



SYNTHESISED TEXT OF THE MLI AND THE CONVENTION BETWEEN AUSTRALIA AND JAPAN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

If you follow the information in this document, and it turns out to be incorrect, or it is misleading and you make a mistake as a result, the ATO will take that into account when determining what action, if any, we should take.

General disclaimer on this synthesised text document

This document presents the synthesised text for the application of the *Convention Between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* signed on 31 January 2008 (the “Convention”) as modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* signed by Australia and Japan on 7 June 2017 (the ‘MLI’).

This document was prepared in consultation with the Ministry of Finance, Japan and represents our shared understanding of the modifications made to the Convention by the MLI.

The document was prepared on the basis of the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018 and of the MLI position of Japan submitted to the Depositary upon acceptance on 26 September 2018. These MLI positions are subject to modifications as provided in the MLI. Modifications made to MLI positions could modify the effects of the MLI on the Convention.

The sole purpose of this document is to facilitate the understanding of the application of the MLI to the Convention and it does not constitute a source of law. The authentic legal texts of the Convention and the MLI take precedence and remain the legal texts applicable.

The provisions of the MLI that are applicable with respect to the provisions of the Convention are included in boxes throughout the text of this document in the context of the relevant provisions of the Convention. The boxes containing the provisions of the MLI have generally been inserted in accordance with the ordering of the provisions of the 2017 OECD Model Tax Convention.

Changes to the text of the provisions of the MLI have been made to conform the terminology used in the MLI to the terminology used in the Convention (such as ‘Covered Tax Agreement’, or ‘Agreement’ and ‘Convention’, ‘Contracting Jurisdictions’ and ‘Contracting States’), to ease the comprehension of the provisions of the MLI. The changes in terminology are intended to increase the readability of the document and are not intended to change the substance of the provisions of the MLI. Similarly, changes have been made to parts of provisions of the MLI that describe existing provisions of the Convention: descriptive language has been replaced by legal references of the existing provisions to ease the readability.

In all cases, references made to the provisions of the Convention or to the Convention must be understood as referring to the Convention as modified by the provisions of the MLI, provided such provisions of the MLI have taken effect.

References

[Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting](#) (provides the authentic legal texts of the MLI).

[Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income](#) (provides, in the case of Australia, the authentic legal text of the Convention).

[Signatories and parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting](#) (provides the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018 and the MLI position of Japan submitted to the Depositary upon acceptance on 26 September 2018).

Entry into effect of the MLI provisions

The provisions of the MLI applicable to the Convention do not take effect on the same dates as the original provisions of the Convention. Each of the provisions of the MLI could take effect on different dates, depending on the types of taxes involved (taxes withheld at source or other taxes levied) and on the choices made by Australia and Japan in their MLI positions.

Dates of the deposit of instruments of ratification, acceptance or approval:

26 September 2018 for Australia and 26 September 2018 for Japan.

Entry into force of the MLI:

1 January 2019 for Australia and 1 January 2019 for Japan.

In accordance with paragraph 1 of Article 35 of the MLI, the provisions of the MLI (other than Article 16 (Mutual Agreement Procedure) and Part VI (Arbitration) of the MLI) have effect with respect to this Convention:

- a) with respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after 1 January 2019, and
- b) with respect to all other taxes levied by each Contracting State, for taxes levied with respect to taxable periods beginning on or after 1 July 2019.

In accordance with paragraph 4 of Article 35 of the MLI, Article 16 (Mutual Agreement Procedure) of the MLI has effect with respect to this Convention for a case presented to the competent authority of a Contracting State on or after 1 January 2019, except for cases that were not eligible to be presented as of that date under the Convention prior to its modification by the MLI, without regard to the taxable period to which the case relates.

In accordance with paragraph 1 of Article 36 of the MLI, the provisions of Part VI (Arbitration) of the MLI shall have effect with respect to this Convention:

- a) with respect to cases presented to the competent authority of a Contracting State (as described in subparagraph a) of paragraph 1 of Article 19 (Mandatory Binding Arbitration) of the MLI), on or after 1 January 2019, and
- b) with respect to cases presented to the competent authority of a Contracting State prior to 1 January 2019, on the date when both Contracting States have notified the Depositary that they have reached mutual agreement pursuant to paragraph 10 of Article 19 of the MLI, along with information regarding the date or dates on which such cases shall be considered to have been presented to the competent authority of a Contracting State (as described in subparagraph a) of paragraph 1 of Article 19 of the MLI) according to the terms of that mutual agreement.

CONVENTION BETWEEN AUSTRALIA AND JAPAN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

Australia and Japan,

The following paragraph 3 of Article 6 of the MLI is included in the preamble of this Convention:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TEXT AGREEMENT

Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,

[REPLACED by the preamble text included in paragraph 1 of Article 6 of the MLI]
Desiring to conclude a new Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

The following paragraph 1 of Article 6 of the MLI replaces the text referring to an intent to eliminate double taxation in the preamble of this Convention:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TAX AGREEMENT

Intending to eliminate double taxation with respect to the taxes covered by [*the Convention*] 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 [*the Convention*] for the indirect benefit of residents of third jurisdictions),

Have agreed as follows:

Article 1

PERSONS COVERED

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

Article 2

TAXES COVERED

1. This Convention shall apply to the following existing taxes:
 - a) in the case of Japan:
 - (i) the income tax; and
 - (ii) the corporation tax(hereinafter referred to as "Japanese tax");
 - b) in the case of Australia:
 - (i) the income tax; and
 - (ii) the petroleum resource rent tax(hereinafter referred to as "Australian tax").
2. This Convention shall apply also to any identical or substantially similar taxes that are

imposed by Japan or under the federal law of Australia after the date of signature of the Convention in addition to, or in place of, the existing taxes referred to in paragraph 1. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in the law of their respective Contracting States relating to the taxes to which the Convention applies within a reasonable period of time after such changes.

Article 3

GENERAL DEFINITIONS

1. For the purposes of this Convention, unless the context otherwise requires:
 - a) the term "Japan", when used in a geographical sense, means all the territory of Japan, including its territorial sea, in which the laws relating to Japanese tax are in force, and all the area beyond its territorial sea, including the seabed and subsoil thereof, over which Japan has sovereign rights in accordance with international law and in which the laws relating to Japanese tax are in force;
 - b) the term "Australia", when used in a geographical sense, excludes all external territories other than:
 - (i) the Territory of Norfolk Island;
 - (ii) the Territory of Christmas Island;
 - (iii) the Territory of Cocos (Keeling) Islands;
 - (iv) the Territory of Ashmore and Cartier Islands;
 - (v) the Territory of Heard Island and McDonald Islands; and
 - (vi) the Coral Sea Islands Territory,and includes any area adjacent to the territorial limits of Australia (including only the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the exclusive economic zone and the seabed and subsoil of the continental shelf;
 - c) the terms "a Contracting State" and "the other Contracting State" mean Japan or Australia, as the context requires;
 - d) the term "tax" means Japanese tax or Australian tax, as the context requires;
 - e) the term "person" includes an individual, a company and any other body of persons;
 - f) the term "company" means any body corporate or any entity that is treated as a company or body corporate for tax purposes;
 - g) the term "enterprise" applies to the carrying on of any business;
 - h) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
 - i) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;
 - j) the term "national", in relation to a Contracting State, means:

- (i) any individual possessing the nationality or citizenship of that Contracting State; and
 - (ii) any juridical or legal person created or organised under the law of that Contracting State and any organisation without juridical or legal personality treated for the purposes of that Contracting State's tax as a juridical or legal person created or organised under the law of that Contracting State;
- k) the term "competent authority" means:
 - (i) in the case of Japan, the Minister of Finance or an authorised representative of the Minister of Finance; and
 - (ii) in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner of Taxation; and
- l) the term "business" includes the performance of professional services and of other activities of an independent character.

2. As regards the application of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Contracting State concerning the taxes to which the Convention applies, any meaning under the applicable tax law of that Contracting State prevailing over a meaning given to the term under other law of that Contracting State.

Article 4

RESIDENT

1. For the purposes of this Convention, the term "resident of a Contracting State" means:
 - a) in the case of Japan, any person who, under the laws of Japan, is liable to tax therein by reason of the person's domicile, residence, place of head or main office, or any other criterion of a similar nature; and
 - b) in the case of Australia, a person who is a resident of Australia for the purposes of Australian tax.

The Government of a Contracting State or a political subdivision or local authority thereof is also a resident of that Contracting State for the purposes of the Convention. A person is not a resident of a Contracting State for the purposes of the Convention if the person is liable to tax in that Contracting State in respect only of income from sources in that Contracting State.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then the individual's status shall be determined as follows:
 - a) the individual shall be deemed to be a resident only of the Contracting State in which the individual has a permanent home available to that individual; if that individual has a permanent home available to that individual in both Contracting States, or in neither of them, that individual shall be deemed to be a resident only of the Contracting State with which the individual's personal and economic relations are closer (centre of vital interests);
 - b) if the Contracting State in which the individual's centre of vital interests is situated cannot be determined, the individual shall be deemed to be a resident only of the Contracting State of which that individual is a national;
 - c) if the individual is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall endeavour to resolve the question by mutual agreement.

