 1969 Treaty nor does the 2015 Singapore – South Africa Tax Treaty. It is unlikely that Australia would request that an equivalent to Article 16 of the 1969 Treaty be included in a renegotiated tax treaty with Singapore.

Article 16A of the 1969 Australia – Singapore Tax Treaty was added by the 1989 Protocol. Although both Article 16A and OECD Article 21(1) deal with income not expressly mentioned in the foregoing Articles they have substantially different effects with OECD Article 21(1) giving exclusive taxing rights to the residence State while Article 16A does not limit the taxing rights of either State in relation to such income. All currently operative Australian tax treaties which contain a provision dealing with income not expressly mentioned give the source State the right to tax such income from sources in that State. The most recent Australian tax treaties to contain a provision having this effect were the 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty. The UN Model contains an equivalent provision in Article 21(3). Article 20(2) is an equivalent provision in the 2015 Singapore – South Africa Tax Treaty.

The 1969 Australia – Singapore Tax Treaty does not contain an equivalent to OECD Article 21(2). Five other currently operative Australian tax treaties do not contain an equivalent to OECD Article 21(2) with the most recent instance of this variation being in the 2013 Australia – Switzerland Tax Treaty. The 2015 Australia – Germany Tax Treaty, the 2019 Australia – Israel Tax Treaty and the 2015 Singapore – South Africa Tax Treaty all contain an equivalent to OECD Article 21(2).

The 2019 Australia – Israel Tax Treaty contains the following additional paragraph 21(3):

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[105] See the discussion in C John Taylor, 'The Negotiation and Drafting of the 1967 United Kingdom – Australia Taxation Treaty' in John Tiley, ed., *Studies in the History of Tax Law*, Volume 5, 427 at 480 to 481.

> 3. Where, by reason of a special relationship between the resident referred to in paragraph 1 and some other person, or between both of them and some third person, the amount of the income referred to in that paragraph exceeds the amount (if any) which might have been expected to have been agreed upon between them in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such a case, the excess part of the income shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

An equivalent paragraph has not been included in Australia's other recent tax treaties.

Omission of OECD Article 22

Like all currently operative Australian tax treaties, other than the 2015 Australia – Germany Tax Treaty the 1969 Australia – Singapore Tax Treaty does not contain an equivalent to OECD Article 22. The last Australian tax treaty to omit Article 22 was the 2013 Australia – Switzerland Tax Treaty. The equivalent article in the 2015 Australia – Germany Tax Treaty only applies to Germany and not reciprocally. The Singapore Draft of October 1967 did contain an equivalent to OECD Article 22 but the Australian Draft of August 1968 did not. The initialled draft of October 1968 did not contain an equivalent to OECD Article 22. The 2015 Singapore – South Africa Tax Treaty does not contain an equivalent provision to OECD Article 22. It is likely that Australia and Singapore would agree not to include an equivalent to OECD Article 22 in a renegotiated tax treaty.

Variations from OECD Article 23 – Article 18 1969 Australia-Singapore Tax Treaty

Article 18 was substituted by the 1989 Protocol. Although the article varies significantly from Article 23B of the OECD and UN Models the provision, Article 18(1), relating to Australia providing credit for Singapore tax paid is identical to the equivalent provision in some recent Australian tax treaties (for example, Article 23(1) of the 2010 Australia – Turkey Tax Treaty) and, but for the inclusion of the phrase 'from sources in' is identical to Article 22(1) of the 2015 Australia – Germany Tax Treaty.

Article 21(a) in the 2015 Singapore – South Africa Tax Treaty allows a credit for underlying South African tax for dividends received by a Singapore company owning not less than 10 per cent of the share capital of the paying company has no equivalent in the 2014 OECD Model. Article 18(5) in the 1969 Treaty is an equivalent provision to Article 21(a) of the 2015 Singapore – South Africa Tax Treaty.

A credit for underlying corporate tax is not provided for in recent Australian tax treaties and, except in the case of income attributed under Australia's CFC rules, is not allowed under Australian domestic law. It is possible, however, that Australia might be agreeable to a provision equivalent to Article 21(a) being included in a new Australia – Singapore Tax Treaty while a provision for a credit which did not take into account underlying Singaporean corporate tax would apply to Australian companies receiving dividends from Singaporean companies. This would allow a Singapore resident company holding a non-portfolio shareholding to receive a credit for underlying Australian corporate tax on dividends it receives. As noted above, however, Singapore domestic law allows a credit for underlying corporate tax in certain circumstances where a bi-lateral treaty does not contain a provision having that effect.

Omission of OECD Article 24

The 1969 Australia – Singapore Tax Treaty does not contain an equivalent to OECD Article 24 dealing with non-discrimination. The Singapore Draft of October 1967 did contain a non-discrimination article but the Australian Draft of August 1968 did not. The initialled draft of October 1968 did not contain a non-discrimination article. It is clear from records of the negotiations and from Australian cabinet minutes that the omission of a non-discrimination article was at Australia's request.

Prior to the 2003 Australia – United Kingdom Tax Treaty the Australian policy was not to agree to the non-discrimination article and the only Australian tax treaty to contain a non-discrimination article was the 1982 Australia – United States Tax Treaty and the non-discrimination article in that treaty was not given the force of law in Australia until 2003. Beginning with the 2003 Australia – United Kingdom Tax Treaty most, but not all, Australian tax treaties have contained a non-discrimination article but with considerable variations from OECD Article 24. The 2008 Australia – France Tax Treaty was the most recent Australian tax treaty to not contain a non-discrimination article.

Australia's two most recent tax treaties, 2013 Australia – Switzerland and 2015 Australia – Germany contain minimal variations from OECD Model Article 24 in the non-discrimination article itself but, in the case of the 2013 Australia – Switzerland Tax Treaty, the Protocol states that the non-discrimination article shall not apply to provisions of domestic law 'intended to prevent tax abuse, address thin capitalisation or to ensure that taxes can be effectively collected or recovered'. In the case of the 2015 Australia – Germany Tax Treaty the Protocol only states that the non-discrimination article shall not be construed as requiring a Contracting State to permit cross-border consolidation of income between enterprises. The 2015 Australia – Germany Tax Treaty however contains Article 23, a Limitation of Benefits article in the form of a principal purpose test. Article 23(3) provides:

> '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.'

The Protocol to the 2015 Australia – Germany Tax Treaty lists the domestic law provisions designed to prevent the evasion or avoidance of taxes as including:

> '(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.'

A similar approach is taken in the 2019 Australia – Israel Tax Treaty where the non-discrimination article itself contains only minimal variations from the OECD Model article but includes a 'principal purpose' test in Article 22 and includes the following provision in paragraph 1 of the Protocol:

> 1. In general:
> Nothing in this Convention shall prevent the application of any provision of the laws of a Contracting State which is designed to prevent the avoidance or evasion of taxes, including:
> a) measures designed to address thin capitalisation and dividend stripping;
> b) measures designed to address transfer pricing;
> c) controlled foreign company and transferor trust rules;
> d) measures designed to ensure that taxes can be effectively collected and recovered, including conservancy measures;

e) foreign occupational company rules;
f) in the case of Australia, Part IVA of the Income Tax Assessment Act 1936 or section 67 of the Fringe Benefits Tax Assessment Act 1986;
g) in the case of Israel, Article 86 of the Income Tax Ordinance 5721-1961.

It is likely that in a renegotiated treaty Australia would want to the approach that it adopted in either the 2013 Australia – Switzerland Tax Treaty or in the 2015 Australia – Germany Tax Treaty or 2019 Australia – Israel Tax Treaty.

Article 22, the non-discrimination article in the 2015 Singapore – South Africa Tax Treaty, also contains several variations from Article 24 of the OECD Model. Article 22 omits OECD Article 24(2) as do recent Australian tax treaties. Article 22(2) omits the final sentence of OECD Article 24(3). This variation is not found in recent Australian tax treaties. Article 22(3) of the 2015 Singapore – South Africa Tax Treaty differs from OECD Article 24(4) by omitting the final sentence of that article. This variation is not found in recent Australian tax treaties. Article 22 of the 2015 Singapore – South Africa Tax Treaty also differs from the OECD Model by adding Articles 22(5) and (6) which have no equivalent in the OECD Model and by omitting OECD Article 24(6). None of these variations are found in recent Australian tax treaties.

