

TR 2001/13A2 - Addendum - Income tax: Interpreting Australia's Double Tax Agreements

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Addendum

Taxation Ruling

Income tax: Interpreting Australia's Double Tax Agreements

This Addendum amends Taxation Ruling TR 2001/13, updating the Commissioner's view on interpreting Australia's double tax agreements.

TR 2001/13 is amended as follows:

1. Preamble

Omit the preamble; substitute:

Preamble

This document provides [administratively binding advice](#). It is not a public ruling for the purposes of the Taxation Administration Act 1953.

[Note: This is a consolidated version of this document. Refer to the ATO Legal database (ato.gov.au/law) to check its currency and to view the details of all changes.]

2. Table of contents

Omit the table of contents; substitute:

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3. Paragraph 1

Omit the paragraph; substitute:

1. This Ruling sets out the Commissioner's view on interpreting Australia's double tax agreements (DTAs). The manner in which DTAs are interpreted is in some respects different from, and in some respects similar to, the way in which domestic tax legislation is interpreted.

4. Paragraph 2

- (a) Omit both occurrences of 'What this Ruling is about'; substitute "What this Ruling is about".
- (b) Omit all occurrences of 'and explanations'.

5. Paragraph 3

- (a) Omit 'and explanations'.
- (b) After the paragraph, insert new paragraphs 3A and 3B:

3A. When referring to specific DTAs, this Ruling adopts the definitions in sections 3AAA and 3AAB of the *International Tax Agreements Act 1953* (the Agreements Act). The Australian Treaty Series citation for each DTA is set out in a note under the relevant definition in those sections.

3B. References in this Ruling to the 'OECD Model' or 'OECD Model Convention' and to its Commentaries, are references to the 2017 update^{A1} unless otherwise indicated.
- (c) After the word 'update' in new paragraph 3B, insert new footnote A1:

^{A1} OECD, 2019, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris.

6. Paragraph 4

- (a) Omit the words "*International Tax Agreements Act 1953* (the "".
- (b) Omit the following:

'), and is incorporated as a schedule to that Act. See, as an example, in relation to the Vietnamese Agreement, section 11ZC and Schedule 38'.
- (c) Omit the wording of footnote 1; substitute:

The *Taipei Agreement* (Schedule 1 to the Agreements Act) is a special case, and is differently framed, but the interpretative approaches discussed below would equally apply. Some DTAs are formally termed Double Tax 'Conventions', but that is a matter of form and does not denote any difference of substance.
- (d) After 'into our domestic law.', insert new footnote 1A:

^{1A} The provisions of Australia's DTAs are incorporated by reference. The text of the agreements is set out in the Australian Treaty Series which is accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au). The *Taipei Agreement* is an exception – it is incorporated as a Schedule to the Agreements Act.
- (e) Omit the wording of footnote 2; substitute:

Most of Australia's DTAs are given force of law under section 5 or 5A of the Agreements Act, however some are given force of law by other provisions of that Act. Note, as an exception, that the *Non-Discrimination Article* (Article 23) of the *United States Convention* was not implemented in our domestic law, but operates only at the international level: subsection 5(2) of the Agreements Act. Article 23 therefore cannot give rise to legally enforceable rights for taxpayers and only the respective governments can take action on it internationally.
- (f) After the paragraph, insert new paragraphs 4A and 4B:

4A. Relevant to the application of its bilateral DTAs, Australia is also a party to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* done at Paris on 7 June 2017^{2A} (also known as the Multilateral Instrument or MLI). The MLI was developed to enable jurisdictions to swiftly modify their bilateral DTAs to give effect to tax integrity rules agreed internationally as part of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project and to improve dispute resolution processes.

4B. Like Australia's DTAs, the MLI is also given force of law in Australia under the Agreements Act. The MLI modifies the majority of Australia's DTAs that existed when it entered into force. Therefore, it needs to be considered when determining tax liability in a DTA case. The general principles of treaty interpretation discussed in this Ruling will also be relevant to interpreting any changes made to a DTA by the MLI.

- (g) After 'Multilateral Convention to Implement Tax Treaty Related Measures to Prevent *Base Erosion and Profit Shifting* done at Paris on 7 June 2017' in new paragraph 4A, insert new footnote 2A:

^{2A} [2019] ATS 1.

7. Paragraph 5

Omit the first sentence, excluding footnote 3, substitute:

As well as giving DTAs and the MLI the force of law, the Agreements Act clarifies the status of these agreements with respect to the 'Assessment Act'³ and the various Acts which impose Australian tax.