3. **[REPLACED by paragraph 1 and subparagraph e) of paragraph 3 of Article 4 of the MLI]**¹ *Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which that person shall be deemed to be a resident for the purposes of this Convention, having regard to the place of its head or main office, its place of effective management and any other relevant factors.*

4. **[REPLACED by paragraph 1 and subparagraph e) of paragraph 3 of Article 4 of the MLI, but only to the extent that this paragraph applies to a person other than an individual]** *In the absence of a mutual agreement under subparagraph c) of paragraph 2 or paragraph 3 a person who is a resident of both Contracting States by reason of the provisions of paragraph 1 shall not be considered a resident of either Contracting State for the purposes of claiming any benefits provided by this Convention, except those provided by Articles 26 and 27.*

The following paragraph 1 and subparagraph e) of paragraph 3 of Article 4 of the MLI replaces paragraph 3 of Article 4 of this Convention, paragraph 4 of Article 4 of this Convention to the extent that it applies to a person other than an individual, and paragraph 4 of the Protocol to this Convention:

ARTICLE 4 OF THE MLI – DUAL RESIDENT ENTITIES

Where by reason of the provisions of [*the Convention*] a person other than an individual is a resident of both [*Contracting States*], the competent authorities of the [*Contracting States*] shall endeavour to determine by mutual 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 [*the Convention*].

5. For the purposes of applying this Convention:

- a) an item of income, profits or gains:
 - (i) derived from a Contracting State through an entity that is organised in the other Contracting State; and
 - (ii) treated as the income, profits or gains of the beneficiaries, members or participants of that entity under the tax law of that other Contracting State,

shall be eligible for the benefits of the Convention that would be granted if it were directly derived by a beneficiary, member or participant of that entity who is a resident of that other Contracting State, to the extent that such beneficiaries, members or participants are residents of that other Contracting State and satisfy any other conditions specified in the Convention, without regard to whether the income, profits or gains are treated as the income, profits or gains of such beneficiaries, members or participants under the tax law of the first-mentioned Contracting State.

- b) an item of income, profits or gains:
 - (i) derived from a Contracting State through an entity that is organised in the other Contracting State; and

¹ Refer to text box immediately after paragraph 4 of Article 4 of the Convention.

- (ii) treated as the income, profits or gains of that entity under the tax law of that other Contracting State,

shall be eligible for the benefits of the Convention that would be granted to a resident of that other Contracting State, without regard to whether the income, profits or gains are treated as the income, profits or gains of the entity under the tax law of the first-mentioned Contracting State, if such entity is a resident of that other Contracting State and satisfies any other conditions specified in the Convention.

c) an item of income, profits or gains:

- (i) derived from a Contracting State through an entity that is organised in a state other than the Contracting States; and
- (ii) treated as the income, profits or gains of the beneficiaries, members or participants of that entity under the tax law of the other Contracting State,

shall be eligible for the benefits of the Convention that would be granted if it were directly derived by a beneficiary, member or participant of that entity who is a resident of that other Contracting State, to the extent that such beneficiaries, members or participants are residents of that other Contracting State and satisfy any other conditions specified in the Convention, without regard to whether the income, profits or gains are treated as the income, profits or gains of such beneficiaries, members or participants under the tax law of the first-mentioned Contracting State or such state.

d) an item of income, profits or gains:

- (i) derived from a Contracting State through an entity that is organised in a state other than the Contracting States; and
- (ii) treated as the income, profits or gains of that entity under the tax law of the other Contracting State,

shall not be eligible for the benefits of the Convention.

e) an item of income, profits or gains:

- (i) derived from a Contracting State through an entity that is organised in that Contracting State; and
- (ii) treated as the income, profits or gains of that entity under the tax law of the other Contracting State,

shall not be eligible for the benefits of the Convention.

Article 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

- a) a place of management;
- b) a branch;
- c) an office;
- d) a factory;
- e) a workshop;

- f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; and
 - g) an agricultural, pastoral or forestry property.
3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than 12 months.
4. Notwithstanding the preceding paragraphs of this Article, where an enterprise of a Contracting State:
- a) undertakes supervisory or consultancy activities in the other Contracting State in connection with a building site or construction or installation project which is being undertaken in that other Contracting State, and those activities last more than 12 months;
 - b) carries on activities (including the operation of substantial equipment) in the other Contracting State in the exploration for or exploitation of natural resources situated in that other Contracting State for a period or periods exceeding in the aggregate 90 days in any 12 month period; or
 - c) operates substantial equipment in the other Contracting State (other than as provided in subparagraph b)) for a period or periods exceeding in the aggregate 183 days in any 12 month period,

such activities shall be deemed to be performed through a permanent establishment that the enterprise has in that other Contracting State.

- 5.
- a) The duration of activities under paragraphs 3 and 4 shall be determined by aggregating the periods during which activities are carried on in a Contracting State by associated enterprises provided that the activities carried on in that Contracting State by an enterprise are connected with the activities carried on in that Contracting State by its associated enterprise.
 - b) The period during which two or more associated enterprises are carrying on concurrent activities shall be counted only once for the purpose of determining the duration of activities.
 - c) For the purposes of this Article, an enterprise shall be deemed to be associated with another enterprise if:
 - (i) an enterprise participates directly or indirectly in the management, control or capital of the other enterprise; or
 - (ii) the same persons participate directly or indirectly in the management, control or capital of the enterprises.

6. **[MODIFIED by paragraph 2 of Article 13 of the MLI]** *Notwithstanding the preceding paragraphs of this Article, an enterprise shall not be deemed to have a permanent establishment merely by reason of:*

- a) *the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;*
- b) *the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;*
- c) *the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;*
- d) *the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise; or*

- e) *the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.*

The following paragraph 2 of Article 13 of the MLI modifies paragraph 6 of Article 5 of this Convention:

ARTICLE 13 OF THE MLI – ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS THROUGH THE SPECIFIC ACTIVITY EXEMPTIONS

(Option A)

Notwithstanding [Article 5 of the Convention], the term ‘permanent establishment’ shall be deemed not to include:

- a) the activities specifically listed in [paragraph 6 of Article 5 of the Convention] as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;
- b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a);
- c) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b),

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

The following paragraph 4 of Article 13 of the MLI applies to paragraph 6 of Article 5 of this Convention as modified by paragraph 2 of Article 13 of the MLI:

[Paragraph 6 of Article 5 of the Convention, as modified by paragraph 2 of Article 13 of the MLI] shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same [Contracting State] and:

- a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of [Article 5 of the Convention]; or
- b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

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

7. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom the provisions of paragraph 8 apply—is acting on behalf of an enterprise and:

- a) has, and habitually exercises, in a Contracting State an authority to substantially negotiate on behalf of or conclude contracts in the name of the enterprise; or
- b) manufactures or processes in a Contracting State for the enterprise goods or merchandise belonging to the enterprise,

that enterprise shall be deemed to have a permanent establishment in that Contracting State in respect of any activities which that person undertakes for that enterprise, unless the

activities are limited to those mentioned in paragraph 6 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under paragraph 1.

8. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that Contracting State through a person who is a broker, general commission agent or any other agent of an independent status, provided that the person is acting in the ordinary course of the person's business as such a broker or agent.

9. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

10. The principles set forth in the preceding paragraphs of this Article shall be applied in determining for the purposes of paragraph 7 of Article 11 and paragraph 5 of Article 12 whether there is a permanent establishment in a state other than the Contracting States, and whether an enterprise, not being an enterprise of either of the Contracting States, has a permanent establishment in a Contracting State.

The following paragraph 1 of Article 15 of the MLI applies to provisions of this Convention:

ARTICLE 15 OF THE MLI – DEFINITION OF A PERSON CLOSELY RELATED TO AN ENTERPRISE

For the purposes of the provisions of [Article 5 of the Convention], a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

Article 6

INCOME FROM REAL PROPERTY

1. Income derived by a resident of a Contracting State from real property situated in the other Contracting State may be taxed in that other Contracting State.

2. The term "real property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include:

- a) a lease of land and any other interest in or over land, whether improved or not;
- b) property accessory to real property;
- c) rights to which the provisions of general law respecting landed property apply;
- d) usufruct of real property;
- e) rights to explore for mineral, oil or gas deposits or other natural resources, and a right to work those deposits or resources; and
- f) rights to receive variable or fixed payments either as consideration for or in

respect of the exploitation of, or the right to explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources.

Ships and aircraft shall not be regarded as real property.

3. Any interest or right referred to in paragraph 2 shall be regarded as situated where the land, mineral, oil or gas deposits, quarries or natural resources, as the case may be, are situated or where the exploration may take place.

4. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of real property.

5. The provisions of paragraphs 1, 3 and 4 shall also apply to the income from real property of an enterprise.

Article 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other Contracting State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment or with other enterprises with which it deals.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses of the enterprise, being expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, and which would be deductible if the permanent establishment were an independent enterprise which paid those expenses, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

4. Nothing in this Article shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person in cases where the information available to the competent authority of that Contracting State is inadequate to determine the profits to be attributed to a permanent establishment, provided that, on the basis of the available information, the determination of the profits of the permanent establishment is consistent with the principles stated in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs of this Article, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income or gains which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

8. Nothing in this Article shall affect the application of any law of a Contracting State relating to tax imposed on profits from insurance with a person other than a resident of that

Contracting State.

9. Where:

- a) a resident of a Contracting State is beneficially entitled, whether directly or through one or more interposed trusts, to a share of the profits derived from business carried on in the other Contracting State by the trustee of a trust (other than a trust which is treated as a company for tax purposes) in its capacity as trustee; and
- b) in relation to the carrying on of the business, that trustee, in accordance with the principles stated in Article 5, has a permanent establishment in that other Contracting State,

the business carried on by the trustee shall be deemed to be a business carried on in that other Contracting State by that resident through a permanent establishment situated therein and the share of the profits shall be attributed to that permanent establishment.

