

Memorandum of Understanding on the Mode of Application on the Implementation of Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting between the competent authorities of Australia and the Kingdom of Belgium

The competent authorities of Australia and of the Kingdom of Belgium (hereinafter referred to as the “Contracting States”) hereby enter into the following mutual arrangements (hereinafter referred to as the “Memorandum of Understanding”) to establish the mode of application of the arbitration process provided for in Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as “the Convention”). This Memorandum of Understanding is entered into pursuant Article 25 of the Agreement between Australia and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income as amended by the Amending Protocol and the Second Amending Protocol (hereinafter referred to as “the Agreement”), as modified by Article 16 of the Convention, and paragraph 10 of Article 19 of the Convention. The competent authorities may modify or supplement this Memorandum of Understanding by mutual consent in writing.

Section 1. Request for submission of case to arbitration

- 1.1 A request that unresolved issues arising from a mutual agreement case be submitted to arbitration pursuant to paragraph 1 of Article 19 of the Convention (hereinafter referred to as the “request for arbitration”) must be made in writing and sent to one or both of the competent authorities. The request must contain sufficient information to identify the case. The request must also be accompanied by a written statement by each of the persons who either made the request or is directly affected by the case that no decision on the same issues has already been rendered by a court or administrative tribunal of the Contracting States. Within 10 days after the receipt of the request, a competent authority who received it without any indication that it was also sent to the other competent authority will send a copy of that request and the accompanying statements to the other competent authority.

Section 2. Minimum information necessary for case to be considered

- 2.1 For purposes of Article 19 of the Convention, references to “the information necessary to undertake substantive consideration of the case” and “the minimum information necessary for each competent authority to undertake substantive consideration of the case” will be understood as follows:
 - (a) for Australia, the information and documentation which must be provided when making a request for Mutual Agreement Procedure as set out on the Mutual Agreement

Procedure page on the Australian Taxation Office website, ato.gov.au, as such guidance may be amended from time to time;

- (b) for the Kingdom of Belgium, the information and documentation which must be provided when making a request for Mutual Agreement Procedure as set out in the Circular letter 2018/C/27 *regarding the rules on dispute resolution in respect of the application of international tax treaties* of 7 March 2018 published by the General Tax Administration of the Federal Public Service Finance, as such guidance may be amended from time to time; and
- (c) any other specific additional information requested by the competent authority of a Contracting State within three calendar months after the receipt of the request for a mutual agreement procedure.

2.2 The competent authorities of the Contracting States will notify each other of any significant changes that are made with respect to the information requirements provided in their domestic guidance relevant to a request for a mutual agreement procedure.

Section 3. Terms of reference

3.1 Unless the competent authorities otherwise jointly determine,

- (a) Within 60 days after the request for arbitration (or a copy thereof) has been received by both competent authorities, the competent authorities will jointly determine the questions to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration. This will constitute the “Terms of Reference” for the case. Notwithstanding the following provisions of this Memorandum of Understanding, the competent authorities may also, in the Terms of Reference, provide procedural rules that are additional to, or different from, those included in these provisions and deal with such other matters as are deemed appropriate.
- (b) If the Terms of Reference have not been communicated to the person who made the request for arbitration within the period referred to in paragraph (a) above, that person and each competent authority may, within 30 days after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration. All the lists so communicated during that period will constitute the tentative Terms of Reference. Within 30 days after all the arbitrators have been appointed as provided in the following provisions of this Memorandum of Understanding, the Chair will communicate to the competent authorities and the person who made the request for arbitration a revised version of the tentative Terms of Reference based on the lists so communicated. Within 30 days after the revised version has been received by both of them, the competent authorities may jointly determine different Terms of Reference and

communicate them in writing to the arbitrators and the person who made the request for arbitration. If they do so within that period, these different Terms of Reference will constitute the Terms of Reference for the case. If no different Terms of Reference have been jointly determined by the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators will constitute the Terms of Reference for the case.