OECD Article 25 – Mutual Agreement Procedure

The 1969 Treaty contains a short mutual agreement procedure at Article 20. The article differs significantly from the mutual agreement procedure article in the 2014 OECD Model. As recent Australian and Singaporean tax treaties largely follow the 2014 OECD Model Article 25 this report will not discuss the differences between Article 20 of the 1969 Treaty and Article 25 of the 2014 OECD Model.

Article 23, the mutual agreement procedure article of the 2015 Singapore – South Africa Tax Treaty differs from the OECD Model by omitting the arbitration provision in OECD Article 25(5). This omission is consistent with the UN Model. Australian practice in some recent Australian tax treaties (2013 Australia – Switzerland and 2015 Australia – Germany but not 2010 Australia – Turkey) has been to include OECD Article 25(5) although with variations in the case of 2015 Australia – Germany and with additional operational provisions in 2013 Australia – Switzerland (article 24(6)).

Article 23(4) of the 2015 Singapore -South Africa Tax Treaty and Article 25(4) of the 2015 Australia-Germany Tax Treaty both differ from OECD Article 25(4) by omitting all words after ‘directly’ and before ‘for the purpose’ in OECD Article 25(4).

Both 2015 Australia – Germany and 2013 Australia – Switzerland add an additional paragraph relating the circumstances in which a dispute between the Contracting States may be brought before the Council for Trade in Services under the General Agreement on Trade in Services. An equivalent provision is not contained in the 2015 Singapore – South Africa Tax Treaty.

The 2019 Australia – Israel Tax Treaty omits OECD paragraph 5 of OECD Article 25. Paragraph 12 of the Protocol to the 2019 Australia – Israel Tax Treaty states:

> It is agreed that the competent authority of each Contracting State will implement a notification process for cases that are presented by a person to a competent authority under paragraph 1.[106] This process is to be used when the competent authority to which a case is

[106] Here the reference is to Paragraph 1 of Article 25 of the Treaty.

presented does not consider the person's objection to be justified. In such circumstances, the competent authority must notify the other competent authority of the case.

OECD Article 26 – Exchange Of Information

Article 19 of the 1969 Treaty was added by the 2009 Protocol and corresponds exactly with Article 26 of the 2014 OECD Model.

Article 24 of the 2015 Singapore – South Africa Tax Treaty differs from the OECD Model by omitting the last sentence of OECD Article 26(2). This omission is not found in recent Australian tax treaties such as the 2013 Australia – Switzerland Tax Treaty, the 2015 Australia – Germany Tax Treaty, or the 2019 Australia – Israel Tax Treaty.

Article 25(5), the exchange of information article in the 2015 Australia – Switzerland Tax Treaty adds a further sentence concerning the powers of the requested State to enforce the disclosure of information required by Article 25(5). This variation is not found in the 2015 Singapore – South Africa Tax Treaty.

OECD Article 27 – Assistance In Collection

The 1969 Treaty does not include an assistance in collection provision.

The 2015 Singapore – South Africa Tax Treaty varies from the OECD Model by omitting OECD Article 27 dealing with Assistance In Collection Of Taxes. Recent Australian tax practice has been to include OECD Article 27, however, the 2019 Australia – Israel Tax Treaty does not contain an equivalent to OECD Article 27. Hence it is appears that Australia will agree to not including Article 27 in bi-lateral negotiations.

Omission of 2017 OECD Article 29 – Entitlement To Benefits

The 1969 Treaty does not contain an equivalent provision to Article 29 in the 2017 OECD Model. As noted earlier, both the 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty contain a 'principal purpose' test corresponding to Article 29(8) of the 2017 OECD Model. Although the 2015 Singapore – South Africa Tax Treaty does not contain a generic principal purpose test, several articles in that treaty deny treaty benefits where the main purpose or one of the main purposes of an act is to take advantage of treaty benefits under the article in question.[107] As discussed in 6 and 7 below, in adopting the Multilateral Instrument both Australia and Singapore chose to adopt Article 7(4) which corresponds with 2017 OECD Article 29(8) so, as discussed below, the effect will be that the 1969 Treaty will be amended by the addition of Multilateral Instrument Article 7(4).

6. Australia's Adoption Of The OECD Multilateral Instrument

Australia signed the Multilateral Instrument on 7th June 2017[108] and lodged a list of notifications and reservations at the time of signature.[109] Australia lodged its instrument of ratification of the

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107 Articles 10(8), 11(10), 12(7), 18(1) and 19 of the 2015 Singapore – South Africa Tax Treaty.

108 http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

109 The list may be accessed at http://www.oecd.org/tax/treaties/beps-mli-position-australia.pdf

Multilateral Instrument on 26th September 2018.[110] At the time of signing, Australia indicated that it wished 43 of its existing bi-lateral tax treaties to be covered by the Convention. A notable exclusion was Australia's 2015 Tax Treaty with Germany which already contained most of the BEPS Tax Treaty measures that Australia adopted under the Multilateral Instrument. The 2015 Australia – Germany Treaty and the 2019 Australia – Israel Tax Treaty each contained some provisions equivalent to those in the Multilateral Instrument in relation to which Australia entered a reservation in adopting the Multilateral Instrument. Hence in following discussion of Australia's reservations will note where the 2015 Australia – Germany Tax Treaty and/or the 2019 Australia – Israel Tax Treaty contains a provision consistent with the BEPS recommendations on which Australia nonetheless reserved its position on signing the Multilateral Instrument. The existence of these provisions in the 2015 Australia -Germany Tax Treaty and/or the 2019 Australia – Israel Tax Treaty may be an indication that in future bi-lateral negotiations Australia may be willing to adopt equivalent provisions notwithstanding the reservations that Australia entered in adopting the Multilateral Instrument.

In adopting the Multilateral Instrument Australia reserved its position on the following articles:

Article 3: Transparent Entities – Australia reserved the right to not apply Article 3(1) to Covered Agreements (with France and Japan) that already contained an equivalent provision.

Article 4: Dual Resident Entities – Australia reserves the right to replace the last sentence of Article 4(1) with:

> 'In the absence of such agreement, such person shall not be entitled to any relief of exemption from tax provided by the Covered Tax Agreement'.

Article 4(3) of the 2015 Australia – Germany Tax Treaty differed from the BEPS Final Recommendations and the Multilateral Instrument by retaining 'place of effective management' as the initial dual corporate residence tiebreaker and only proceeding to the mutual agreement procedure where place of effective management either cannot be determined or is in a third state. The 2019 Australia – Israel Tax Treaty followed the BEPS Final Recommendation and, as noted above, the corporate residence tiebreaker in that treaty follows the 2017 OECD Model.

Article 9: Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property - Australia reserved the right not to apply Article 9(1)(b) to Covered Agreements that contain a provision of the type described in Article 9(1) that applies to the alienation of interests other than shares (Australia lists 19 Tax Treaties not including the Singapore Treaty).

Australia listed all 43 treaties (including the Singapore Treaty) which contain a provision of the type described in Article 9(1) to which Article 9(1) will apply if all Contracting Jurisdictions have made a notification in relation to that provision.

Article 10: Anti Abuse Rule for Permanent Establishments Situated in Third Jurisdictions – Australia reserved the right for Article 10 in its entirety not to apply to its Covered Agreements.

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110 http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

Article 12: Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies – Australia reserved the right for Article 12 in its entirety not to apply to its Covered Agreements. The 2015 Australia – Germany Tax Treaty contains provisions that are substantially equivalent effect to Article 12 of the Multilateral Instrument.[111] So too does the 2019 Australia – Israel Tax Treaty.[112] Although Australia will clearly agree in particular negotiations to provisions having an equivalent effect to Article 12 of the Multilateral Instrument, it should be noted that what is known as the 'multi national anti-avoidance law' inserted into *Income Tax Assessment Act* 1936 as s177DA arguably has a similar effect Article 12 of the Multilateral Instrument so far as planning has been directed at avoiding Australian taxation of business through artificial avoidance of permanent establishment status. Hence, Australia may be unlikely to argue for the inclusion, in a renegotiated tax treaty, of a provision having substantially equivalent effect to Article 12 of the Multilateral Instrument or Article 5(5) of the 2017 OECD Model.