Article 8

SHIPPING AND AIR TRANSPORT

1. Profits of an enterprise of a Contracting State derived from the operation of ships or aircraft in international traffic shall be taxable only in that Contracting State.
2. Notwithstanding the provisions of Article 2, provided that no political subdivision or local authority of Australia levies a tax similar to the local inhabitant taxes or the enterprise tax in Japan in respect of the operation of ships or aircraft in international traffic carried on by an enterprise of Japan, an enterprise of Australia shall be exempt from the local inhabitant taxes and the enterprise tax in Japan in respect of the operation of ships or aircraft in international traffic.
3. Notwithstanding the provisions of paragraph 1, profits of an enterprise of a Contracting State derived from the operation of ships or aircraft may be taxed in the other Contracting State to the extent that they are profits derived directly or indirectly from the operation of ships or aircraft confined solely to places in that other Contracting State.
4. For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State and are discharged at a place in that Contracting State shall be treated as profits from the operation of ships or aircraft confined solely to places in that Contracting State.
5. The provisions of the preceding paragraphs of this Article shall also apply to profits from the operation of ships or aircraft derived through participation in a pool service, joint business or other profit sharing arrangement.

Article 9

ASSOCIATED ENTERPRISES

1. Where:

- a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or
- b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions operate between the two enterprises in their commercial or

financial relations which differ from those which might be expected to operate between independent enterprises dealing wholly independently with one another, then any profits which, but for those conditions, might have been expected to have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Nothing in this Article, other than paragraph 4, shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person in cases where the information available to the competent authority of that Contracting State is inadequate to determine the profits accruing to an enterprise, provided that, on the basis of the available information, the determination of that tax liability of the enterprise is consistent with the principles stated in paragraph 1.

3. Where a Contracting State includes, in accordance with the provisions of paragraph 1 or 2, in the profits of an enterprise of that Contracting State - and taxes accordingly - profits on which an enterprise of the other Contracting State has been charged to tax in that other Contracting State and where the competent authorities of the Contracting States agree, upon consultation, that all or part of the profits so included are profits which might have been expected to have accrued to the enterprise of the first-mentioned Contracting State if the conditions operative between the two enterprises had been those which might have been expected to have operated between independent enterprises dealing wholly independently with one another, then the other Contracting State shall make an appropriate adjustment to the amount of the tax charged therein on those agreed profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention.

4. Notwithstanding the provisions of paragraphs 1 and 2, a Contracting State shall not change the profits of an enterprise of that Contracting State in the circumstances referred to in those paragraphs, if an enquiry into the profits of that enterprise is not initiated within seven years from the end of the taxable year in which the profits that would be subject to such change, but for the conditions referred to in those paragraphs, might have been expected to have accrued to that enterprise. The provisions of this paragraph shall not apply in the case of fraud or wilful default or if the inability to initiate an enquiry within the prescribed period is attributable to the actions or inaction of that enterprise.

Article 10

DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State for the purposes of its tax, being dividends beneficially owned by a resident of the other Contracting State, may be taxed in that other Contracting State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident for the purposes of its tax and according to the law of that Contracting State, but the tax so charged shall not exceed:

- a) 5 per cent of the gross amount of the dividends if the beneficial owner of the dividends is a company which owns directly shares representing at least 10 per cent of the voting power of the company paying the dividends;
- b) 10 per cent of the gross amount of the dividends in all other cases.

3. Notwithstanding the provisions of paragraph 2, dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident for the purposes of its tax if the beneficial owner of the dividends is a company that is a resident of the other Contracting State and that has owned directly shares representing at least 80 per cent of the voting power of the company paying the dividends for the 12 month period ending on the date on which entitlement to the dividends is determined and the company that is the beneficial owner of the dividends:

- a) is a qualified person by reason of the provisions of subparagraph c) of paragraph 2 of Article 23;
- b) has at least 50 per cent of the aggregate vote and value of its shares owned directly or indirectly by five or fewer companies referred to in subparagraph a); or
- c) is granted benefits with respect to those dividends under paragraph 5 of Article 23.

4. Notwithstanding the provisions of paragraphs 2 and 3, dividends paid by a company that is a resident of Japan and that is entitled to a deduction for dividends paid to its beneficiaries in computing its taxable income in Japan, being dividends beneficially owned by a resident of Australia, may also be taxed in Japan according to the law of Japan, but the tax so charged shall not exceed:

- a) 15 per cent of the gross amount of the dividends if more than 50 percent of the assets of such company consist, directly or indirectly, of real property situated in Japan;
- b) 10 per cent of the gross amount of the dividends in all other cases.

5. The provisions of paragraphs 2, 3 and 4 shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

6. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income or other distributions which are subjected to the same taxation treatment as income from shares by the law of the Contracting State of which the company making the distribution is a resident for the purposes of its tax.

- 7. a) Distributions of income, profits or gains by a Real Estate Investment Trust (hereinafter referred to as a "REIT"), being distributions beneficially owned by a resident of Japan, may be taxed in Japan.
- b) However, such distributions may also be taxed in Australia according to the law of Australia, but the tax so charged shall not exceed 15 per cent of the gross amount of the distributions if the beneficial owner of the distributions is a resident of Japan other than a beneficial owner of the distributions which holds, or has held at any time in the 12 month period preceding the date on which the distributions are made, directly or indirectly, capital that represents at least 10 percent of the value of all the capital in the REIT.
- c) For the purposes of this paragraph, the term "Real Estate Investment Trust" means a managed investment trust created or organised under the laws of Australia which carries on a business consisting of investment, directly or indirectly, in real property for the main purpose of deriving rent.

8. The provisions of paragraphs 1, 2, 3, 4 and 7 shall not apply if the beneficial owner of the dividends or distributions, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident for the purposes of its tax (or, in the case of a REIT to which paragraph 7 applies, in Australia) through a permanent establishment situated therein and the holding in respect of which the dividends or distributions are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

9. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other Contracting State may not impose any tax on the dividends paid by the company – being dividends beneficially owned by a person who is not a resident of that other Contracting State – except insofar as the holding in respect of which such dividends are paid is effectively connected with a permanent establishment situated in

that other Contracting State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in that other Contracting State. However, in the case of dividends paid by a company which is deemed to be a resident only of a Contracting State by reason of the provisions of paragraph 3 of Article 4, the other Contracting State may tax such dividends to the extent that they are paid out of profits or income arising in that other Contracting State and, in the case of dividends beneficially owned by a resident of the first-mentioned Contracting State, according to the provisions of paragraphs 2 or 3.

10. A resident of a Contracting State shall not be considered the beneficial owner of the dividends paid by a resident of the other Contracting State for the purposes of its tax in respect of preferred shares or other similar interests if such preferred shares or other similar interests might not have been expected to have been established or acquired unless a person:

- a) that is not entitled to benefits with respect to dividends paid by a resident of that other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and
- b) that is not a resident of either Contracting State,

owned equivalent preferred shares or other similar interests in the first-mentioned resident.

11. **[REPLACED by paragraph 1 of Article 7 of the MLI]**² *No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the assignment of the dividends or distributions, the creation or assignment of the shares or other rights in respect of which the dividends or distributions are paid, or the establishment, acquisition or maintenance of the company which is the beneficial owner of the dividends or distributions or the conduct of its operations to take advantage of this Article.*

Article 11

INTEREST

1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in that other Contracting State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the law of that Contracting State, but the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall not be taxed in the first-mentioned Contracting State if:

- a) the interest is derived by a Contracting State or a political subdivision or local authority thereof, by any other body exercising governmental functions in a Contracting State, or by the Bank of Japan or the Reserve Bank of Australia;
- b) the interest is derived by a financial institution which is unrelated to and dealing wholly independently with the payer. For the purpose of this Article, the term "financial institution" means a bank or other enterprise substantially deriving its profits by raising debt finance in the financial markets or taking deposits at interest and by using those funds in carrying on a business of providing finance; or
- c) the interest is derived by:

² Refer to text box immediately after Article 29 of the Convention.

- (i) in the case of Japan, the Japan Bank for International Cooperation, or the Nippon Export and Investment Insurance;
- (ii) in the case of Australia, the Export Finance and Insurance Corporation, or a public authority that manages the investments of the Future Fund; and
- (iii) any similar institution as may be agreed upon from time to time between the Governments of the Contracting States through an exchange of diplomatic notes.

4. Notwithstanding the provisions of paragraph 3, interest referred to in subparagraph *b)* of that paragraph may be taxed in the Contracting State in which it arises at a rate not exceeding 10 per cent of the gross amount of the interest if the interest is paid as part of an arrangement involving back-to-back loans or other arrangement that is economically equivalent and intended to have a similar effect to an arrangement involving back-to-back loans.

5. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, interest from government securities and interest from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures, and all other income that is subjected to the same taxation treatment as income from money lent by the tax law of the Contracting State in which the income arises. Income dealt with in Article 10 shall not be regarded as interest for the purposes of this Convention.