Section 4. Appointment of arbitrators

- 4.1. Notwithstanding the provisions of Article 20 of the Convention, the competent authorities of the Contracting States have jointly determined that the following rules will govern the appointment of the members of an arbitration panel:
- (a) Each competent authority will appoint one panel member within 90 days of the date of the request for arbitration under paragraph 1 of Article 19 of the Convention. The two members so appointed will, within 60 days of the latter of their appointments, appoint a third member who will serve as the Chair of the arbitration panel. The arbitrators will choose the Chair from the list that has been jointly determined by the competent authorities pursuant to paragraph 4.7.
 - (b) In the event that the competent authority of a Contracting State fails to appoint a member of the arbitration panel within the time period specified in subparagraph 4.1(a), a member will be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting State. The relevant appointment will be made within 60 days after receiving a request to that effect from the person who made the request for arbitration. In these circumstances, the member of the arbitration panel will be appointed from the list, identified pursuant to paragraph 4.8, that has been provided by the competent authority that fails to appoint a panel member. In the event that no list has been provided pursuant to paragraph 4.8 or none of the persons identified in the list are available, a member will be appointed on behalf of that competent authority by and at the discretion of the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting State.
 - (c) If the two initial members of the arbitration panel fail to appoint the Chair within the time period specified in subparagraph 4.1(a), the Chair will be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting State. The relevant appointment will be made within 60 days after receiving a request

to that effect from the person who made the request for arbitration. In these circumstances, the Chair of the arbitration panel will be appointed from the list that has been jointly determined by the competent authorities pursuant to paragraph 4.7. In the event that no list has been provided pursuant to paragraph 4.7 or none of the persons identified in the list are available, a Chair will be appointed by and at the discretion of the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting State.

- 4.2. Except to the extent that the competent authorities jointly determine on different rules, the procedures provided in Article 20 of the Convention and Section 4 of this Memorandum of Understanding will apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process has begun. In such circumstances, the competent authorities will also jointly determine on necessary adaptations, as appropriate, to the deadlines provided in Section 5 of this Memorandum of Understanding.
- 4.3. An arbitrator will be considered to have been appointed when a letter confirming that appointment and signed by both the arbitrator and the person or persons who have the power to appoint that arbitrator has been communicated to both competent authorities.
- 4.4. The competent authorities will appoint arbitrators who have expertise or experience in international tax matters. They need not, however, have experience as either a judge or arbitrator. Each arbitrator appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting States and of all persons directly affected by the case (as well as their advisors and any related persons). In particular, the arbitrators may not be employed by the competent authorities, tax administrations, and ministries of finance of the Contracting States and of all persons directly affected by the case (as well as their advisors and any related persons) in the period of 12 months preceding an appointment and at the time of accepting an appointment. The arbitrators must maintain their impartiality and independence throughout the proceedings, and avoid any conduct for 12 months after the date the panel delivers its decision under paragraph 5.7 or subparagraph 5.8(g), as the case may be, or any other period jointly determined by the competent authorities, which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings. Each arbitrator appointed to the arbitration panel will execute a written certification to this effect. The arbitrators will undertake to promptly disclose to both competent authorities, in writing, any new facts or circumstances that arise during or following the arbitration proceedings that might give rise to doubts with respect to their impartiality or independence.
- 4.5. For the purposes of this paragraph, a person who has accepted an appointment as an arbitrator in another arbitration proceeding pursuant to Part VI of the Convention, or pursuant to the

provisions of any other bilateral or multilateral agreement providing for arbitration of unresolved issues in a mutual agreement procedure case, will not be considered based on such appointment to be employed, or to have been employed, by the competent authority, tax administration or ministry of finance of a Contracting State.

- 4.6. If a competent authority becomes aware of a breach by an arbitrator of the impartiality and independence requirements referred to in paragraph 4.4 he or she will bring that breach to the attention of the other arbitrators and the competent authority of the other Contracting State immediately. The competent authorities will then, based on the particular facts and circumstances of the case and the breach, jointly determine how to proceed and may, for example:
- (a) remove and replace the relevant arbitrator;
 - (b) terminate the arbitration proceeding and appoint a new arbitration panel; or
 - (c) invalidate the arbitration decision, if the arbitration decision has already been rendered.
- 4.7. The competent authorities will identify and jointly determine on a list of at least 5 persons who are qualified and willing to serve as the Chair of an arbitration panel. The competent authorities will review and revise this list as necessary. The persons to be identified for purposes of this list must meet the requirements of paragraph 4.4.
- 4.8. Each competent authority will identify a list of at least 5 persons who are qualified and willing to serve as members of the arbitration panel. Each competent authority will review and revise its list as necessary. The persons to be identified for purposes of these lists must meet the requirements of paragraph 4.4.

