

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

The competent authorities of Australia and of Japan (hereinafter referred to as the “Contracting Jurisdictions”) hereby enter into the following mutual arrangements (hereinafter referred to as the “Memorandum”) to establish the mode of application of the arbitration process provided for in Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as “the MLI”).

This Memorandum is entered into pursuant to Article 27 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, done at Tokyo on 31 January 2008 (hereinafter referred to as “the Convention”), as modified by Article 16 of the MLI, and paragraph 10 of Article 19 of the MLI.

The competent authorities may modify or supplement this Memorandum by an exchange of letters between them.

Section 1. Request for submission of case to arbitration

1.1 A request that unresolved issues arising from a mutual agreement procedure case be submitted to arbitration pursuant to paragraph 1 of Article 19 of the MLI (hereinafter referred to as the “request for arbitration”) will be made in writing and sent to one or both of the competent authorities through:

- (a) (in the case of Australia):
The Australian Competent Authority, Australian Taxation Office; or
- (b) (in the case of Japan):
Office of Mutual Agreement Procedures, National Tax Agency.

1.2 The request for arbitration will contain sufficient information to identify the case. The request for arbitration will also be accompanied by a written statement by each of the persons who either made the request for arbitration or is directly affected by the case that no decision on the same issues has already been rendered by a court or administrative tribunal of the Contracting Jurisdictions.

1.3 Within 10 days after the receipt of the request for arbitration, a competent authority which received it without any indication that it was also sent to the other competent authority will send a copy of that request for arbitration and the accompanying statements to the other competent authority.

Section 2. Minimum information necessary for the case to be considered

2.1 For the purposes of Article 19 of the MLI, references to “the information necessary to undertake substantive consideration of the case” and “the minimum information necessary for each competent authority to undertake substantive consideration of the case” will be understood as follows:

- (a) for Australia, the information and documentation which will be provided when making a request for a mutual agreement procedure as set out on the Mutual Agreement Procedure page on the Australian Taxation Office website, ato.gov.au, as such guidance may be amended from time to time;
- (b) for Japan, the information and documentation which will be provided when making a request for a mutual agreement procedure as set out in the Commissioner's Directive on the Mutual Agreement Procedure issued on 25 June 2001, as such guidance may be amended from time to time;
- (c) a proposed resolution by the taxpayer addressing the unresolved issue to be arbitrated and their position as to how the taxation not in accordance with the provisions of the Convention will be resolved; and
- (d) any other specific additional information requested by the competent authority of a Contracting Jurisdiction within three calendar months after the receipt of the request for a mutual agreement procedure.

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

Section 3. Terms of Reference

3.1 Within 60 days after the request for arbitration (or a copy thereof) has been received by both competent authorities, the competent authorities will jointly determine the unresolved issue to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration. This will constitute the "Terms of Reference" for the case. Notwithstanding the following Sections of this Memorandum, the competent authorities may also, in the Terms of Reference, provide procedural rules that are additional to, or different from, those included in these Sections and deal with such other matters as are deemed appropriate.

3.2 If the Terms of Reference have not been communicated to the person who made the request for arbitration within the period referred to in paragraph 3.1 above, that person and each competent authority may, within 30 days after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration. All the lists so communicated during that period will constitute the tentative Terms of Reference. Within 30 days after all the arbitrators have been appointed as provided in the following Section of this Memorandum, the Chair of the arbitration panel (hereinafter referred to as "the Chair") will communicate to the competent authorities and the person who made the request for arbitration a revised version of the tentative Terms of Reference based on the lists so communicated. Within 30 days after the revised version has been received by both of them, the competent authorities will have the possibility to jointly determine different Terms of Reference and communicate them in writing to the arbitrators and the person who made the request for arbitration. If they do so within that period, these different Terms of Reference will constitute the Terms of Reference for the case. If no different Terms of Reference have been jointly determined by the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators will constitute the Terms of Reference for the case.

Section 4. Appointment of arbitrators

4.1 Notwithstanding the provisions of Article 20 of the MLI, the competent authorities of the Contracting Jurisdictions jointly determine that the following rules will govern the appointment of the members of an arbitration panel:

- (a) Each competent authority will appoint one panel member within 90 days of the date of the request for arbitration under paragraph 1 of Article 19 of the MLI. The two members so appointed will, within 60 days of the latter of their appointments, appoint a third member who will serve as the Chair. The Chair will not be a national or resident of either Contracting Jurisdiction. The arbitrators will choose the Chair from the list that has been jointly determined by the competent authorities pursuant to paragraph 4.6. In the event that no list has been provided pursuant to paragraph 4.6 or none of the persons identified in the list are available, the arbitrators will mutually appoint a Chair at their discretion.
- (b) In the event that a competent authority fails to appoint a member of the arbitration panel within the time period specified in subparagraph 4.1(a), a member will be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting Jurisdiction. The relevant appointment will be made within 60 days after receiving a request to that effect from the person who made the request for arbitration.
- (c) If the two initial members of the arbitration panel fail to appoint the Chair within the time period specified in subparagraph 4.1(a), the Chair will be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development who is not a national of either Contracting Jurisdiction. The relevant appointment will be made within 60 days after receiving a request to that effect from the person who made the request for arbitration. In these circumstances, the Chair will be appointed from the list that has been jointly determined by the competent authorities pursuant to paragraph 4.6.

4.2 Except to the extent that the competent authorities jointly determine different rules, the procedures provided in Article 20 of the MLI and Section 4 of this Memorandum will apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitration process have begun. In such circumstances, the competent authorities will also jointly determine necessary adaptations, as appropriate, to the deadlines provided in Section 5 of this Memorandum.

4.3 An arbitrator will be considered to have been appointed when a letter confirming that appointment and signed by both the arbitrator and the person or persons who have the power to appoint that arbitrator has been communicated to both competent authorities.

4.4 The competent authorities will appoint arbitrators who have expertise or experience in international tax matters. They need not, however, have experience as either a judge or arbitrator. In this respect:

- (a) Each member appointed to the arbitration panel will be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the Contracting Jurisdictions and of all persons directly affected by the case (as well as their advisors and any related persons).
- (b) In particular, the arbitrators will not be employed by the competent authorities, tax administrations, and ministries of finance of the Contracting Jurisdictions and by all persons directly affected by the case (as well as their advisors and any related persons) in the period of 12 months preceding an appointment and at the time of accepting an appointment.
- (c) The arbitrators will maintain their impartiality and independence throughout the proceedings, and avoid any conduct for 12 months after the date the panel delivers its decision under paragraph 5.7 or subparagraph 5.8(g), as the case may be, or any other period jointly determined by the competent authorities, which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings. Each arbitrator appointed to the arbitration panel will execute a written certification to this effect.
- (d) The arbitrators will undertake to promptly disclose to both competent authorities, in writing, any new facts or circumstances that arise during or following the arbitration proceedings that might give rise to doubts with respect to their impartiality or independence.

4.5 If a competent authority becomes aware of a breach by an arbitrator of the impartiality and independence requirements referred to in paragraph 4.4, they will bring that breach to the attention of the other arbitrators and the other competent authority immediately. The competent authorities will then, based on the particular facts and circumstances of the case and the breach, jointly determine how to proceed and may, for example:

- (a) remove and replace the relevant arbitrator; or
- (b) terminate the arbitration proceedings and appoint a new arbitration panel.

4.6 The competent authorities will identify and jointly determine a list of no greater than 3 persons who are qualified and willing to serve as the Chair. The competent authorities will review and revise this list as necessary. The persons to be identified for the purposes of this list will meet the requirements of paragraph 4.4.

Section 5. Arbitration process

Final Offer Arbitration

5.1 Within 90 days after the appointment of the Chair (unless, before the end of that period, the competent authorities jointly determine a different period or jointly determine to use a different type of arbitration process, such as the approach described in paragraph 5.8, with respect to the relevant case), the competent authority of each Contracting Jurisdiction will submit to each arbitrator and to the other competent authority a proposed resolution which addresses all unresolved issue or issues in the case (taking into account all mutual agreements previously reached in that case between the competent authorities). The proposed resolution will be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax that may be charged pursuant to the provisions of the Convention (as it may be modified by the MLI), for each adjustment or similar issue in the case. In a case in which the competent authorities of the Contracting Jurisdictions have been unable to reach a mutual agreement on an issue regarding the conditions for application of a provision of the Convention (as it may be modified by the MLI) (hereinafter referred to as a “threshold question”), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

5.2 The competent authority of each Contracting Jurisdiction may also submit a supporting position paper for consideration by the arbitrators. Any such supporting position paper will be submitted to the arbitrators and to the other competent authority within the period of time provided for in paragraph 5.1. Any annex to a supporting position paper will be a document that was provided by one competent authority to the other, or by the taxpayer to both competent authorities, for use in the negotiation of the mutual agreement procedure case.

5.3 In the event that the competent authority of one Contracting Jurisdiction fails to submit a proposed resolution within the period of time provided for in paragraph 5.1, the Chair will notify the competent authority that if a proposed resolution is not submitted within an additional 7 days after the receipt of that notification, the arbitration panel will select as its decision the proposed resolution submitted by the other competent authority.