6. The provisions of paragraphs 1 and 2, subparagraph *b)* of paragraph 3 and paragraph 4 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein and the debt-claims or other rights in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

7. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that Contracting State for the purposes of its tax. Where, however, the person paying interest, whether such person is a resident of a Contracting State or not, has in a Contracting State or a state other than the Contracting States a permanent establishment in connection with which the indebtedness on which the interest is paid were incurred, and such interest is borne by such permanent establishment, then:

- a) if the permanent establishment is situated in a Contracting State, such interest shall be deemed to arise in that Contracting State; and
- b) if the permanent establishment is situated in a state other than the Contracting States, such interest shall not be deemed to arise in either Contracting State.

8. Where, by reason of a special relationship between the payer and the beneficial owner of the interest, or between both of them and some other person, the amount of the interest, having regard to the debt-claims or other rights for which it is paid, exceeds the amount which might have been expected to have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

9. A resident of a Contracting State shall not be considered the beneficial owner of the interest arising in the other Contracting State in respect of a debt-claim or other right if such debt-claim or other right might not have been expected to have been established unless a person:

- a) that is not entitled to benefits with respect to the interest arising in that other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and
- b) that is not a resident of either Contracting State,

owned an equivalent debt-claim or other right against the first-mentioned resident.

10. **[REPLACED by paragraph 1 of Article 7 of the MLI]**³ *No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the assignment of the interest, the creation or assignment of the debt-claim or other rights in respect of which the interest is paid, or the establishment, acquisition or maintenance of the company which is the beneficial owner of the interest or the conduct of its operations to take advantage of this Article.*

Article 12

ROYALTIES

1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in that other Contracting State.
2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the law of that Contracting State, but the tax so charged shall not exceed 5 per cent of the gross amount of the royalties.
3. The term "royalties" as used in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:
 - a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right;
 - b) the supply of scientific, technical, industrial or commercial knowledge or information;
 - c) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph a) or any such knowledge or information as is mentioned in subparagraph b);
 - d) the use of, or the right to use:
 - (i) motion picture films; or
 - (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; or
 - e) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the property or right in respect of which the royalties are paid or credited is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.
5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident

³ Refer to text box immediately after Article 29 of the Convention.

of that Contracting State for the purposes of its tax. Where, however, the person paying royalties, whether such person is a resident of a Contracting State or not, has in a Contracting State or a state other than the Contracting States a permanent establishment in connection with which the liability to pay or credit the royalties was incurred, and such royalties are borne by such permanent establishment, then:

- a) if the permanent establishment is situated in a Contracting State, such royalties shall be deemed to arise in that Contracting State; and
- b) if the permanent establishment is situated in a state other than the Contracting States, such royalties shall not be deemed to arise in either Contracting State.

6. Where, by reason of a special relationship between the payer and the beneficial owner of the royalties, or between both of them and some other person, the amount of the royalties, having regard to what they are paid or credited for, exceeds the amount which might have been expected to have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments or credits shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

7. A resident of a Contracting State shall not be considered the beneficial owner of the royalties arising in the other Contracting State in respect of the use of the property or right if such royalties might not have been expected to have been paid to the resident unless the resident paid royalties in respect of the same property or right to a person:

- a) that is not entitled to benefits with respect to royalties arising in that other Contracting State which are equivalent to, or more favourable than, those available under this Convention to a resident of the first-mentioned Contracting State; and
- b) that is not a resident of either Contracting State.

8. **[REPLACED by paragraph 1 of Article 7 of the MLI]**⁴ *No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the assignment of the royalties, the creation or assignment of the property or right in respect of which the royalties are paid, or the establishment, acquisition or maintenance of the company which is the beneficial owner of the royalties or the conduct of its operations to take advantage of this Article.*

Article 13

ALIENATION OF PROPERTY

1. Income, profits or gains derived by a resident of a Contracting State from the alienation of real property referred to in Article 6 and situated in the other Contracting State may be taxed in that other Contracting State.

2. **[MODIFIED by subparagraph a) of paragraph 1 of Article 9 of the MLI]** *Income, profits or gains derived by a resident of a Contracting State from the alienation of shares in a company or of interests in a partnership, trust or other entity may be taxed in the other Contracting State where the shares or the interests derive at least 50 per cent of their value directly or indirectly from real property referred to in Article 6 and situated in that other Contracting State.*

The following subparagraph a) of paragraph 1 of Article 9 of the MLI applies to paragraph 2

⁴ Refer to text box immediately after Article 29 of the Convention.

of Article 13 of this Convention:

ARTICLE 9 OF THE MLI – CAPITAL GAINS FROM ALIENATION OF SHARES OR INTERESTS OF ENTITIES DERIVING THEIR VALUE PRINCIPALLY FROM IMMOVABLE PROPERTY

[Paragraph 2 of Article 13 of the Convention] shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation

3. Unless the provisions of paragraph 2 are applicable, income, profits or gains derived by a resident of a Contracting State which are not subject to tax in that Contracting State from the alienation of shares issued by a company being a resident of the other Contracting State may be taxed in that other Contracting State, if:

- a) shares owned by the alienator (together with such shares owned by any other related or connected persons as may be aggregated therewith) amount to at least 25 per cent of the total issued shares of such company at any time during the taxable year in which the alienation takes place; and
- b) the total of the shares alienated by the alienator and such related or connected persons during that taxable year in which the alienation takes place amounts to at least 5 per cent of the total issued shares of such company.

4. Notwithstanding the provisions of paragraph 3, income, profits or gains from the alienation of property (other than real property) that forms part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including income, profits or gains from the alienation of that permanent establishment (alone or with the whole enterprise), may be taxed in that other Contracting State.

5. Income, profits or gains derived by an enterprise of a Contracting State from the alienation of ships or aircraft operated by that enterprise in international traffic, or of property (other than real property) pertaining to the operation of such ships or aircraft, shall be taxable only in that Contracting State.

6. Gains from the alienation of any property other than that referred to in the preceding paragraphs of this Article shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14

INCOME FROM EMPLOYMENT

1. Subject to the provisions of Articles 15, 17 and 18, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that Contracting State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other Contracting State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned Contracting State if:

- a) the recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days in any 12 month period commencing or ending in the taxable year of that other Contracting State;
- b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Contracting State; and

- c) the remuneration is not borne by a permanent establishment which the employer has in the other Contracting State.

3. Notwithstanding the preceding paragraphs of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State may be taxed in that Contracting State.

Article 15

DIRECTORS' FEES

Directors' fees and other similar payments derived by a person who is a resident of a Contracting State in that person's capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other Contracting State.

Article 16

ENTERTAINERS AND SPORTSPERSONS

1. Notwithstanding the provisions of Articles 7 and 14, income derived by a person who is a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that person's personal activities as such exercised in the other Contracting State, may be taxed in that other Contracting State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in that person's capacity as such accrues not to that person but to another person, that income may, notwithstanding the provisions of Articles 7 and 14, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

Article 17

PENSIONS AND ANNUITIES

1. Subject to the provisions of paragraph 2 of Article 18, pensions and other similar remuneration paid periodically to an individual who is a resident of a Contracting State shall be taxable only in that Contracting State.

2. Annuities paid to an individual who is a resident of a Contracting State shall be taxable only in that Contracting State.

3. Lump sums in lieu of the right to receive a pension or other similar remuneration, or to receive an annuity, paid to an individual who is a resident of a Contracting State shall be taxable only in that Contracting State. However, such lump sums may also be taxed in the other Contracting State if they arise in that other Contracting State.

4. The term "annuity" means a stated sum payable periodically at stated times during the life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Article 18

GOVERNMENT SERVICE

- 1.
 - a) Salaries, wages and other similar remuneration paid by a Contracting State or a political subdivision or local authority thereof to an individual in respect of services rendered to that Contracting State or political subdivision or local authority, in the discharge of functions of a governmental nature, shall be taxable only in that Contracting State.
 - b) However, such salaries, wages and other similar remuneration shall be taxable

only in the other Contracting State if the services are rendered in that other Contracting State and the individual is a resident of that other Contracting State who:

- (i) is a national of that other Contracting State; or
 - (ii) did not become a resident of that other Contracting State solely for the purpose of rendering the services.
- 2.
 - a) Notwithstanding the provisions of paragraph 1, pensions and other similar remuneration paid periodically by, or out of funds to which contributions are made or created by, a Contracting State or a political subdivision or local authority thereof to an individual in respect of services rendered to that Contracting State or political subdivision or local authority shall be taxable only in that Contracting State.
 - b) However, such pensions and other similar remuneration shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that other Contracting State.
- 3. The provisions of Articles 14, 15, 16 and 17 shall apply to salaries, wages, pensions, and other similar remuneration in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or local authority thereof.

Article 19

STUDENTS

Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is temporarily present in the first-mentioned Contracting State solely for the purpose of that person's education or training receives for the purpose of that person's maintenance, education or training shall not be taxed in the first-mentioned Contracting State, provided that such payments arise from sources outside that first-mentioned Contracting State. The exemption provided by this Article shall apply to a business apprentice only for a period not exceeding one year from the date the person first begins that person's training in the first-mentioned Contracting State.

Article 20

SLEEPING PARTNERSHIP (TOKUMEI KUMIAI)

Notwithstanding any other provisions of this Convention, other than those of Article 26, any income, profits or gains derived by a sleeping partner in respect of a sleeping partnership (Tokumei Kumiai) contract or other similar contract may be taxed in the Contracting State in which such income, profits or gains arise, and according to the laws of that Contracting State.

Article 21

OTHER INCOME

- 1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that Contracting State.
- 2. The provisions of paragraph 1 shall not apply to income, other than income from real property as defined in paragraph 2 of Article 6, derived by a resident of a Contracting State who carries on business in the other Contracting State through a permanent establishment situated therein and the property or right in respect of which the income is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Convention from sources in the other Contracting State may also be taxed in that other Contracting State.