Section 5. Arbitration process

- 5.1. Within 90 days after the appointment of the Chair of the arbitration panel (unless, before the end of that period, the competent authorities jointly determine on a different period or jointly arrange to use a different type of arbitration process, such as the approach described in paragraph 5.8, with respect to the relevant case), the competent authority of each Contracting State will submit to the Chair of the arbitration panel a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities). The Chair will forward the proposed resolutions to the other members of the arbitration panel and the other competent authority only after receipt of both proposed resolutions or after the 90 day period has expired, whichever is the earlier. The proposed resolution will be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax that may be charged pursuant to the provisions of the Agreement (as it may be modified by the Convention), for each adjustment or similar issue in the case. In a case in which the competent authorities of

the Contracting States have been unable to reach agreement on an issue regarding the conditions for application of a provision of the Agreement (as it may be modified by the Convention) (hereinafter referred to as a “threshold question”), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

- 5.2. The competent authority of each Contracting State may also submit a supporting position paper for consideration by the arbitrators. Any such supporting position paper will be submitted to the Chair of the arbitration panel within the period of time provided for in paragraph 5.1. The Chair will forward the supporting position papers to the other members of the arbitration panel and the other competent authority only after receipt of both supporting position papers or after the period of time provided for in paragraph 5.1 has expired, whichever is the earlier. Any annex to a supporting position paper will be a document that was provided by one competent authority to the other, or by the taxpayer to both competent authorities, for use in the negotiation of the mutual agreement procedure case.
- 5.3. In the event that the competent authority of one Contracting State fails to submit a proposed resolution within the period of time provided for in paragraph 5.1, the Chair of the arbitration panel will inform the competent authority that if a proposed resolution is not submitted within an additional 7 days, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.
- 5.4. Each competent authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. Any such reply submission will be submitted to the Chair of the arbitration panel within 150 days after the appointment of the Chair of the arbitration panel. The Chair will forward the reply submissions to the other members of the arbitration panel and the other competent authority only after receipt of both reply submissions or after the 150-day period has expired, whichever is the earlier.
- 5.5. In the event that the competent authority of one Contracting State fails to submit a reply submission within the period of time provided for in paragraph 5.4, the Chair of the arbitration panel will inform the Contracting State that any reply submission not received within an additional 7 days will not be considered by the arbitrators.
- 5.6. As far as possible, the arbitrators will use tele- and videoconferencing to communicate between themselves and with both competent authorities. If a face-to-face meeting involving additional costs is necessary, the Chair will contact the competent authorities who will decide when and where the meeting should be held and will communicate that information to the arbitrators.

5.7. The arbitration panel will select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and will not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will be delivered to the competent authorities of the Contracting States in writing within 90 days after the reception by the arbitrators of the last reply submission or, if no reply submission has been submitted, within 180 days after the appointment of the Chair of the arbitration panel. The arbitration decision will have no precedential value.

5.8.

- (a) If, within 60 days after the appointment of the Chair of the arbitration panel, the competent authorities mutually arrange to use the approach described in this paragraph with respect to a given case, each competent authority will provide to the arbitration panel and to the other competent authority, within 120 days after that arrangement, any information that it considers necessary for the panel to reach its decision. That information should include a description of the facts and of the unresolved issues to be decided together with the position of the competent authority concerning these issues and the arguments supporting that position. Unless the competent authorities otherwise jointly determine, the arbitration panel may not take into account any information that was not available to both competent authorities before both competent authorities received the request for arbitration (or a copy thereof).
- (b) In the event that the competent authority of one Contracting State fails to submit the information described in subparagraph (a) within the period of time provided for in that subparagraph, the Chair of the arbitration panel will inform the competent authority of the Contracting State that if a proposed position is not submitted within an additional 7 days the arbitration panel will select as its decision the position submitted by the other competent authority.
- (c) The competent authority who received the written request for arbitration will notify the person who made the request for arbitration of an arrangement to use the approach described in this paragraph within 7 days of such an arrangement (if the written request for arbitration indicates that it was also sent to the other competent authority, such notification will be provided by the competent authority of the jurisdiction of residence of the person who made the request for arbitration). The person who made the request for arbitration may, either directly or through their representatives, present their position to the arbitrators in writing to the same extent that they can do so during the mutual agreement procedure. Any written materials prepared by the person who made the request for arbitration or their representatives will be submitted to the arbitrators by the competent authorities. Such materials will only be presented to the arbitrators if they

are provided to both competent authorities within 120 days after the notification referred to in the first sentence of this subparagraph.