Article 13: Artificial Avoidance of Permanent Establishment Status through Specific Activity Exemptions – Australia reserved the right not to apply Article 13(2) to Covered Agreements that explicitly state that the list of activities is not a permanent establishment if only each of the activities is of a preliminary or auxiliary character. The list of the three treaties within the scope of this reservation does not include the Singapore Treaty.

Australia listed all of its remaining Covered Agreements (including the Singapore Treaty) as containing a provision described in Article 13(5)(a) that will be replaced by Article 13(2) or (3). As noted below Australia's choice was to apply Article 13(2).

Article 14: Splitting Up Contracts – Australia reserved the right for the entirety of Article 14 not to Covered Agreements relating to the exploration or exploitation of natural resources. Only the Australia – Norway Treaty is listed as being within the scope of this reservation.

Australia listed 10 treaties (not including the Singapore Treaty) which contained a provision of the type described in Article 14(1) that were not the subject of a reservation under Article 14(3)(b).

Article 16: Mutual Agreement Procedure – Australia did not reserve its position under Article 16(5). Hence, where to the extent that the other Contracting State ratifying the MLI has not reserved its position under Article 16(5) then Paragraphs (1) to (3) of the MLI will apply to the tax treaty between the Contracting States.

Pursuant to Article 16(6)(c)(i) of the Multilateral Instrument, Australia listed the 1969 Australia – Singapore Tax Treaty among those of its tax treaties that do not contain a provision described in Article 16(4)(b)(i).

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[111] See the discussion in C John Taylor, 'The 2015 Australia – Germany Tax Treaty, BEPS and the Multilateral Instrument', (2017) 46 *Australian Tax Review* 149.

[112] 2019 Australia – Israel Tax Treaty, Article 5(8).

Pursuant to Article 16(6)(c)(ii) of the Multilateral Instrument, Australia listed the 1969 Australia – Singapore Tax Treaty among those of its tax treaties that do not contain a provision described in Article 16(4)(b)(ii).

Pursuant to Article 16(6)(d)(ii) of the Multilateral Instrument, Australia listed the 1969 Australia – Singapore Tax Treaty among those of its tax treaties that do not contain a provision described in Article 16(4)(c)(ii).

Article 17: Corresponding Adjustments- Australia reserved the right for Article 17 not to apply to Covered Agreements that contain a provision of the type described in Article 17(2). All 43 Covered Agreements are listed including the Singapore Treaty.

Article 19: Mandatory Binding Arbitration – Australia reserved the right for the following provision to apply to its Covered Agreements notwithstanding the other provision of Article 19:

(a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by the Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction;

(b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate.

Article 26: Compatibility – Australia provided a list of Covered Agreements not within the scope of a reservation under Article 26(4) that contain a provision that provides for arbitration of unresolved issues regarding a mutual agreement procedure case. Only the New Zealand and Switzerland treaties are listed.

Article 28: Reservations – Australia formulated the following reservation with respect to the scope of cases that shall be eligible for arbitration under the provision of Part VI:

> 1. Australia reserves the right to exclude from the scope of Part VI any case to the extent that it involves the application of Australia's general anti-avoidance rules contained in Part IVA of the Income Tax Assessment Act 1936 and section 67 of the Fringe Benefits Tax Assessment Act 1986. Australia also reserves the right to extend the scope of the exclusion for Australia's general anti-avoidance rules to any provisions replacing, amending or updating those rules. Australia shall notify the Depositary of any such provisions that involve substantial changes.

In adopting the Multilateral Instrument Australia chose the following options:

Article 18: Choice to Apply Part VI – Australian chose to apply Part VI.

7. Singapore's Adoption Of The OECD Multilateral Instrument

Singapore signed the Multilateral Instrument on 7th June 2017 and lodged its instrument of ratification on 21st December 2018.[113] In adopting the Multilateral Instrument Singapore reserved its position on the following articles:

Article 3: Transparent Entities – Singapore reserved the right to not apply Article 3 to its Covered Agreements.

Article 4: Dual Resident Entities – Singapore reserved the right for Article 4 in its entirety to not apply to its Covered Agreements.

Article 5: Application of Methods for Elimination of Double Taxation – Singapore reserved the right for the entirety of Article 5 to not apply to its Covered Agreements.

Article 8: Dividend Transfer Transactions – Singapore reserved the right for the entirety of Article 8 not to apply to its Covered Agreements.

Article 9: Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property - Singapore reserved the right not to apply Article 9(1)(b) to its Covered Agreements.

Article 10: Anti Abuse Rule for Permanent Establishments Situated in Third Jurisdictions – Singapore reserved the right for Article 10 in its entirety not to apply to its Covered Agreements.

Article 11: Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents - Singapore reserved the right for Article 11 in its entirety not to apply to its Covered Agreements.

Article 12: Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies – Singapore reserved the right for Article 12 in its entirety not to apply to its Covered Agreements.

Article 13: Artificial Avoidance of Permanent Establishment Status through Specific Activity Exemptions – Singapore reserved the right not to apply Article 13(4) to its Covered Agreements.

Article 14: Splitting Up Contracts – Singapore reserved the right for Article 14 in its entirety not to apply to its Covered Agreements.

Article 15: Definition of a Person Closely Related to an Enterprise – Singapore reserved the right for the entirety of Article 15 not to apply to the Covered Tax Agreement to which the reservations described in Article 12(4), Article 13(6)(a) or (c), and Article 14(3)(a) apply.

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113 http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

Article 16: Mutual Agreement Procedure

Singapore reserved the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intended to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified.

Pursuant to Article 16(6)(c)(ii) of the Multilateral Instrument, Singapore listed the 1969 Australia – Singapore Tax Treaty among those of its tax treaties that do not contain a provision described in Article 16(4)(b)(ii).

Pursuant to Article 16(6)(d)(i) of the Multilateral Instrument, Singapore listed the 1969 Treaty among those that do not contain a provision described in Article 16(4)(c)(i).

Pursuant to Article 16(6)(d)(ii) of the Multilateral Instrument, Singapore listed the 1969 Treaty among those that do not contain a provision described in Article 16(4)(c)(ii).

Article 19: Mandatory Binding Arbitration

Singapore reserved the right for the following rules to apply with respect to its Covered Tax Agreements notwithstanding the other provisions of Article 19:

a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by the Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction;

b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate.

Article 23: Type of arbitration process

Singapore reserved the right for Article 23(1) and (2) not to apply with respect to its Covered Tax Agreements with Parties that have made the reservation described in Article 23(2).

Article 26: Compatibility –

Singapore provided a list of Covered Agreements not within the scope of a reservation under Article 26(4) that contain a provision that provides for arbitration of unresolved issues regarding a mutual agreement procedure case. Only the Singapore-Mexico Tax Treaty is listed.

Article 28: Reservations –

Singapore formulated the following reservation with respect to the scope of cases that shall be eligible for arbitration under the provision of Part VI:

> The Republic of Singapore reserves the right to exclude from the scope of Part VI (Arbitration) cases involving the application of its domestic general anti-avoidance rules contained in Section 33 of the Income Tax Act, case law or juridical doctrines. Any subsequent provisions replacing, amending or updating these anti-avoidance rules would also be comprehended. The Republic of Singapore shall notify the Depositary of any such subsequent provisions.

Article 36: Entry into Effect of Part VI

> Singapore reserved the right for Part VI to apply to a case presented to the competent authority of a Contracting Jurisdiction prior to the later of the dates on which the Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement only to the extent that the competent authorities of both Contracting Jurisdictions agree that it will apply to that specific case.

In adopting the Multilateral Instrument Singapore made the following notifications and chose the following options:

Article 17: Corresponding Adjustments-

Singapore considered that the 1969 Australia-Singapore Tax Treaty contained a provision of the type described in Article 17(2).

Article 18: Arbitration

Pursuant to Article 18 Singapore chose to apply Part VI (Arbitration) of the Multilateral Instrument.

Article 23: Type of arbitration process

Pursuant to Article 23(4) of the Multilateral Instrument, Republic of Singapore chose to apply Article 23(5) which provides:

> 5. Prior to the beginning of arbitration proceedings, the competent authorities of the Contracting Jurisdictions to a Covered Tax Agreement shall ensure that each person that presented the case and their advisors agree in writing not to disclose to any other

> person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel. The mutual agreement procedure under the Covered Tax Agreement, as well as the arbitration proceeding under this Part, with respect to the case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a person that presented the case or one of that person's advisors materially breaches that agreement.