Article 22

SOURCE OF INCOME

1. Income, profits or gains derived by a resident of a Contracting State which, under any one or more of Articles 6 to 8 and 10 to 18, may be taxed in the other Contracting State shall for the purposes of the law of that other Contracting State relating to its tax be deemed to arise from sources in that other Contracting State.

2. Income, profits or gains derived by a resident of a Contracting State which, under any one or more of Articles 6 to 8, 10 to 18 and 20, may be taxed in the other Contracting State shall for the purposes of Article 25 and of the law of the first-mentioned Contracting State relating to its tax be deemed to arise from sources in the other Contracting State.

Article 23

LIMITATION ON BENEFITS

1. Except as otherwise provided in this Article, a resident of a Contracting State that derives income, profits or gains described in Article 7; in paragraph 3 of Article 10 or paragraph 3 of Article 11; or in Article 13 from the other Contracting State shall be entitled to the benefits granted for a taxable year by the provisions of those paragraphs or Articles only if such resident is a qualified person as defined in paragraph 2 and satisfies any other specified conditions in those paragraphs or Articles for the obtaining of such benefits.

2. A resident of a Contracting State shall be a qualified person for a taxable year only if such resident is either:

- a) an individual;
- b) a qualified governmental entity;
- c) a company (including a company participating in a dual listed company arrangement), if its principal class of shares is listed or registered on a recognised stock exchange specified in clause (i) or (ii) of subparagraph d) of paragraph 6 and is regularly traded on one or more recognised stock exchanges;
- d) a person other than an individual or a company, if the principal class of units in that person is listed or admitted to dealings on a recognised stock exchange specified in clause (i) or (ii) of subparagraph d) of paragraph 6 and is regularly traded on one or more recognised stock exchanges;
- e) a pension fund, provided that as of the end of the prior taxable year more than 50 per cent of its beneficiaries, members or participants are individuals who are residents of either Contracting State;
- f) an organisation established under the law of that Contracting State and operated exclusively for a religious, charitable, educational, scientific, artistic, cultural or public purposes, provided that all or part of its income, profits or gains may be exempt from tax under the domestic law of that Contracting State; or
- g) a person other than an individual, if residents of either Contracting State that are qualified persons by reason of the provisions of subparagraphs a) to f) of this paragraph own, directly or indirectly, at least 50 per cent of the aggregate vote and value of the shares of the person, or at least 50 per cent of the

beneficial interests in the person.

3. Where the provisions of subparagraph *g)* of paragraph 2 apply:
 - a) in respect of taxation by withholding at source, a resident of a Contracting State shall be considered to satisfy the conditions described in that subparagraph for the taxable year in which the payment is made if such resident satisfies those conditions during the 12 month period preceding the date of payment of an item of income, profits or gains (or, in the case of dividends, the date on which entitlement to the dividends is determined);
 - b) in all other cases, a resident of a Contracting State shall be considered to satisfy the conditions described in that subparagraph for the taxable year in which the payment is made if such resident satisfies those conditions on at least half the days of the taxable year.
4.
 - a) Notwithstanding that a resident of a Contracting State may not be a qualified person, that resident shall be entitled to the benefits granted by the provisions of Article 7; of paragraph 3 of Article 10 or paragraph 3 of Article 11; or of Article 13 with respect to an item of income, profits or gains described in those paragraphs or Articles derived from the other Contracting State if the resident is carrying on business in the first-mentioned Contracting State (other than the business of making or managing investments for the resident's own account, unless the business is banking, insurance or securities business carried on by a bank, insurance company or securities dealer), the income, profits or gains derived from the other Contracting State are derived in connection with, or are incidental to, that business and that resident satisfies any other specified conditions in those paragraphs or Articles for the obtaining of such benefits.
 - b) If a resident of a Contracting State derives an item of income, profits or gains from a business carried on by that resident in the other Contracting State or derives an item of income, profits or gains arising in the other Contracting State from a person that has with the resident a relationship described in subparagraph *a)* or *b)* of paragraph 1 of Article 9, the conditions described in subparagraph *a)* of this paragraph shall be considered to be satisfied with respect to such an item of income, profits or gains only if the business carried on in the first-mentioned Contracting State is substantial in relation to the business carried on in the other Contracting State. Whether such business is substantial for the purpose of this paragraph shall be determined on the basis of all the facts and circumstances.
 - c) In determining whether a person is carrying on business in a Contracting State under subparagraph *a)* of this paragraph, the business conducted by a partnership in which that person is a partner and the business conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses, directly or indirectly, at least 50 per cent of the beneficial interests in the other (or, in the case of a company, at least 50 per cent of the aggregate vote and value of the shares of the company) or another person possesses, directly or indirectly, at least 50 per cent of the beneficial interests (or, in the case of a company, at least 50 per cent of the aggregate vote and value of the shares of the company) in each person. In any case, a person shall be considered to be connected to another if, on the basis of all the facts and circumstances, one has control of the other or both are under the control of the same person or persons.
5. A resident of a Contracting State that is neither a qualified person nor entitled under paragraph 4 to the benefits granted by the provisions of Article 7; of paragraph 3 of Article 10

or paragraph 3 of Article 11; or of Article 13 with respect to an item of income, profits or gains described in those paragraphs or Articles shall, nevertheless, be granted such benefits if the competent authority of the other Contracting State determines, in accordance with its domestic law or administrative practice, that the establishment, acquisition or maintenance of such resident and the conduct of its operations are considered as not having the obtaining of such benefits as one of the principal purposes.

6. For the purposes of this Article:

- a) the term "qualified governmental entity" means entities referred to in subparagraphs a) and c) of paragraph 3 of Article 11;
- b) the term "principal class of shares" means the ordinary shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary shares represents the majority of the voting power and value of the company, the principal class of shares is that class or those classes that in the aggregate represent a majority of the voting power and value of the company. For the purposes of the preceding sentences, in the case of a company participating in a dual listed company arrangement, the principal class of shares will be determined after excluding the special voting shares which were issued as a means of establishing that dual listed company arrangement;
- c) the term "dual listed company arrangement" means an arrangement pursuant to which two publicly listed companies, while maintaining their separate legal entity status, shareholdings and listings, align their strategic directions and the economic interests of their respective shareholders through:
 - (i) the appointment of common (or almost identical) boards of directors;
 - (ii) management of the operations of the two companies on a unified basis;
 - (iii) equalised distributions to shareholders in accordance with an equalisation ratio applying between the two companies, including in the event of a winding up of one or both of the companies;
 - (iv) the shareholders of both companies voting in effect as a single decision-making body on substantial issues affecting their combined interests; and
 - (v) cross-guarantees as to, or similar financial support for, each other's material obligations or operations except where the effect of the relevant regulatory requirements prevents such guarantees or financial support;
- d) the term "recognised stock exchange" means:
 - (i) any stock exchange established by a Financial Instruments Exchange or an approved-type financial instruments firms association under the terms of the Financial Instruments and Exchange Law (Law No.25 of 1948) of Japan;
 - (ii) the Australian Securities Exchange and any other securities exchange recognised as such under the Corporations Act 2001 of Australia; and
 - (iii) any other stock exchange which the competent authorities of the Contracting States agree to recognise for the purposes of this Article;
- e) the term "units" includes any instrument, not being a debt-claim, granting an entitlement to share in the asset or income of, or receive a distribution from, the person;
- f) the term "principal class of units" means the class of units which represents the

majority of the value of the person. If no single class of units represents the majority of the value of the person, the principal class of units is that class or those classes that in the aggregate represent the majority of the value of the person; and

- g) the term "pension fund" means any person that:
- (i) is established under the law of a Contracting State; and
 - (ii) is operated principally to administer or provide pensions, retirement benefits or other similar remuneration or to earn income, profits or gains for the benefit of other pension funds.

7. Nothing in this Article shall be construed as restricting, in any manner, the application of any provisions of the law of a Contracting State which are designed to prevent the avoidance or evasion of taxes.

Article 24

LIMITATION OF RELIEF

1. Where under this Convention any income, profits or gains are relieved from tax in a Contracting State and, under the law in force in the other Contracting State, an individual, in respect of that income or those profits or gains, is taxed by reference to the amount thereof that is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the relief to be allowed under the Convention in the first-mentioned Contracting State shall apply only to so much of that income or those profits or gains as is taxed in the other Contracting State.

2. Where under this Convention any income, profits or gains are relieved from tax in a Contracting State and, under the law in force in the other Contracting State, an individual, in respect of that income or those profits or gains, is exempt from tax by virtue of being a temporary resident of that other Contracting State within the meaning of the applicable law of that other Contracting State, then the relief to be allowed under the Convention in the first-mentioned Contracting State shall not apply to the extent that that income or those profits or gains are exempt from tax in the other Contracting State.

Article 25

ELIMINATION OF DOUBLE TAXATION

1. Subject to the provisions of the laws of Japan regarding the allowance as a credit against Japanese tax of tax payable in any country other than Japan:

- a) Where a resident of Japan derives income from Australia which may be taxed in Australia in accordance with the provisions of this Convention, the amount of Australian tax payable in respect of that income shall be allowed as a credit against the Japanese tax imposed on that resident. The amount of credit, however, shall not exceed that part of the Japanese tax which is appropriate to that income.
- b) Where the income derived from Australia is dividends paid by a company which is a resident of Australia to a company which is a resident of Japan and which has owned at least 10 per cent either of the voting shares or of the total issued shares of the company paying the dividends during the period of six months immediately before the day when the obligation to pay dividends is confirmed, the credit shall take into account Australian tax payable by the company paying the dividends in respect of its income.