- (d) Within 30 days after the Chair has informed the competent authorities that a meeting of the arbitration panel should be held, the competent authorities will decide when and where the meeting will be held and will communicate that information to the arbitrators.
- (e) The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Agreement, as modified by the Convention, and, subject to these provisions, of those of the domestic laws of the Contracting States. The arbitrators will also consider any other sources which the competent authorities of the Contracting States may by mutual arrangement expressly identify.
- (f) Subject to the provisions of the Agreement, as modified by the Convention, and of this Memorandum of Understanding, the arbitrators may adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.
- (g) Unless the competent authorities jointly determine otherwise, the arbitration decision will be delivered to the competent authorities of the Contracting States in writing within 365 days after the date of the appointment of the Chair and will indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will have no precedential value.

- 5.9. 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, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting States, the arbitration process shall terminate.

Section 6. Communication of information and confidentiality

- 6.1. Each arbitrator must agree in writing, prior to acting in an arbitration proceeding, to abide by and be subject to the confidentiality and non-disclosure provisions of Article 26 of the Agreement and of the applicable domestic laws of the Contracting States. If an arbitrator will use staff in connection with the performance of their duties, each staff member must execute a similar written agreement.
- 6.2. If a competent authority becomes aware of a breach by an arbitrator and/or their staff of the confidentiality and non-disclosure requirements referred to in paragraph 6.1 they will bring that breach, to the attention of the other arbitrators and the competent authority of the other Contracting State immediately. The competent authorities will then, based on the particular

facts and circumstances of the case and the breach, jointly determine how to proceed and may, for example –

- (a) remove and replace the relevant arbitrator;
- (b) terminate the arbitration proceeding and appoint a new arbitration panel; or
- (c) invalidate the arbitration decision, if the arbitration decision has already been rendered.

- 6.3. Each person that presented the case and their advisors must, prior to the beginning of arbitration proceedings, 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.
- 6.4. 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, a person that presented the case or one of that person's advisors materially breaches the agreement referred to in paragraph 6.3, the mutual agreement procedure under the Agreement, as well as the arbitration proceedings, with respect to the case shall terminate.
- 6.5. Before the Chair is appointed, the competent authorities will send any correspondence concurrently to both arbitrators.
- 6.6. After the Chair is appointed, unless jointly determined otherwise by the competent authorities and the Chair, the competent authorities will send any correspondence to the Chair (with a copy sent to the other competent authority). The Chair will send any correspondence from the arbitrators to the competent authorities concurrently to both competent authorities.
- 6.7. Except with regard to administrative or logistical matters, no arbitrator will have any *ex parte* communications with one competent authority with respect to the mutual agreement case that resulted in the arbitration proceeding.
- 6.8. All communication, except with regard to administrative or logistical matters, between the arbitrators and the competent authorities will be in writing. Unless the competent authorities otherwise jointly determine, written communication by email is allowed to the extent that appropriate measures are taken to preserve the confidentiality of any information that may identify the taxpayer. Express or priority mail or a courier service will be used for all correspondence other than that sent via email.
- 6.9. No substantive discussions may take place without all three arbitrators present.
- 6.10. Except as permitted pursuant to subparagraph 5.8(c), no arbitrator will have communications regarding the issues or matters before the arbitration panel with
 - (a) the person who presented the case;

- (b) any other person whose tax liability to either Contracting State may be directly affected by a mutual agreement reached as a result of the case; or
 - (c) their representatives or agents
- during or subsequent to the arbitration proceedings.

6.11. At the termination of the arbitration proceedings each arbitrator will immediately destroy all documents or other information received in connection with the proceedings.

Section 7. Operating procedures

- 7.1. To the extent needed, the arbitration panel may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Part VI of the Convention or Article 25 of the Agreement, as modified by Article 16 of the Convention.
- 7.2. If the arbitration panel adopts any additional procedures, the Chair will provide a written copy of them to the competent authorities. These procedures will have effect only if both competent authorities mutually consent.

Section 8. Costs

- 8.1. Unless the competent authorities otherwise jointly determine:
 - (a) each competent authority and the person who requested the arbitration will bear the costs related to its own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of its views);
 - (b) all other costs related to the arbitration proceedings will be borne in equal shares by the two competent authorities.
- 8.2. The competent authorities will jointly determine in writing the compensation of the arbitrators in proceedings under this Memorandum of Understanding including:
 - (a) The fees of the arbitrators per person per meeting, preparation or travel day;
 - (b) The reimbursement of the expenses of the arbitrators; and
 - (c) Limits on the overall amount of compensation to be paid. Each arbitrator will be compensated for no more than three days of preparation, for two meeting days and for travel days. If the arbitration panel considers that it requires additional time to properly consider the case, the Chair will contact the competent authorities to request additional time.