Article 24: Agreement on a different resolution

Singapore chose to apply Article 24(2) which provides:

> 2. Notwithstanding paragraph 4 of Article 19 (Mandatory Binding Arbitration), an arbitration decision pursuant to this Part shall not be binding on the Contracting Jurisdictions to a Covered Tax Agreement and shall not be implemented if the competent authorities of the Contracting Jurisdictions agree on a different resolution of all unresolved issues within three calendar months after the arbitration +decision has been delivered to them.

8. Assessment of the likely impact of the Multilateral Instrument on the 1969 Australia – Singapore Taxation Treaty[114]

As a result of the adoption of the Multilateral Instrument by Australia and Singapore the 1969 Australia – Singapore Tax Treaty will be amended as follows:

Multi-lateral Instrument Article 6: Preamble To The Treaty

As both countries have adopted Article 6(1) of the Multilateral Instrument the Preamble to the Treaty will be amended to include the following:

> "Intending to eliminate double taxation with respect to the taxes covered by this agreement 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 jurisdictions),"

Multi-lateral Instrument Article 7: Prevention Of Treaty Abuse

Article 7(1) of the Multilateral Instrument will be incorporated in the Treaty. Article 7(1) reads as follows:

1. Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or 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

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[114] The analysis in the report is consistent with the result obtained under the OECD MLI Matching Database http://www.oecd.org/tax/treaties/mli-matching-database.htm

granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.

As both Australia and Singapore chose to apply Article 7(4) of the Multilateral Instrument it will be included in the Treaty. Article 7(4) reads as follows:

4. Where a benefit under a Covered Tax Agreement is denied to a person under provisions of the Covered Tax Agreement (as it may be modified by this Convention) that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits, the competent authority of the Contracting Jurisdiction that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement. The competent authority of the Contracting Jurisdiction to which a request has been made under this paragraph by a resident of the other Contracting Jurisdiction shall consult with the competent authority of that other Contracting Jurisdiction before rejecting the request.

Multilateral Instrument Article 16: Mutual Agreement Procedure

The first sentence of Article 16(1) will not apply but the remaining sentence in Article 16(1) will apply as will Articles 16(2) and (3). Articles 16(1), (2) and (3) read as follows (the sentence in italic will not apply):

Article 16 – Mutual Agreement Procedure

1. *Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, that person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority of either Contracting Jurisdiction.* 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 Covered Tax 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 Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Covered Tax Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.

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

Multilateral Instrument Article 19: Mandatory Binding Arbitration

The 1969 Treaty will be amended by the inclusion of Articles 19(1) to (10) of the Multilateral Instrument which reads as follows:

1. Where:

a) under a provision of a Covered Tax Agreement (as it may be modified by paragraph 1 of Article 16 (Mutual Agreement Procedure)) that provides that a person may present a case to a competent authority of a Contracting Jurisdiction where that person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement (as it may be modified by the Convention), a person has presented a case to the competent authority of a Contracting Jurisdiction on the basis that the actions of one or both of the Contracting Jurisdictions have resulted for that person in taxation not in accordance with the provisions of the Covered Tax Agreement (as it may be modified by the Convention); and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to a provision of a Covered Tax Agreement (as it may be modified by paragraph 2 of Article 16 (Mutual Agreement Procedure)) that provides that the competent authority shall endeavour to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, within a period of two years beginning on the start date referred to in paragraph 8 or 9, as the case may be (unless, prior to the expiration of that period the competent authorities of the Contracting Jurisdictions have agreed to a different time period with respect to that case and have notified the person who presented the case of such agreement), any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Part, according to any rules or procedures agreed upon by the competent authorities of the Contracting Jurisdictions pursuant to the provisions of paragraph 10.

2. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 because a case with respect to one or more of the same issues is pending before court or administrative tribunal, the period provided in subparagraph b) of paragraph 1 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In addition, where a person who presented a case and a competent authority have agreed to suspend the mutual agreement procedure, the period provided in subparagraph b) of paragraph 1 will stop running until the suspension has been lifted.

3. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the start of the period provided in subparagraph b) of paragraph 1, the period provided in subparagraph b) of paragraph 1 shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

4. a) The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1. The arbitration decision shall be final.

b) The arbitration decision shall be binding on both Contracting Jurisdictions except in the following cases:

i) if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities. The mutual agreement that implements the arbitration decision on the case shall be considered not to be accepted by a person directly affected by the case if any person directly affected by the case does not, within 60 days after the date on which notification of the mutual agreement is sent to the person, withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such issues in a manner consistent with that mutual agreement.

ii) if a final decision of the courts of one of the Contracting Jurisdictions holds that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 1 shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of Articles 21 (Confidentiality of Arbitration Proceedings) and 25 (Costs of Arbitration Proceedings)). In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be permitted.

iii) if a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal.

5. The competent authority that received the initial request for a mutual agreement procedure as described in subparagraph a) of paragraph 1 shall, within two calendar months of receiving the request:

a) send a notification to the person who presented the case that it has received the request; and

b) send a notification of that request, along with a copy of the request, to the competent authority of the other Contracting Jurisdiction.

6. Within three calendar months after a competent authority receives the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other Contracting Jurisdiction) it shall either:

a) notify the person who has presented the case and the other competent authority that it has received the information necessary to undertake substantive consideration of the case; or

b) request additional information from that person for that purpose.

7. Where pursuant to subparagraph b) of paragraph 6, one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the

additional information shall, within three calendar months of receiving the additional information from that person, notify that person and the other competent authority either:

a) that it has received the requested information; or

b) that some of the requested information is still missing.

8. Where neither competent authority has requested additional information pursuant to subparagraph b) of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

a) the date on which both competent authorities have notified the person who presented the case pursuant to subparagraph a) of paragraph 6; and

b) the date that is three calendar months after the notification to the competent authority of the other Contracting Jurisdiction pursuant to subparagraph b) of paragraph 5.

9. Where additional information has been requested pursuant to subparagraph b) of paragraph 6, the start date referred to in paragraph 1 shall be the earlier of:

a) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to subparagraph a) of paragraph 7; and

b) the date that is three calendar months after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in subparagraph b) of paragraph 7, such notification shall be treated as a request for additional information under subparagraph b) of paragraph 6.

In addition both Australia and Singapore have chosen to adopt the following provision which will be added to the 1969 Treaty:

a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by the Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction;

b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate.

9. Conclusions and Recommendations

Changes in the domestic tax law of both countries relevant to cross border trade and investment since the signing of the 1969 Treaty and the two protocols along with the increased significance of the two-way trade and investment relationship between them provide a strong case for the negotiation of a new bi-lateral tax treaty between Singapore and Australia.

The analysis in sections 5 demonstrated that the 1969 Treaty (as amended by the 1989 and 2009 Protocols) varies significantly from: (a) the 2014 OECD Model; (b) recent Australian tax treaty practice; and (c) recent Singaporean tax treaty practice. Nonetheless the 1969 Treaty contains some variations from the 2014 and 2017 OECD Models and from recent Singaporean tax treaty practice that are consistent with recent Australian tax treaty practice. Sections 6 to 8 also demonstrated that the Multilateral Instrument will have minimal impact on the treaty due to the limited degree of overlap between the articles on which both countries did not reserve their position. Hence, any more significant changes from the 1969 Treaty would have to be the product of bi-lateral negotiations between Singapore and Australia. Given the extent of the divergence of the 1969 Treaty from the 2017 OECD Model a renegotiated treaty based on the 2017 OECD Model would be highly desirable as it would enable more confident use to be made of the OECD Commentaries in interpretation and, hence, would provide greater certainty for business and investors.[115]

The 2015 Australia – Germany Tax Treaty and the 2019 Australia – Israel Tax Treaty read in conjunction with Australia's position on the Multilateral Instrument provide the best indication of changes from the 1969 Treaty that Australia would argue for in a new treaty with Singapore.