5.4 Each competent authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. Any such reply submission will be submitted to the arbitrators and to the other competent authority within 150 days after the appointment of the Chair. Any annex to a reply submission will be a document that was provided by one competent authority to the other, or by the taxpayer to both competent authorities, for use in the negotiation of the mutual agreement procedure case.

5.5 In the event that the competent authority of one Contracting Jurisdiction fails to submit a reply submission within the period of time provided for in paragraph 5.4, the Chair will notify the competent authority that any reply submission not submitted within an additional 7 days after the receipt of that notification will not be considered by the arbitrators.

5.6 As far as possible, the arbitrators will use tele- and videoconferencing to communicate between themselves and with both competent authorities.

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

Independent Opinion Arbitration

- 5.8 (a) If, within 90 days after the appointment of the Chair, the competent authorities jointly determine to use the independent opinion arbitration process, each competent authority will provide to the arbitration panel and to the other competent authority, within 120 days after that joint determination, any information that it considers necessary for the panel to reach its decision. That information will include a description of the facts and the unresolved issues to be decided together with the positions of the competent authorities concerning these issues and the arguments supporting these positions. Unless the competent authorities otherwise jointly determine, the arbitration panel will not take into account any information that was not available to both competent authorities before both competent authorities received the request for arbitration (or a copy thereof).
- (b) In the event that a competent authority fails to submit the information described in subparagraph 5.8(a) within the period of time provided for in that subparagraph, the Chair will notify the competent authority that if a proposed position is not submitted within an additional 7 days after the receipt of that notification, the arbitration panel will select as its decision the position submitted by the other competent authority.
- (c) The competent authority which received the written request for arbitration will notify the person who made the request for arbitration of the competent authorities' joint determination to use the independent opinion approach described in this paragraph within 7 days of making that joint determination. The person who made the request for arbitration may, either directly or through their representatives, present their position to the arbitrators in writing to the same extent that they can do so during the mutual agreement procedure. Any written materials prepared by the person who made the request for arbitration or their representatives will be submitted to the arbitrators by the competent authorities. Such materials will only be presented to the arbitrators if they are provided to both competent authorities within 120 days after the communication of the Terms of Reference to the person who made the request for arbitration.
- (d) Within 30 days after the Chair has informed the competent authorities that a meeting of the arbitration panel would be held, the competent authorities will decide when and where the meeting will be held and communicate that information to the arbitrators.
- (e) The arbitrators will decide the issues submitted to arbitration in accordance with the applicable provisions of the Convention, as modified by the MLI, and, subject to these provisions, of those of the domestic laws of the Contracting Jurisdictions. The arbitrators will consider any sources which the competent authorities of the Contracting Jurisdictions may by a joint determination expressly identify.

- (f) Subject to the provisions of the Convention, as modified by the MLI, and of this Memorandum, the arbitrators will adopt those procedural and evidentiary rules that they deem necessary to provide a decision concerning the unresolved issues submitted to arbitration.
- (g) Unless the competent authorities jointly determine otherwise, the arbitration decision will be delivered to the competent authorities of the Contracting Jurisdictions in writing within 365 days after the date of the appointment of the Chair and will indicate the sources of law relied upon and the reasoning which led to its result. The sources of law and the reasoning will not be communicated to any third party other than the competent authorities, unless the competent authorities jointly determine otherwise. The arbitration decision will be adopted by a simple majority of the arbitrators. The arbitration decision will have no precedential value.

Section 6. Communication of information and confidentiality

6.1 The competent authorities will, together, ensure each arbitrator agrees in writing, prior to acting in an arbitration proceeding, to abide by and be subject to the confidentiality and non-disclosure provisions of Article 28 of the Convention and of the applicable domestic laws of the Contracting Jurisdictions. If an arbitrator uses staff in connection with the performance of their duties, each staff member will be required to execute a similar written agreement.

6.2 If a competent authority becomes aware of a breach by an arbitrator or their staff of the confidentiality and non-disclosure requirements referred to in paragraph 6.1, they will bring that breach to the attention of the other arbitrators and the competent authority of the other Contracting Jurisdiction immediately. The competent authorities will then, based on the particular facts and circumstances of the case and the breach, jointly determine how to proceed and may, for example –

- (a) remove and replace the relevant arbitrator; or
- (b) terminate the arbitration proceedings and appoint a new arbitration panel.

6.3 Before the Chair is appointed, the competent authorities will send any correspondence concurrently to both arbitrators.

6.4 After the Chair is appointed, unless jointly determined otherwise by the competent authorities and the Chair, the competent authorities will send any correspondence to the Chair (with a copy sent to the other competent authority). The Chair will send any correspondence from the arbitrators concurrently to both competent authorities.