Section 9. Failure to communicate the decision within the required period

- 9.1. In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 5.7 or subparagraph 5.8(g), as the case may be, or within any other period jointly determined by the competent authorities, the fees of each arbitrator will be limited to an amount agreed to by competent authorities at the time. In such a case, the competent authorities may jointly decide to appoint new arbitrators in accordance with Article 20 of the Convention and Section 4 of this Memorandum of Understanding. The date of such joint decision to appoint new arbitrators will, for the purposes of the subsequent application of Article 20 of the Convention and Section 4 of this Memorandum of Understanding, be deemed to be the date when the request for arbitration has been received by both competent authorities.

Section 10. Final decision

- 10.1. If a final decision by a court of one of the Contracting States holds that the arbitration decision is invalid, the arbitration decision will not be binding on the Contracting States. In such a case, the request for arbitration under paragraph 1 of Article 19 of the Convention will be considered not to have been made, and the arbitration process will be considered not to have taken place (except for the purposes of Article 21 (Confidentiality of Arbitration Proceedings) and Article 25 (Costs of Arbitration Proceedings) of the Convention and Sections 6 and 8 of this Memorandum of Understanding). In such a case the person who made the request for arbitration may make a new request for arbitration, which will be accepted unless the competent authorities jointly determine that the actions of that person or its representatives were the main reason for the invalidation of the arbitration decision.
- 10.2. It is understood that subdivision ii) of subparagraph b) of paragraph 4 of Article 19 of the Convention is intended to apply where, under the domestic laws of a Contracting State, a court has invalidated the arbitration decision based on a procedural or other failure or other conduct that has materially affected the outcome of the arbitration proceeding, which may include:
- (a) a violation of the impartiality or independence requirements applicable to arbitrators pursuant to Article 20 of the Convention and Section 4 of this Memorandum of Understanding;
 - (b) a breach of the confidentiality requirements applicable to arbitrators pursuant to Article 21 of the Convention and Section 6 of this Memorandum of Understanding;
 - (c) any other failure to adhere to the procedural requirements provided in Part VI of the Convention and this Memorandum of Understanding; or
 - (d) collusion between the person who presented the mutual agreement procedure request and one of the Contracting States.

10.3. It is understood that Section 10 of this Memorandum of Understanding does not provide independent grounds for the invalidation of an arbitration decision where such grounds do not exist under the domestic laws of the Contracting States.

Section 11. Implementing the arbitration decision

11.1. The competent authorities will implement the arbitration decision within 180 days after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.

Section 12. Entry into effect of Part VI (Arbitration) of the Convention

12.1. As provided by Article 36 (Entry into Effect of Part VI) of the Convention the provisions of Part VI (Arbitration) of the Convention will have effect with respect to cases presented to the competent authority of a Contracting State on or after the later of the dates on which the Convention has entered into force for each of the Contracting States.

Section 13. Reservation with respect to the scope of cases that will be eligible for arbitration under the provisions of Part VI of the Convention

13.1. Pursuant to subparagraph a) of paragraph 2 of Article 28 of the Convention, the following reservations have been made with respect to the scope of cases that will be eligible for arbitration under the provisions of Part VI of the Convention:

(a) By Australia

Australia reserves the right to exclude from the scope of Part VI of the Convention 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 will notify the Depositary of the Convention any such provisions that involve substantial changes.

Section 14. Entry into effect and termination


14.1. This Memorandum of Understanding takes effect on 3rd of March 2021 and remains in effect until terminated by either competent authority giving at least 6 months written notice to the other.

14.2. Arbitrations that have commenced prior to the termination date will be concluded in accordance with this Memorandum of Understanding.

Signed in duplicate at Sydney / Brussels on this 3rd day of March 2021

The foregoing represents the understanding reached between the competent authorities and does not constitute a treaty.

For the competent authority of Australia



Signature of representative

Simon Hellmers

Printed name of representative

**Assistant Commissioner –
Public Groups and International**

Official title of representative

For the competent authority of the
Kingdom of Belgium

Signature of representative

LIESBETH MOREELS

Printed name of representative

**Advisor General
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