Based on the analysis above the following chart summarises the likely form that a renegotiated treaty between Australia and Singapore would take if it were based on the 2017 OECD Model but took into account Australian and Singaporean tax treaty practice, the effect of the multi-lateral instrument and Australia and Singapore's reservations on the multi-lateral instrument. The chart also notes where a renegotiated treaty based on the 2017 OECD Model would amount to a variation from the 1969 Treaty.

[115] For an argument that Australian 'exceptionalism' in drafting curtails the usefulness of the OECD Commentaries in interpreting Australian tax treaties such as the 1969 Treaty see R J Vann, 'Australia's Future Tax Treaty Policy' in Chris Evans and Richard Krever (eds), Australian Business Tax Reform in Retrospect and Prospect (Thomson Reuters, 2009) 401– 16.

2017 OECD Model Article	Singapore Tax Treaty Practice	Australian Tax Treaty Practice	1969 Treaty	Impact of MLI & Likely Outcome in a renegotiated treaty
Preamble	2015 Singapore – South Africa Tax Treaty is not in 2017 OECD format	2015 Australia-Germany Tax Treaty and 2019 Australia – Israel Tax Treaty adopt	Not in the 2017 OECD format	Will be amended as per Article 6(1) of MLI Likely that a renegotiated treaty would contain 2017 OECD Preamble
Article 1(1)	Recent treaties follow	Recent treaties follow	1969 Treaty follows OECD	Likely that a renegotiated treaty would adopt OECD Article 1(1)
Article 1(2)	No equivalent provision in recent treaties	2015 Australia – Germany and 2019 Australia – Israel includeequivalents	Not in 1969 Treaty	Australia only reserved on 3(1) in relation to treaties that contained provisions dealing with transparent entities in some respects. Singapore reserved its position on Article 3 in its entirety. Australia is likely to argue for some form of transparent entity provision. Australian tax treaties with France (2006), Japan (2008) contain other forms of provision relating to transparent entities.
Article 2(1)	Recent treaties include	Many treaties do not include but is included in (2013) Switzerland and in (2015) Germany	Not in 1969 Treaty	Possibly not in Australian model but Australia likely to agree to inclusion.
Article 2(2)	Recent treaties include a variant	Until the 2019 Australia – Israel Tax Treaty, Australian tax treaties did not include Article 2(2). The 2019 Australia – Israel Tax Treaty does	Not in 1969 Treaty	Australia might agree to including Article 2(2) or a variant on Article 2(2).

		include OECD Article 2(2).		
Article 3	Largely follow OECD Model but definitions can differ between tax treaties	Largely follow OECD Model but definitions can differ between tax treaties	Definitions differ from current OECD Model. Defines 'profits of a Singapore enterprise' and 'profits of an Australian enterprise' terms which exclude particular categories of income. This is not longer practice in either Australia or Singapore.	Definitions will largely follow OECD Model but may be variations owing to particular features of the bi-lateral relationship.
Article 4	Largely follows OECD but omits final sentence of Article 4(1).	Usual Australian practice is to regard as a treaty resident a person who is a resident of the Contracting State for the purposes of its tax law.	Definitions of 'resident' and of 'Australian company' are unique in Australian tax treaties and no longer reflect practice in either Australia or Singapore.	As discussed above, Australia's reservation on Article 4(1) only related to the last sentence. Singapore reserved its position on Article 4 in its entirety. Australia is likely to argue for the Australian approach to defining a treaty resident to apply. Australia is also likely to argue for the corporate dual residence tiebreaker to align with MLI Article 4(1). The corporate dual residence tiebreaker in the (2015) Germany tax treaty might be a compromise that Australia would agree to.

Article 5(2)	2015 Singapore – South Africa Tax Treaty follows OECD Model.	Australian practice is to add 'agricultural, pastoral or forestry property' to the list of examples. Most recent Australian practice is to tax income from the exploitation of land for primary production under Article 6.	'agricultural, pastoral or forestry property' is not included in the list of examples.	Australia will request that this addition be made to the list of examples but should agree to tax income from primary production land under Article 6.
Article 5(3)	2015 Singapore – South Africa Tax Treaty and Singapore's reservation on Article 5(3) both include a reference to 'assembly project' and connected 'supervisory activities'	Australian tax treaties have included a reference to 'assembly project' and 'supervisory activities' and have shortened the time period. The 2013 Australia – Switzerland and 2015 Australia – Germany Tax Treaties do not deem 'supervisory activities' of themselves to be permanent establishments but deem the income from them to be attributable to the site or project permanent establishment. In the 2015 Australia – Germany Tax Treaty 'connected activities' were aggregated for the purpose of determining whether time thresholds were met.	Refers to a 'combination of' a building site, or construction or installation or assembly project' and aggregating more than 6 months in a 12 month period. Refers to 'connected supervisory activities' in relation to the above building sites or projects for the same time period.	Likely that Singapore will ask for 'assembly project' to be included and for connected supervisory activities to be included. Australia has agreed to these provisions in the past and may be likely to do so. Australia, however, might prefer the approach adopted in the 2015 Australia – Germany Tax Treaty. Australia will likely agree to the approach on 'connected activities' in the 2015 Australia – Germany Tax Treaty.
Article 5(3) Australian	2015 Singapore – South Africa Tax	Except for the 1992 Australia –	Substantial equipment	Australia is likely to request the inclusion

special provision on 'substantial equipment'	Treaty does not contain a substantial equipment provision	Indonesia Tax Treaty, all currently operative Australian tax treaties contain a 'substantial equipment' provision which from 2006 onwards is confined to deeming the 'operation' as distinct from the passive use of equipment to be a permanent establishment. The deeming is consistent with Australia's reservation on OECD Article 5(3).	provision contained in Article 4(3)(b),	of a 'substantial equipment' provision similar to the one in the 2015 Australia – Germany Tax Treaty. Singapore would have difficulty persuading Australia to agree to this provision not being included.
MLI Article 14 Aggregation of time periods of 'connected activities' in determining if time thresholds satisfied. Alternative provision in Paragraph 52 OECD Commentary	Singapore reserved its position MLI Article 14 and 2015 Singapore – South Africa Tax Treaty does not contain an equivalent provision.	Australia only reserved its position under MLI Article 14(3)(b) in relation to exploration or exploitation of natural resources. 2015 Australia – Germany Tax Treaty contains an equivalent provision.	No direct equivalent in 1969 Treaty	Likely that Australia in a renegotiated treaty will request inclusion of equivalent to MLI Article 14.
Singapore's reservation on 2017 OECD Article 5(3); the Service PE.	Singapore reserves the right to include a 'service PE' provision	Australia did not make an equivalent reservation but some Australian tax treaties include a 'service PE' provision.	No equivalent in 1969 Treaty	Singapore is likely to request the inclusion of a 'service PE' provision. Australia is likely to agree to this request given the presence of 'service PE' provisions in some of its tax treaties.
Article 5(4) inclusion of examples of	2015 Singapore – South Africa Tax Treaty does not	Most Australian tax treaties contain this	Article 4(4)(e) contains examples of	MLI will mean that equivalent to MLI Article 13(2) is

preparatory or auxiliary activities. Issue is dealt with under 2017 OECD Article 5(4) and MLI Article 13(2)	contain this variation. Singapore on signing MLI did not reserve its position on Article 13(2).	variation. It most recently appeared in the 2013 Australia – Switzerland Tax Treaty. Equivalent approach to 2017 OECD Article 5(4) and MLI Article 13(2) taken in 2015 Australia – Germany Tax Treaty.	preparatory or auxiliary activities.	inserted in 1969 Treaty. On renegotiated treaty likely that both parties will agree to 2017 OECD Article 5(4).
2017 OECD Article 5(5) and Article 5(6).	Singapore reserved the right to use the pre 2017 version of Article 5(5) and Article 5(6).	Australia did not reserve its position on the 2017 OECD Article 5(5) and the 2015 Australia – Germany Tax Treaty contains an equivalent provision	Dependent agent provision in Article 4(5) does not include features introduced in OECD 2017 Articles 5(5) and (6).	MLI Article 12 Both Australia and Singapore reserved the right to not apply Article 12 to their Covered Tax Agreements The 1969 Treaty will not be amended by Article 12 of the MLI> For a renegotiated treaty Australia will presumably argue that 2017 OECD Articles 5(5) and 5(6) should be adopted. Australia would not be particularly concerned if the 2017 version of these articles were not adopted as the anti avoidance provisions in domestic law in s177DA serve a similar function. It may be Singapore's advantage to agree to 2017 Articles 5(5) and 5(6) as a means of limiting the operation of s177DA.