6.5 Except with regard to administrative or logistical matters, no arbitrator will have any ex parte communications with one competent authority with respect to the mutual agreement procedure case that resulted in the arbitration proceedings.

6.6 All communication, except with regard to administrative or logistical matters, between the arbitrators and the competent authorities will be in writing. Unless the competent authorities otherwise jointly determine, written communication by email is allowed to the extent that appropriate measures are taken to preserve the confidentiality of any information that may identify the taxpayer.

6.7 No substantive discussions may take place without all three arbitrators present.

6.8 Except as permitted pursuant to subparagraph 5.8(c), no arbitrator will have communications regarding the issues or matters before the arbitration panel, during or subsequent to the arbitration proceedings with:

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

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

Section 7. Operating procedures

7.1 To the extent needed, the arbitration panel may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Part VI of the MLI or Article 27 of the Convention, as modified by Article 16 of the MLI.

7.2 If the arbitration panel adopts any additional procedures, the Chair will provide a written copy of them to the competent authorities. These procedures will have effect only if both competent authorities mutually agree.

Section 8. Costs

Unless the competent authorities otherwise jointly determine:

- (a) each competent authority will bear its own expenses and those of its appointed panel member; and
- (b) the cost of the Chair and other expenses associated with the conduct of the arbitration proceedings will be jointly determined and borne by the competent authorities in equal shares.

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

In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraph 5.7 or subparagraph 5.8(g), as the case may be or within any other period jointly determined by the competent authorities, the competent authorities will jointly determine to appoint new arbitrators in accordance with Article 20 of the MLI and Section 4 of this Memorandum. The date of such joint determination to appoint new arbitrators will, for the purposes of the subsequent application of Article 20 of the MLI and Section 4 of this Memorandum, be deemed to be the date when the request for arbitration has been received by both competent authorities.

Section 10. Final decision

10.1 If a final decision by a court of one of the Contracting Jurisdictions holds that the arbitration decision is invalid, the arbitration decision will not be binding on the Contracting Jurisdictions. In such a case, the request for arbitration will be considered not to have been made, and the arbitration process will be considered not to have taken place (except for the purposes of Article 21 (Confidentiality of Arbitration Proceedings) and Article 25 (Costs of Arbitration Proceedings) of the MLI and Sections 6 and 8 of this Memorandum). In such a case, a new request for arbitration may be made unless the competent authorities jointly determine that such a new request will not be permitted.

10.2 It is understood that subdivision ii) of subparagraph b) of paragraph 4 of Article 19 of the MLI is intended to apply where, under the domestic laws of a Contracting Jurisdiction, a court has invalidated the arbitration decision based on a procedural or other failure or other conduct that has materially affected the outcome of the arbitration proceedings, which may include:

- (a) a violation of the impartiality or independence requirements applicable to arbitrators pursuant to Article 20 of the MLI and Section 4 of this Memorandum;
- (b) a breach of the confidentiality requirements applicable to arbitrators pursuant to Article 21 of the MLI and Section 6 of this Memorandum;
- (c) any other failure to adhere to the procedural requirements provided in Part VI of the MLI and this Memorandum; or
- (d) collusion between the person who presented the mutual agreement procedure request and one of the Contracting Jurisdictions.

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

Section 11. Implementing the arbitration decision

The competent authorities will implement the arbitration decision within 180 days after the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration. The relevant period will be extended if the competent authorities jointly determine to extend the period.

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

As provided by Article 36 (Entry into Effect of Part VI) of the MLI, the provisions of Part VI (Arbitration) of the MLI will have effect with respect to cases presented to a competent authority of a Contracting Jurisdiction on or after 1 January 2019.

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

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

(a) By Australia

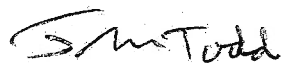
Australia may exclude from the scope of Part VI of the MLI any case to the extent that it involves the application of Australia's general anti-avoidance rules contained in Part IVA of the Income Tax Assessment Act 1936 and section 67 of the Fringe Benefits Tax Assessment Act 1986. Australia also may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

(b) By Japan

- (i) Japan may 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.
- (ii) 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 may 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.

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

For the competent authority of the
Government of Australia



Signature of representative

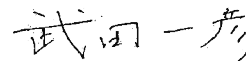
Jonathan Todd

Printed name of representative

Assistant Commissioner

Official title of representative

For the competent authority of the
Government of Japan



Signature of representative

TAKEDA Kazuhiko

Printed name of representative

Deputy Commissioner
International Affairs

Official title of representative