2. Subject to the provisions of the law of Australia from time to time in force which relate

to the allowance of a credit against Australian tax of tax paid in a country outside Australia (which shall not affect the general principle of this Article), Japanese tax paid under the law of Japan and in accordance with this Convention, whether directly or by deduction, in respect of income, profits or gains derived by a person who is a resident of Australia from sources in Japan shall be allowed as a credit against Australian tax payable in respect of that income, profits or gains.

Article 26

NON-DISCRIMINATION

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other Contracting State in the same circumstances, in particular with respect to residence, are or may be subjected. The provisions of this paragraph shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.
2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other Contracting State than the taxation levied on enterprises of that other Contracting State carrying on the same activities in similar circumstances. The provisions of this paragraph shall not be construed as obliging a Contracting State to grant to individuals who are residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes which it grants to its own residents.
3. Except where the provisions of paragraph 1 of Article 9, paragraph 8 of Article 11, or paragraph 6 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned Contracting State.
4. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned Contracting State in similar circumstances are or may be subjected.
5. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof.

Article 27

MUTUAL AGREEMENT PROCEDURE

1. **[The first sentence of paragraph 1 of Article 27 of this Convention is REPLACED by the first sentence of paragraph 1 of Article 16 of the MLI]** *Where a person considers that the actions of one or both of the Contracting States result or will result for the person in taxation not in accordance with the provisions of this Convention, the person may, irrespective of the remedies provided by the domestic law of those Contracting States, present a case to the competent authority of the Contracting State of which the person is a resident or, if the case comes under paragraph 1 of Article 26, to that of the Contracting State of which the person is a national. 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 Convention.*

The following first sentence of paragraph 1 of Article 16 of the MLI replaces the first sentence of paragraph 1 of Article 27 of this Convention:

ARTICLE 16 OF THE MLI – MUTUAL AGREEMENT PROCEDURE

Where a person considers that the actions of one or both of the [*Contracting States*] result or will result for that person in taxation not in accordance with the provisions of [*the Convention*], that person may, irrespective of the remedies provided by the domestic law of those [*Contracting States*], present the case to the competent authority of either [*Contracting State*].

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

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

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

5. For the purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding the provisions of that paragraph, any dispute between them as to whether a measure falls within the scope of this Convention may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of this Article or, failing agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States.

The following Part VI of the MLI applies to this Convention:

PART VI OF THE MLI (ARBITRATION)

Article 19 (Mandatory Binding Arbitration) of the MLI

1. Where:

a) under [*paragraph 1 of Article 27 of the Convention*], a person has presented

a case to the competent authority of a [Contracting State] on the basis that the actions of one or both of the [Contracting States] have resulted for that person in taxation not in accordance with the provisions of [the Convention]; and

- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to [paragraph 2 of Article 27 of the Convention], within a period of two years beginning on the start date referred to in paragraph 8 or 9 [of Article 19 of the MLI], as the case may be (unless, prior to the expiration of that period the competent authorities of the [Contracting States] 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 States] pursuant to the provisions of [paragraph 10 of Article 19 of the MLI].

2. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 [of Article 19 of the MLI] 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 [of Article 19 of the MLI] 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 [of Article 19 of the MLI] 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 [of Article 19 of the MLI], the period provided in subparagraph b) of paragraph 1 [of Article 19 of the MLI] 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 [of Article 19 of the MLI]. The arbitration decision shall be final.
 - b) The arbitration decision shall be binding on both [Contracting States] 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 States] holds

that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 1 [*of Article 19 of the MLI*] 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) [*of the MLI*]). 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 [*of Article 19 of the MLI*] 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 State*].

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 State*]) 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 [*of Article 19 of the MLI*], 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 [*of Article 19 of the MLI*], the start date referred to in paragraph 1 [*of Article 19 of the MLI*] 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 [*of Article 19 of the MLI*]; and
- b) the date that is three calendar months after the notification to the competent authority of the other [*Contracting State*] pursuant to subparagraph b) of paragraph 5 [*of Article 19 of the MLI*].

9. Where additional information has been requested pursuant to subparagraph b) of paragraph 6 [*of Article 19 of the MLI*], the start date referred to in paragraph 1 [*of Article 19 of the MLI*] 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 [*of Article 19 of the MLI*]; 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 [*of Article 19 of the MLI*], such notification shall be treated as a request for additional information under subparagraph b) of paragraph 6 [*of Article 19 of the MLI*].

10. The competent authorities of the [*Contracting States*] shall by mutual agreement pursuant to [*Article 27 of the Convention*] settle the mode of application of the provisions contained in this Part, including the minimum information necessary for each competent authority to undertake substantive consideration of the case. Such an agreement shall be concluded before the date on which unresolved issues in a case are first eligible to be submitted to arbitration and may be modified from time to time thereafter.

11. *Omitted*

- 12. a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by [*the MLI*] 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 State*];
- 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 State*], a decision concerning the issue is rendered by a court or administrative tribunal of one of the [*Contracting States*], the arbitration process shall terminate.

Article 20 (Appointment of Arbitrators) of the MLI

1. Except to the extent that the competent authorities of the [*Contracting States*] mutually agree on different rules, paragraphs 2 through 4 [*of Article 20 of the MLI*] shall apply for the purposes of this Part.

2. The following rules shall govern the appointment of the members of an arbitration panel:

- a) The arbitration panel shall consist of three individual members with expertise or experience in international tax matters.
- b) Each competent authority shall appoint one panel member within 60 days of the date of the request for arbitration under paragraph 1 of Article 19 [*of the MLI*]. The two panel members so appointed shall, within 60 days of the latter of their appointments, appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either [*Contracting State*].
- c) Each member 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) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

3. In the event that the competent authority of a [Contracting State] fails to appoint a member of the arbitration panel in the manner and within the time periods specified in paragraph 2 of [Article 20 of the MLI] or agreed to by the competent authorities of the [Contracting States], a member shall 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 that is not a national of either [Contracting State].

4. If the two initial members of the arbitration panel fail to appoint the Chair in the manner and within the time periods specified in paragraph 2 [of Article 20 of the MLI] or agreed to by the competent authorities of the [Contracting States], the Chair shall be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either [Contracting State].

Article 21 (Confidentiality of Arbitration Proceedings) of the MLI

1. Solely for the purposes of the application of the provisions of this Part and of the provisions of [the Convention] and of the domestic laws of the [Contracting States] related to the exchange of information, confidentiality, and administrative assistance, members of the arbitration panel and a maximum of three staff per member (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be considered to be persons or authorities to whom information may be disclosed. Information received by the arbitration panel or prospective arbitrators and information that the competent authorities receive from the arbitration panel shall be considered information that is exchanged under the provisions of [the Convention] related to the exchange of information and administrative assistance.

2. The competent authorities of the [Contracting States] shall ensure that members of the arbitration panel and their staff agree in writing, prior to their acting in an arbitration proceeding, to treat any information relating to the arbitration proceeding consistently with the confidentiality and nondisclosure obligations described in the provisions of [the Convention] related to exchange of information and administrative assistance and under the applicable laws of the [Contracting States].

Article 22 (Resolution of a Case Prior to the Conclusion of the Arbitration) of the MLI

For the purposes of this Part and the provisions of [the Convention] that provide for resolution of cases through mutual agreement, the mutual agreement procedure, as well as the arbitration proceeding, with respect to a 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 States]:

- a) the competent authorities of the [Contracting States] reach a mutual agreement to resolve the case; or
- b) the person who presented the case withdraws the request for arbitration or the request for a mutual agreement procedure.

Article 23 (Type of Arbitration Process) of the MLI

1. Omitted

Independent opinion arbitration

2. [E]xcept to the extent that the competent authorities of the [Contracting States] mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding:

- a) After a case is submitted to arbitration, the competent authority of each [Contracting State] shall provide any information that may be necessary for

the arbitration decision to all panel members without undue delay. Unless the competent authorities of the [*Contracting States*] agree otherwise, any information that was not available to both competent authorities before the request for arbitration was received by both of them shall not be taken into account for purposes of the decision.

- b) The arbitration panel shall decide the issues submitted to arbitration in accordance with the applicable provisions of [*the Convention*] and, subject to these provisions, of those of the domestic laws of the [*Contracting States*]. The panel members shall also consider any other sources which the competent authorities of the [*Contracting States*] may by mutual agreement expressly identify.
- c) The arbitration decision shall be delivered to the competent authorities of the [*Contracting States*] in writing and shall indicate the sources of law relied upon and the reasoning which led to its result. The arbitration decision shall be adopted by a simple majority of the panel members. The arbitration decision shall have no precedential value.

3. *Omitted*

4. *Omitted*

5. Prior to the beginning of arbitration proceedings, the competent authorities of the [*Contracting States*] 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 Convention*], 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 States*], a person that presented the case or one of that person's advisors materially breaches that agreement.