Article 5(5) Australian addition: dependent agent manufacturing or processing goods deemed to be PE in certain circumstances.	No equivalent in the 2015 Singapore – South Africa Tax Treaty	Article has been included in every Australian tax treaty including 2015 Australia – Germany Tax Treaty	Article 4(5)(d) is a provision to this effect.	Likely that Australia will request the inclusion of this provision.
Article 6 Income from immovable property. Australian variations on definition and inclusion of situs rule.	2015 Singapore – South Africa Tax Treaty follows OECD Model.	Australia reserves the right to tax income from natural resources under Article 6. Most Australian tax treaties vary the definition of 'immovable property' particularly to include rights in relation to certain natural resources. Australian tax treaties also contain a situs rule in relation to interests or rights constituting immovable property.	Article 4A refers to 'income from real property' and definition includes rights in relation to certain natural resources. Article 4A(4) applies the provisions of Articles 4A(1) and (2) to income from real property used for the performance of professional services.	Australia is likely to request that a definition and situs rule similar to the definition and situs rule in the 2015 Australia – Germany Tax Treaty be included.
Article 7	Singapore reserves the right to use the pre 2010 OECD version of Article 7 in its tax treaties subject to reservations below.	Australia reserves the right to use the pre 2010 OECD version of Article 7 in its tax treaties subject to reservations below.	Broadly follows the pre 2010 version of Article 7	In a renegotiated tax treaty Australia and Singapore are likely to adopt the pre 2010 OECD version of Article 7 subject to the differences noted below.
Article 7(4)	2015 Singapore – South Africa Tax Treaty does not contain pre 2010 OECD Article 7(4)	Australian practice is not to include pre 2010 OECD Article 7(4).	No equivalent to OECD Article 7(4) contained in 1969 Treaty.	In a renegotiated tax treaty Australia and Singapore are likely to exclude pre 2010 OECD Article 7(4).
Article 7(6)	2015 Singapore – South Africa Tax Treaty contains	Most Australian tax treaties omit pre 2010 OECD Article 7(6).	No equivalent to OECD Article 7(6) is	Australia is likely to request that Article 7(6) but it has agreed to its inclusion in 9 of

	pre 2010 OECD Article 7(6).		contained in 1969 Treaty.	its currently operative tax treaties.
Article 7 Australian special provision – saving provision for domestic law in situations where information inadequate to determine arm's length	2015 Singapore - South Africa Tax Treaty does not contain an equivalent provision.	Australia reserves the right to include a provision to this effect in Article 7. In the 2015 Australia – Germany Tax Treaty the issue is dealt with via the principal purpose test and by listing Australian transfer pricing provisions among the domestic law provisions whose operation is preserved.	Savings provision is contained in Article 5(5).	Australia is likely to ask for the inclusion of a provision to this effect and may be agreeable to following the approach adopted in the 2015 Australia – Germany Tax Treaty.
Article 7 Australian saving provision for domestic law in relation to insurance	2015 Singapore – South Africa Tax Treaty does not contain an equivalent provision.	All Australian tax treaties, except the treaty with Chile, contain a provision preserving the operation of domestic law in relation to insurance. Some treaties confine its operation to non life insurance business.	Article 5(7) is a savings provision for domestic law relating to insurance with non-residents.	Australia will be likely to request the inclusion of such a provision but may agree to confine its operation to businesses other than life insurance.
Article 7 Australian provision attribution to beneficiaries of profits of PE operated through a trust	2015 Singapore – South Africa Tax Treaty does not contain an equivalent provision.	Most, but not all, Australian tax treaties contain an equivalent provision and it is consistent with an Australian reservation to pre 2010 OECD Article 7. The most recent instance is in the 2015 Australia – Germany Tax Treaty	Article 5(8) has this effect.	Australia is likely to request that a provision to this effect. Singapore will be able to point to the number of instances where Australia has not included a provision to this effect in its currently operative tax treaties.

OECD 2014 Article 8(1) 2017 OECD Article 8 no consistent with Australian and Singapore practice	Right of tax lies with the state of residence of person carrying on an enterprise.	Right to tax lies with the state of residence of the taxpayer deriving the profits.	Article 7(1) of 1969 Treaty has this effect	Singapore and Australia likely to agree that right to tax will not lie with place of effective management of the enterprise. Australia will argue for right to tax being with state of residence of the taxpayer and this will have substantially the same effect as recent Singaporean provisions have. This will be consistent with 2017 OECD Model
OECD 2014 Article 8(2)	Paragraph is omitted	Paragraph is usually omitted	Paragraph is omitted	Paragraph likely to be omitted.
OECD 2014 Article 8(3)	Paragraph is omitted	Paragraph is omitted	Paragraph is omitted	Paragraph likely to be omitted.
Article 8 Special Australian provision shipping and aircraft profits from within a Contracting State.	Not in recent treaties.	Australian tax treaties all contain a provision permitting source taxation of shipping and aircraft profits where the shipping and discharge both occur in the source country.	Article 7(2) is a provision to this effect. Article 7(5) defines profits from operations of ships and aircraft solely within source state.	Australia is likely to argue for the inclusion of a provision to this effect.
Article 8 Special Australian provision on container leasing	Not in Singapore tax treaties.	2015 German treaty is the most recent	Not present in 1969 Treaty.	Australia likely to argue for the inclusion of a container leasing provision.
Article 8 Special Singaporean provision – bare boat charters	In (2015) South Africa Tax Treaty.	Not in recent Australian tax treaties.	Not present in 1969 Treaty	Singapore likely to argue inclusion of a provision on bare boat charters.
Article 9	Recent treaties generally follow OECD	Recent treaties generally follow OECD subject to exceptions noted below	Article 6 generally follows OECD subject to	Likely to follow OECD subject to issues discussed below

			exceptions noted below.	
Article 9(2)	In (2015) South Africa Tax Treaty	Practice varies but 9(2) included in (2010) Turkey Tax Treaty and (2015) Germany Tax Treaty	Article 6(3) is an equivalent provision.	Likely that Australia would agree to include Article 9(2).
Article 9 Special Australian provision preserving the operation of domestic law where information inadequate to determine income to be attributed.	Not in recent Singaporean tax treaties.	In all Australian tax treaties but different approach taken in (2015) German Treaty where operation of domestic anti-avoidance laws is preserved through the principal purpose test	Article 6(2) is a savings provision for domestic law where information is inadequate to establish arm's length.	Australia will argue for some form of provision preserving the operation of domestic anti-avoidance laws and may agree to deal with this in a principal purpose test.
Article 10	Recent treaties generally follow OECD subject to items noted below	Recent treaties generally follow OECD subject to items noted below	1969 Treaty broadly consistent with OECD Model subject to variations noted below	Likely will follow OECD subject to items noted below.
Article 10(2)	Singapore – South Africa exempts from South African tax dividends paid by a South African company to the Government of Singapore as defined in the treaty	No equivalent provision in Australian tax treaties.	Equivalent not contained in 1969 Treaty. Article 8(2) of 1969 Treaty exempts dividends paid by Singapore company from withholding tax.	Exemption would only be relevant for unfranked portion of dividends paid by Australian companies that did not represent conduit foreign source income. Australia unlikely to agree to this provision but possibly could if there were to be a matching concession by Singapore.
Article 10 Special Australian provision	Not in recent Singaporean tax treaties.	Several recent Australian tax treaties provide for zero source taxation of inter-corporate dividends where beneficial owner	Not in 1969 Treaty.	Australia unlikely to ask for inclusion of this provision but would probably have to agree to it if asked by Singapore.

		has 80% or more of voting power in the paying company.		
Article 10(2)	Upper limit of source taxation of portfolio dividends in recent Singaporean tax treaties is 10%.	Upper limit of source taxation of portfolio dividends in recent Australian tax treaties is 15%.	Article 8(1) sets 15% as upper limit for all dividends paid by Australian company.	Limit would only be relevant where dividend is otherwise subject to tax under domestic law. Australia has on occasions in the past agreed to a lower limit for source taxation of portfolio dividends.
Article 10(3)	Recent Singaporean tax treaties omit 'jouissance shares or jouissance rights, mining rights, founders shares' from the definition of 'dividend'	Recent Australian tax treaties omit Recent Singaporean tax treaties omit 'jouissance shares or jouissance rights, mining rights, founders shares' from the definition of 'dividend'	1969 Treaty does not contain a definition of 'dividend'.	Likely that Article 10(3) would be varied by omitting reference to 'jouissance shares or jouissance rights, mining rights, founders shares' from the definition of 'dividend'
Article 10(5)	Current practice is to include Article 10(5).	Current practice is to include Article 10(5).	No equivalent to OECD Article 10(5) is contained in 1969 Treaty	Article 10(5) would be likely to be included in a renegotiated tax treaty.
Article 11	Recent treaties follow OECD	Recent treaties largely follow OECD subject to aspects noted below.	Subject to exception noted below largely follows OECD Model	Likely will largely follow OECD subject to aspects noted below.
Article 11(3) Definition of interest	Recent treaties follow OECD	Definition in recent Australian tax treaties differs from OECD definition in some respects		Australia is likely to argue for its variations to the OECD definition.
Rate of source tax on interest	2015 Singapore – South Africa Tax Treaty has a maximum of 7.5%.	Australian tax treaties (subject to exemptions discussed below) impose of 10% maximum.	10% maximum imposed subject to exceptions.	Likely Australia will argue for a 10% maximum as consistent with the OECD but has at times agreed to a lower rate.

Special provisions in Australian and Singaporean tax treaties exempting interest paid to certain creditors	Exemption in 2015 South African treaty for interest paid to a Government of a Contracting State or arising from a debt instrument issued on a recognised stock exchange.	Australian tax treaties have exempted interested paid to a Contracting State or to a financial institution or pension fund. Australian domestic law exempts interest paid on widely held debentures.	No equivalent in 1969 Treaty.	Likely that interest paid to the Government of a Contracting State will be exempt as will interest arising from a debt instrument issued on a recognised stock exchange. Australia is likely to argue for exemption for interest
Article 11(5)	Current practice is to include Article 11(5).	Current practice is to include Article 11(5).	No equivalent to OECD Article 11(5) contained in 1969 Treaty	Likely that Article 11(5) would be included in a renegotiated tax treaty.
Article 12	Subject to the variation to Article 12(1) follows the OECD Model	Subject to important variations follows the OECD Model.	Subject to important variations follows the OECD Model.	Likely will largely follow the OECD Model subject to several variations to be negotiated. Most importantly is likely to permit source taxation of royalties.
Article 12(1)	Singaporean tax treaties permit source taxation of royalties. Currently at a 5% rate.	Recent Australian tax treaties permit source taxation of royalties at a 5% rate.	Source taxation of royalties at a rate of 10% permitted.	Likely that source taxation of royalties at a 5% rate will be agreed on.
Article 12(2) definition of 'royalty'	Definition in 2015 Singapore – South Africa Tax Treaty follows the OECD Model	Australian tax treaties broaden the definition of 'royalty'. The definition in the 2015 Australia – Germany Tax Treaty is the most recent Australian definition.	Varies the OECD definition of 'royalty'. Uniquely in Australian tax treaties the definition does not include a reference to 'films or audio or video tapes or disks used in radio or television broadcasting.'	Australia is likely to argue for broader definition of 'royalty' consistent that it recent Australian tax treaties such as the 2015 Australia – Germany Tax Treaty
Special Australian provision	Not in recent Singaporean Tax Treaties	Contained in 35 currently operative	Deemed source rule not contained in	Australia likely to request inclusion of this provision

deemed source rule for royalties borne by PE or fixed base in third state		Australian tax treaties most recently in 2015 Australia – Germany Tax Treaty	royalty article but is contained in Article 17 for the purposes of the credit article.	
Article 13(1)	2015 Singapore – South Africa Tax Treaty follows OECD	Some recent Australian treaties eg 2010 Australia – Turkey vary OECD by substituting 'real property' for immovable property'. These variations do not appear in the 2013 Australia – Switzerland Tax Treaty nor in the 2015 Australia – Germany Tax Treaty	Article 10A refers to 'real property'.	Australia may argue for the variation found in the 2010 Australia – Turkey Tax Treaty but the 2013 Australia – Switzerland and 2015 Australia – Germany Tax Treaties show that Australia is prepared to follow OECD in this respect.
Article 13(1)	2015 Singapore - South Africa Tax Treaty follows OECD Model	Several Australian treaties, most recently 2015 Australia – Germany substitute 'income or gains' for 'gains' in the OECD Model. Other Australian treaties use 'income, profits or gains'	Article 10A refers to 'income or gains'.	Australia is likely to request that either 'income or gains' or 'income, profits or gains' be used.
Article 13(2)	2015 Singapore - South Africa Tax Treaty follows OECD Model	Several Australian tax treaties include a reference to 'independent personal services' but this reference does not appear in 2015 Australia – Germany Tax Treaty	Article 10A(2) refers to 'independent personal services'	Australia may request inclusion of refence to 'independent personal services' but 2015 Australia - Germany Tax Treaty shows that Australia is prepared to follow OECD Model in this respect.
Article 13(3)	2015 Singapore - South Africa does not refer to 'boats engaged in inland waterways transport'	9 currently operative Australian tax treaties, most recently 2015 Australia –	Article 10A does not refer to 'boats engaged in inland	Likely that both countries will agree to remove reference to 'boats engaged in inland waterways transport'

		Germany Tax Treaty do not refer to 'boats engaged in inland waterways transport'	waterways transport'	
Article 13(4)	2015 Singapore – South Africa follows OECD Model	Several Australian treaties expand the reference to 'shares' to a wider class of interests. The most recent usage is 'shares or comparable interests' in the 2015 Australia – Germany Tax Treaty	Article 10A(4) refers to 'shares or comparable interests'.	Likely that Australia will request that Article 13(4) refer to 'shares or comparable interests'.
Article 13(4)	2015 Singapore – South Africa follows OECD Model	Some Australian tax treaties refer to 'shares or comparable interests in a company, the assets of which consist wholly or principally of real property' but the last Australian tax treaty to contain this variation was the 2009 Australia – New Zealand Tax Treaty	Article 10A(4) contains this variation.	Unlikely that Australia will request this variation and 2015 Australia – Germany Tax Treaty shows that it is prepared to agree to the OECD Model in this respect.
Article 13(5)	2015 Singapore – South Africa follows OECD Model	Several Australian tax treaties do not contain Article 13(5) but Australia's three most recent tax treaties do contain Article 13(5).	The 1969 Treaty does not contain Article 13(5).	Australia is likely to agree to the inclusion of Article 13(5).
Article 13 Special Australian provision	Not in Singapore tax treaties	Several Australian tax treaties preserve the operation of domestic capital gains law in relation to transactions other	Article 10A(5) preserves the operation of domestic law in relation to transactions other than those referred	Australia is likely to request a provision preserving the operation of domestic capital gains tax law in relation to transactions other

		than those referred to in Article 13. The most recent example of this provision is the 2009 Australia – New Zealand Tax Treaty	to in Article 10A.	than those referred to in Article 13 but recent Australian tax treaties show that it is prepared to not include such a provision.
Article 17(1) and (2) Public Entertainers	2015 Singapore – South Africa follows OECD	Australia's 5 most recent tax treaties follow OECD	Article 12(2) merely excludes income of public entertainers from scope of Article 12(1) dealing with personal, including professional, services.	Likely that a renegotiated tax treaty would follow OECD Article 17(1) and(2).
Article 17 Special provision exempting from source basis taxation where visit mainly supported by public funds of the resident State or a political subdivision	Provision to this effect contained in 2015 Singapore – South Africa Tax Treaty	Provision to this effect contained in 3 of Australia's 5 most recent tax treaties	Article 12(3) contains a rule to this effect and also contains a deemed source rule.	Clearly both countries may be agreeable to including a provision to this effect. It is unclear whether either of them will request its inclusion.
Article 21(1) and (2)	2015 Singapore – South Africa Tax Treaty contains equivalents to OECD 21(1) and (2).	Five currently operative Australian tax treaties do not contain an equivalent to OECD Article 21(2). The most recent instance of this variation was the 2013 Switzerland – Australian Tax Treaty.	Article 16A is an equivalent to OECD Article 21(1). The 1969 Treaty does not contain an equivalent to OECD Article 21(2). Article 16 is no longer part of	2015 Australia – Germany Tax Treaty shows that Australia is prepared to agree to OECD Article 21(1) and (2).