6. *Omitted*

7. *Omitted*

Article 24 (Agreement on a Different Resolution) Omitted

Article 25 (Costs of Arbitration Proceedings) of the MLI

In an arbitration proceeding under this Part, the fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with the arbitration proceedings by the [*Contracting States*], shall be borne by the [*Contracting States*] in a manner to be settled by mutual agreement between the competent authorities of the [*Contracting States*]. In the absence of such agreement, each [*Contracting State*] shall bear its own expenses and those of its appointed panel member. The cost of the chair of the arbitration panel and other expenses associated with the conduct of the arbitration proceedings shall be borne by the [*Contracting States*] in equal shares.

Article 26 (Compatibility) of the MLI

1. *Omitted*

2. Any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for in this Part shall not be submitted to arbitration if the issue falls within the scope of a case with respect to which an arbitration panel or similar body has previously been set up in accordance with a bilateral or multilateral convention that provides for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case.

3. [*Nothing*] in this Part shall affect the fulfilment of wider obligations with respect to the

arbitration of unresolved issues arising in the context of a mutual agreement procedure resulting from other conventions to which the [*Contracting States*] are or will become parties.

4. *Omitted*

Subparagraph a) of paragraph 2 of Article 28 of the MLI

Pursuant to Subparagraph a) of paragraph 2 of Article 28 of the MLI, Australia formulates the following reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI:

Australia reserves the right to exclude from the scope of Part VI [*of the MLI*] 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.

Pursuant to Subparagraph a) of paragraph 2 of Article 28 of the MLI, Japan formulates the following reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI:

1. Japan reserves the right to exclude from the scope of Part VI of the MLI with respect to the Convention cases falling within the provisions of paragraph 3 of Article 4 of the Convention.
2. Where a reservation made by Australia pursuant to subparagraph a) of paragraph 2 of Article 28 of the MLI exclusively excludes, whether or not by referring to its domestic law, from the scope of Part VI of the MLI cases of taxation in Australia, Japan reserves the right to exclude from the scope of Part VI of the MLI with respect to the Convention cases of taxation in Japan which are analogous to the cases referred to in Australia's reservation.

Article 28

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic law concerning taxes of every kind and description imposed on behalf of the Contracting States, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic law of that Contracting State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- a) to carry out administrative measures at variance with the law and administrative practice of that or of the other Contracting State;
- b) to supply information which is not obtainable under the law or in the normal course of the administration of that or of the other Contracting State;
- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other Contracting State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Article 29

MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS

Nothing in this Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special international agreements.

The following paragraph 1 of Article 7 of the MLI applies and supersedes the provisions of this Convention:

ARTICLE 7 OF THE MLI – PREVENTION OF TREATY ABUSE (Principal purposes test provision)

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

Article 30

HEADINGS

The headings of the Articles of this Convention are inserted for convenience of reference only and shall not affect the interpretation of the Convention.

Article 31

ENTRY INTO FORCE

1. This Convention shall be approved in accordance with the legal procedures of each of the Contracting States and shall enter into force on the thirtieth day after the date of exchange of diplomatic notes indicating such approval.
2. This Convention shall be applicable:
 - a) in the case of Japan:
 - (i) with respect to taxes withheld at source, for amounts taxable on or after 1 January in the calendar year next following that in which the Convention enters into force;
 - (ii) with respect to taxes on income which are not withheld at source, as regards income for any taxable year beginning on or after 1 January in the calendar year next following that in which the Convention enters into force; and
 - (iii) with respect to other taxes, as regards taxes for any taxable year beginning on or after 1 January in the calendar year next following that in which the Convention enters into force; and
 - b) in the case of Australia:
 - (i) with respect to withholding tax on income that is derived by a resident of Japan, in relation to income derived on or after 1 January in the calendar year next following that in which the Convention enters into force; and
 - (ii) with respect to other taxes, as regards any taxable year beginning on or after 1 July in the calendar year next following that in which the Convention enters into force.
3. The Agreement between Japan and the Commonwealth of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed at Canberra on 20 March, 1969 (hereinafter referred to as "the prior Agreement") shall cease to be effective from the date upon which this Convention has effect in respect of the taxes to which the Convention applies in accordance with the provisions of paragraph 2.
4. The prior Agreement shall terminate on the last date on which it has effect in accordance with this Article.
5. Notwithstanding the entry into force of this Convention, an individual who is entitled to the benefits of Article 15 of the prior Agreement at the time of the entry into force of the Convention shall continue to be entitled to such benefits until such time as the individual would have ceased to be entitled to such benefits if the prior Agreement had remained in force.

Article 32

TERMINATION

This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention after the expiration of a period of five years from the date of its entry into force, by giving to the other Contracting State, through the diplomatic channel, six months prior written notice of termination. In such event, the Convention shall cease to have effect:

- a) in the case of Japan:

- (i) with respect to taxes withheld at source, for amounts taxable on or after 1 January in the calendar year next following the expiration of the six month period;
 - (ii) with respect to taxes on income which are not withheld at source, as regards income for any taxable year beginning on or after 1 January in the calendar year next following the expiration of the six month period; and
 - (iii) with respect to other taxes, as regards taxes for any taxable year beginning on or after 1 January in the calendar year next following the expiration of the six month period; and
- b) in the case of Australia:
 - (i) with respect to withholding tax on income that is derived by a resident of Japan, in relation to income derived on or after 1 January in the calendar year next following the expiration of the six month period; and
 - (ii) with respect to other taxes, as regards any taxable year beginning on or after 1 July in the calendar year next following the expiration of the six month period.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed this Convention.

DONE in duplicate at Tokyo this thirty-first day of January, 2008, in the English and Japanese languages, each text being equally authentic.

For Australia

Hon. Stephen Smith
Minister for Foreign Affairs

For Japan

Hon. Masahiko Koumura
Minister for Foreign Affairs

Protocol

At the signing of the Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (hereinafter referred to as "the Convention"), Australia and Japan have agreed upon the following provisions, which shall form an integral part of the Convention.

1. With reference to subparagraph *b*) of paragraph 1 of Article 2 (Taxes Covered) of the Convention:

The term "the petroleum resource rent tax" means the resource rent tax, in respect of offshore projects relating to the exploration for or exploitation of petroleum resources, imposed under the Petroleum Resource Rent Tax Act 1987.

2. With reference to subparagraph *d*) of paragraph 1 of Article 3 (General Definitions) of the Convention:

The term "Australian tax" or "Japanese tax" shall not include any amount which represents a penalty or interest imposed under the laws of Australia or Japan, respectively, relating to the taxes to which the Convention applies.

3. With reference to paragraph 2 of Article 4 (Resident) of the Convention:

It is understood that the fact of having an habitual abode in a Contracting State rather than in the other Contracting State shall be taken into account in determining where the individual's centre of vital interests is situated.

4. **[REPLACED by paragraph 1 and subparagraph e) of paragraph 3 of Article 4 of the MLI.]**⁵ *With reference to paragraph 3 of Article 4 (Resident) of the Convention:*

It is understood that the term "any other relevant factors" includes:

- a) where the senior day-to-day management is carried on;*
- b) which Contracting State's law governs the legal status;*
- c) where the accounting records are held; and*
- d) where business is carried on.*

5. With reference to subparagraphs *b*) and *c*) of paragraph 4 of Article 5 (Permanent Establishment) of the Convention:

- a)* It is understood that an enterprise of a Contracting State shall not be considered to operate equipment in the other Contracting State where the enterprise leases equipment under a lease contract that is solely for the provision of equipment, including a bareboat lease contract.
- b)* It is understood that the factors of size, quantity or value of equipment or the role of equipment in income producing activities are relevant in determining whether the equipment is substantial on the basis of the facts and circumstances of each particular case.
- c)* It is understood that the term "substantial equipment" may include:
 - (i)* industrial earthmoving equipment or construction equipment used in road building, dam building or powerhouse construction;
 - (ii)* manufacturing or processing equipment used in a factory; and
 - (iii)* oil or drilling rigs, platforms and other structures used in the petroleum or mining industry.

⁵ Refer to text box immediately after paragraph 4 of Article 4 of the Convention.

6. With reference to paragraph 7 of Article 5 (Permanent Establishment) of the Convention:

It is understood that the term "substantially negotiate" is included in order to remove any doubt as to the existence of a permanent establishment where contracts that have been negotiated by an agent in a Contracting State are formally concluded in the other Contracting State.

7. With reference to Articles 6 (Income from Real Property), 7 (Business Profits), 21 (Other Income) and 22 (Source of Income) of the Convention:

It is understood that nothing in these Articles shall prevent a Contracting State from applying its domestic tax law in the case where income is derived by a resident of that Contracting State from real property situated in that Contracting State, even where such a resident carries on business in the other Contracting State through a permanent establishment situated therein and the real property is effectively connected with such permanent establishment. In this case, such income shall not be deemed to arise from sources in that other Contracting State for the purposes of applying the domestic tax law of the first-mentioned Contracting State.

8. With reference to subparagraph *f*) of paragraph 2 of Article 6 (Income from Real Property) of the Convention:

It is understood that the rights referred to in that subparagraph principally cover:

- a) rights to receive payments where the person receiving the payments grants rights to explore for or exploit natural resources; and
- b) rights to receive payments which arise or are quantified by reference to the exploitation of, or exploration for, natural resources in circumstances where the person receiving the payments may not have an interest in the natural resources or rights over the extraction of, or exploration for, natural resources.

9. With reference to Articles 7 (Business Profits) and 13 (Alienation of Property) of the Convention:

It is understood that, where an enterprise of a Contracting State which has carried on business in the other Contracting State through a permanent establishment situated therein, receives, after the enterprise has ceased to carry on business as aforesaid, income, profits or gains attributable to the permanent establishment, such income, profits or gains may be taxed in that other Contracting State in accordance with the principles stated in Articles 7 and 13 of the Convention.