			Australian tax treaty practice.	
UN Article 21(3)	2015 Singapore – South Africa contains an equivalent to UN Model Article 21(3).	All currently operative Australian tax treaties contain an equivalent provision to UN Article 21(3).	The 1969 Treaty contains an equivalent article to UN Article 21(3).	Likely that a renegotiated tax treaty would contain an equivalent to UN Article 21(3).
OECD Article 22	2015 Singapore – South Africa does not contain an equivalent provision.	Only the 2015 Australia – Germany Tax Treaty contains an equivalent provision.	The 1969 Treaty does not contain an equivalent to OECD Article 22.	Likely that a renegotiated tax treaty would not contain an equivalent to OECD article 22
Article 23	Article 23(1) of the 2015 Singapore – South Africa tax treaty has an equivalent substantive effect to OECD Article 23(1). Note that in Articles 23(1) and (2) in the 2015 Singapore – South Africa Tax Treaty the granting of the credit is subject to the laws of each country relating ot the granting of credit.	Australian tax treaties contain more significant variations from the credit article in the OECD Model. In all cases the granting of credit is subject to Australian law relating to the granting of credit. The credit provided is always against Australian tax payable on the income. The Australian interpretation of this provision is that, where Australian domestic law exempts an item of foreign source income the credit article in the tax treaty does not operate.	Article 18 is consistent with the variations from OECD Article 23 in other Australian tax treaties.	Likely that the credit article in a renegotiated tax treaty would contain a provision having a substantially equivalent effect to OECD Article 23(1) with Australian and Singaporean variations noted in columns 1 and 2 of this table.
Article 23(2) OECD Model	2015 Singapore - South Africa Tax Treaty does not contain an equivalent provision to OECD Model 23(2).	No Australian tax treaties contain equivalent provisions to OECD Article 23(2).	The 1969 Treaty does not contain an equivalent provision.	Likely that a renegotiated tax treaty would contain an equivalent provision to OECD Article 23(2).

Article 23 Singapore special provision. Credit for underlying corporate tax.	Under the credit article in the 2015 Singapore – South Africa Tax Treaty Singapore will allow a credit for underlying South African corporate tax on the profits that funded a non-portfolio dividend paid to a Singaporean company.	Recent Australian tax treaties do not allow a credit for underlying corporate tax on non-portfolio dividends. Australian domestic law only allows a credit for underlying corporate tax where Australia's CFC rules have attributed the underlying foreign corporate income to an Australian taxpayer.	Article 18(5) allows a credit for underlying Australian tax.	It is unlikely that Australia would agree to allow a reciprocal provision for credit for underlying corporate tax. In any event credit is provided for in Singapore domestic law.
Article 24	Non-discrimination article in 2015 Singapore – South Africa Tax Treaty contains several variations from OECD Model Article 24 that are not found in recent Australian tax treaties. The non-discrimination article has no equivalent to OECD Article 24(2).	Australian non-discrimination articles preserve the operation of domestic anti avoidance rules either in the article itself of, as is the case with Germany 2015, refer to anti avoidance provisions as part of the principal purpose test.	The 1969 Treaty does not contain a non-discrimination article.	Each country will argue for their own variations on OECD Article 24. Australia will be expected to argue for making the non-discrimination article subject, in some way, to domestic anti avoidance law.
Article 25	2015 Singapore – South Africa Tax Treaty omits words after 'directly' and before 'for the purpose' in OECD Article 25(4). 2015 Singapore - South Africa does not contain an equivalent to	2015 Australia – Germany Tax Treaty omits words after 'directly' and before 'for the purpose' in OECD Article 25(4). Some but not all recent Australian tax treaties contain OECD	The mutual agreement procedure in Article 20 differs significantly from the 2017 OECD Article 25	Singapore reserved its position on the first sentence of MLI Article 16(1). The 1969 Treaty will be modified by the remainder of MLI 16(1) and by MLI 16(2) and (3). The 1969 Treaty will be modified by Articles 19(1) to (10)

	OECD Article 25(5).	Article 15(5) with variations.		of the MLI as discussed above. Singapore's reservation on MLI 16(1) will mean that the first sentence of the 2014 version of OECD Article 25(1) will continue to apply to the 1969 Treaty. Singapore will presumably argue for this position to be continued in a renegotiated tax treaty. The 1969 Treaty will be modified by the remainder of MLI Article 16(1) which will affect the time limit. The 1969 Treaty will also be modified by MLI 16(2) and (3). As these MLI articles reproduce 2014/2017 OECD Articles 25(2) and (3) presumably both Australia and Singapore will be agreeable to their inclusion in a renegotiated tax treaty. It is likely that both Australia and Singapore would want Article 25(4) modified as described in columns 2 and 3. Singapore presumably would argue for the omission of OECD Article 25(5) and also Article 25(5) has appeared in several recent Australian tax treaties the fact that

				it did not appear in the 2010 Australia – Turkey Tax Treaty indicates that Australia might agree to its omission. Australia and Singapore might consider in a renegotiated tax treaty the desirability of including in Article 25 provisions detailing the operation of the arbitration process based on Articles 19(1) to (10) of the MLI.
Article 26	Subject to exception noted below Singapore's recent tax treaties follow OECD Article 26	Subject to exception noted below Australia's recent tax treaties follow OECD Article 26	Article 19 follows the OECD Model.	Subject to exceptions noted below likely that a renegotiated treaty would follow OECD Article 26
Article 26(2)	2015 Singapore – South Africa Tax Treaty omits last sentence of Article 26(2).	Recent Australian tax treaties (2013 Australia – Switzerland and 2015 Australia – Germany) do not omit the last sentence of Article 26(2). Other recent Australian tax treaties such as 2010 Australia – Turkey Tax Treaty do omit the last sentence of Article 26(2).	Not present in the 1969 Treaty.	On the basis of the 2010 Australia – Turkey Tax Treaty Australia would be likely to agree to the omission of the last sentence of Article 26(2) if requested.
Article 26(5)	2015 Singapore – South Africa Tax Treaty follows OECD Article 26(5).	2013 Australia – Switzerland Tax Treaty adds additional sentence to Article 26(5) giving the requested state the power to	Not present in 1969 Treaty.	Likely that Australia will agree to OECD Article 26(5) without this variation.

		enforce the disclosure of information. An equivalent provision does not appear in other recent Australian tax treaties such as 2010 Australia – Turkey and 2015 Australia - Germany		
Article 27 Assistance in collection	2015 Singapore – South Africa Tax Treaty does not contain an equivalent to Article 27	Some recent Australian tax treaties (such as 2008 Protocol to Australia – South Africa and 2015 Australia – Germany) contain Article 27. Other recent Australian tax treaties such as 2010 Australia – Turkey and 2013 Australia – Switzerland.	Not present in 1969 Treaty.	Likely that Australia will request inclusion of Article 27 but 2010 Australia – Turkey Tax Treaty and 2013 Australia – Singapore Tax Treaty shows that Australia can be prepared to not include Article 27.
Article 29	Singapore chose to apply Article 7(1) and Article 7(4) of the MLI. Singapore reserved its position on paragraph 8 of Article 29 in the 2017 version of the OECD Model.	Australian chose to apply Article 7(1) and Article 7(4) of the MLI. The 2015 Australia – Germany Tax Treaty included a principal purpose test and in addition preserved the operation of Australia's domestic general anti avoidance laws including the transfer pricing rules, CFC rules and transferor trust rules.	Not present in 1969 Treaty.	The choices that Singapore and Australia made under the MLI will mean that the 1969 Treaty is modified to contain MLI Article 7(1) and Article 7(4) It is likely that in a renegotiated treaty Singapore and Australia would agree to include Article 29(9) and an equivalent to MLI Article 7(4). Australia's domestic hybrid mismatch provisions (discussed above) deal more comprehensively with the issues covered by Article

				29(8) and, given that Singapore taxes foreign source income on a remittance basis with a foreign tax credit, Australia should be agreeable to omitting Article 29(8).

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