10. With reference to paragraph 6 of Article 7 (Business Profits) of the Convention:

It is understood that, for the purposes of the paragraph, a good and sufficient reason to the contrary shall be considered to exist where there is an alternative method that gives the most appropriate determination of the profits in accordance with the principles contained in the Article.

11. With reference to subparagraph *a*) of paragraph 9 of Article 7 (Business Profits) of the Convention:

It is understood that in the case of Japan the term "a trust which is treated as a company for tax purposes" means a trust, the trustee of which is subject to tax in respect of profits derived from business carried on by the use of trust estate.

12. With reference to Articles 10 (Dividends), 11 (Interest) and 12 (Royalties) of the Convention:

The term "for the purposes of its tax" in relation to a resident of a Contracting State refers to the case where a person is a resident of a Contracting State by virtue of paragraph 1 of Article 4 of the Convention, even if the person is deemed to be a resident of the other Contracting

State by virtue of paragraph 2 or 3 of that Article.

13. With reference to subparagraph a) of paragraph 3 of Article 11 (Interest) of the Convention:

It is understood that the term "any other body exercising governmental function" shall be determined according to the law of the Contracting State in which the interest arises.

14. With reference to subparagraph b) of paragraph 3 of Article 11 (Interest) of the Convention:

It is understood that:

- a) a financial institution shall be unrelated to a payer of the interest where, in considering the level of participation in the ownership or control of either the financial institution or the payer by the other party, neither party is able to exert sufficient influence over the other party;
- b) an enterprise shall derive its profits substantially by a certain activity, where the activity constitutes its main activity when compared to any other activity that it undertakes in terms of its contribution to the enterprise's overall profits.

15. With reference to paragraph 4 of Article 11 (Interest) of the Convention:

It is understood that the term "arrangement involving back-to-back loans" would cover, *inter alia*, any kind of arrangement structured in such a way that a financial institution which is a resident of a Contracting State receives interest arising in the other Contracting State and the financial institution pays an equivalent interest to another person who is a resident of the first-mentioned Contracting State and, if it received the interest directly from the other Contracting State, would not be entitled to the exemption from tax with respect to that interest in that other Contracting State.

16. With reference to paragraph 3 of Article 12 (Royalties) of the Convention:

The term "royalties" shall not include payments for the use of spectrum licences. The provisions of Article 7 of the Convention shall apply to such payments.

17. With reference to subparagraph e) of paragraph 3 of Article 12 (Royalties) of the Convention:

It is understood that the term "forbearance in respect of the use or supply of any property or right" applies to cases where the holder of any property or right receives a payment or provides credits, as consideration, for not making such property or right available to another person.

18. With reference to paragraph 3 of Article 13 (Alienation of Property) of the Convention:

It is understood that where, in the case of schemes of reorganisation of companies, the laws of a Contracting State allow for the taxation of the gains arising from the disposal of shares in a company to be deferred, such gains shall be regarded as subject to tax unless any part of the deferred gains is as a result of a later disposal or reorganisation subject to a statutory exemption under the laws of that Contracting State.

19. With reference to paragraph 1 of Article 25 (Elimination of Double Taxation) of the Convention:

For the purposes of the paragraph, the income tax and the petroleum resource rent tax referred to in subparagraph b) of paragraph 1 of Article 2 of the Convention shall be treated as a unified tax on income.

20. With reference to Article 26 (Non-Discrimination) of the Convention:

The provisions of the Article shall not apply to the following provisions of the laws of Australia:

- a) Subdivision A of Division 3 of Part III of the Income Tax Assessment Act 1936

(hereinafter referred to as "ITAA 1936"), which provides deductions to eligible taxpayers for research and development;

- b) Section 26-25 of Part 2-5 of Chapter 2 of the Income Tax Assessment Act 1997 (hereinafter referred to as "ITAA 1997"), which provides measures to ensure that taxes can be effectively collected and recovered, including conservancy measures under the general law; and
- c) any provision adopted after the date of signature of the Convention which is substantially similar in purpose or intent to a provision covered by this paragraph, or is otherwise agreed between the Governments of the Contracting States through an exchange of diplomatic notes.

21. With reference to Article 26 (Non-Discrimination) of the Convention:

It is understood that nothing in the Article shall be construed as restricting the application of any of the following provisions of the laws of Australia:

- a) Subdivision D of Division 2 of Part III of the ITAA 1936, to the extent those provisions do not allow tax rebates or credits to non-resident taxpayers in relation to dividends paid by a company that is a resident of Australia for the purposes of its tax;
- b) Division 6AAA of Part III of the ITAA 1936, which provides for the taxation of certain residents in relation to non-resident trust estates;
- c) Division 13 of Part III of the ITAA 1936, which deals with transfer pricing;
- d) Section 177E of Part IVA of the ITAA 1936, which addresses dividend stripping arrangements;
- e) Part X of the ITAA 1936, which provides for the taxation of certain residents with interests in controlled foreign companies;
- f) Part XI of the ITAA 1936, which provides for the taxation of certain resident investors in foreign investment funds and foreign life assurance policies;
- g) Section 122-25 of Part 3-3 of Chapter 3 of the ITAA 1997, which does not permit the deferral of tax arising on the transfer of an asset, where the subsequent transfer of the asset by the transferee would be beyond the taxing jurisdiction of Australia under its laws;
- h) Part 3-90 of Chapter 3 of the ITAA 1997, which provides for consolidation of group entities for treatment as a single entity for tax purposes;
- i) Division 820 of Part 4-5 of Chapter 4 of the ITAA 1997, which addresses thin capitalisation; and
- j) any provision adopted after the date of signature of the Convention which is substantially similar in purpose or intent to a provision covered by this paragraph, or is otherwise agreed between the Governments of the Contracting States through an exchange of diplomatic notes.

22. With reference to paragraph 1 of Article 28 (Exchange of Information) of the Convention:

In the case of Australia, the term "taxes of every kind and description imposed on behalf of the Contracting States" means taxes of every kind and description imposed under the federal tax laws administered by the Commissioner of Taxation.

23. It is understood that under paragraph 5 of Article 28 of the Convention a refusal to supply information held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or information relating to ownership interests must be based on reasons unrelated to the person's status as a bank, other financial institution, nominee, agent

or fiduciary, or the fact that the information relates to ownership interests. It is also understood that under paragraph 5 of Article 28 a Contracting State may decline to supply information relating to confidential communications between attorneys, solicitors or other admitted legal representatives in their role as such and their clients to the extent that the communications are protected from disclosure under the domestic law of that Contracting State.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed this Protocol.

DONE in duplicate at Tokyo this thirty-first day of January, 2008, in the English and Japanese languages, each text being equally authentic.

For Australia

For Japan

Hon. Stephen Smith
Minister for Foreign Affairs

Hon. Masahiko Koumura
Minister for Foreign Affairs

(Japanese Note)

Translation

Tokyo, 31 January, 2008

Excellency:

I have the honour to refer to the Convention between Japan and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income which was signed today (hereinafter referred to as “the Convention”) and to the Protocol also signed today which forms an integral part of the Convention, and to make, on behalf of the Government of Japan, the following proposals:

1. It is understood that both Contracting States shall cooperate for the avoidance of double taxation through appropriate application of the provisions of the Convention and other necessary measures.

2. With reference to Article 9 (Associated Enterprises) of the Convention:

It is understood that both Contracting States shall undertake to conduct transfer pricing examinations of enterprises and evaluate applications for advance pricing arrangements in accordance with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations of the Organisation for Economic Cooperation and Development (hereinafter referred to as “the OECD Transfer Pricing Guidelines”), which reflect the international consensus with respect to these issues. The domestic transfer pricing rules, including the transfer pricing methods, of each Contracting State may be applied in resolving transfer pricing cases under the Convention only to the extent that they are consistent with the OECD Transfer Pricing Guidelines.

His Excellency
The Hon. Stephen Smith
Minister for Foreign Affairs
of Australia

3. With reference to paragraph 3 of Article 10 (Dividends) and subparagraph a) of paragraph 3 of Article 23 (Limitation on Benefits) of the Convention:

It is understood that the date on which entitlement to the dividends is determined is:

- a) in the case of Japan, the end of the accounting period for which the distribution of profits takes place; or
- b) in the case of Australia, the date the dividends are declared.

If the foregoing understanding is acceptable to the Government of Australia, I have the honour to suggest that the present note and Your Excellency’s reply to that effect should be regarded as constituting an agreement between the two Governments in this matter, which shall enter into force at the same time as the Convention.

I avail myself of this opportunity to extend to Your Excellency the assurance of my highest consideration.

Masahiko Koumura
Minister for Foreign Affairs
of Japan

(Australian Note)

Tokyo, 31 January, 2008

Excellency:

I have the honour to acknowledge receipt of Your Excellency's Note of today's date which in translation reads as follows:

“(Japanese Note)”

The foregoing understanding being acceptable to the Government of Australia, I have the honour to confirm that Your Excellency's Note and this reply shall be regarded as constituting an agreement between the two Governments in this matter, which shall enter into force at the same time as the entry into force of the Convention.

I take this opportunity to extend to Your Excellency the assurance of my highest consideration.

Stephen Smith
Minister for Foreign Affairs
of Australia

His Excellency
Mr. Masahiko Koumura
Minister for Foreign Affairs
of Japan