8. Paragraph 6

- (a) After the words 'except for'; insert 'the general anti-avoidance provisions in'.
- (b) Omit ', which is a general anti-avoidance provision, and section 160AO of the same Act, dealing with maximum credits'.
- (c) Omit 'the Rates Acts'; substitute 'Acts imposing Australian tax'.

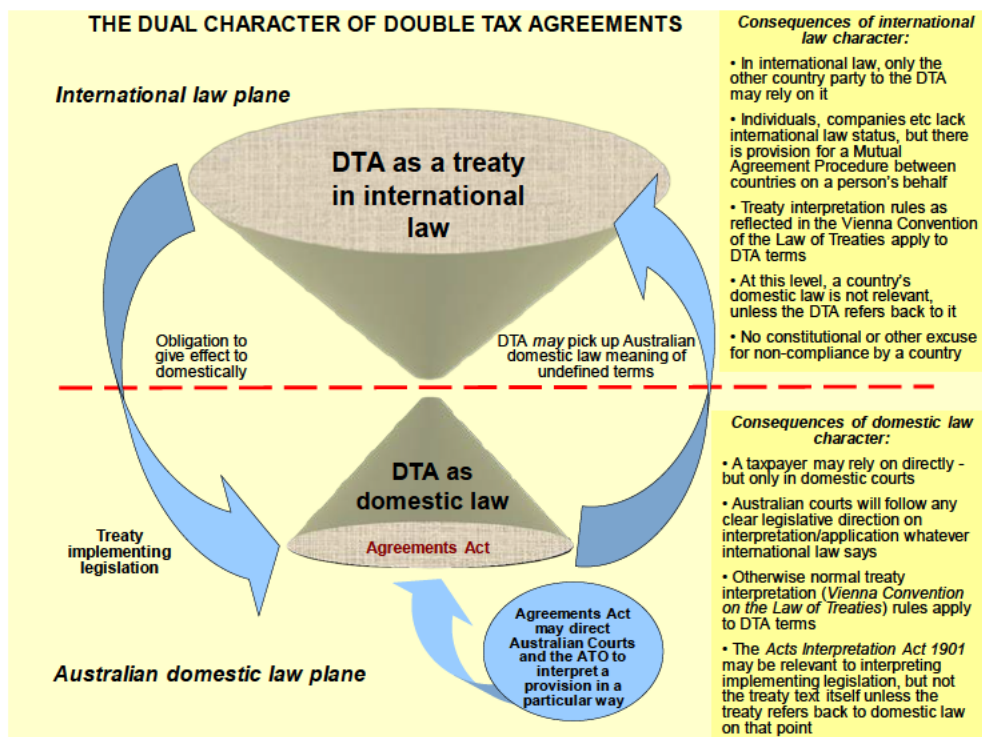
9. Paragraph 7

Omit the fourth sentence; substitute:

While issues will usually arise in the context of the domestic law implementation of DTAs, those issues can only be properly analysed, and their implications fully understood, when the 'parallel lives' of Australian DTAs are kept in mind.

10. Paragraph 8

Omit the diagram; substitute:



11. Paragraph 9

Before the paragraph, omit 'and explanations' from the first heading.

12. Paragraph 13

- (a) Omit the paragraph, including footnotes 7, 8 and 9, but excluding footnote 6; substitute:

13. Accordingly, the DTAs contain 'tie-breaker' rules to ensure that a dual resident 'person' (whether an individual, company or other entity) is treated as a resident of only one of the countries for the purposes of applying the DTA.⁶ These tie-breaker rules do not directly affect whether the person is a resident of a country at domestic law – the 'person' remains a domestic law resident of each country.^{6A} Therefore, a dual resident who is treated as solely a resident of another country for the purposes of an Australian DTA remains a resident of Australia for the purposes of the Assessment Act.

- (b) Omit the wording of footnote 6, substitute:

The *United States Convention* is an exception in that it only has such 'tie-breaker rules' for individuals, not companies. It should also be noted that the application of some 'tie-breaker' rules can result in dual residents being denied the benefits of a DTA in certain cases (see, for example, Article 4(3) of the *German Agreement*).

- (c) After 'resident of each country', insert new footnote 6A:

^{6A} The DTA will override the general domestic law only to the extent of inconsistency, such as where it limits taxing rights over 'non-residents' under the treaty. In some cases a

country's domestic law may make domestic law residence status or the operation of particular domestic tax rules depend on treaty residence status after application of the tie-breaker test. For example, see the definition of 'prescribed dual resident' at subsection 6(1) of the *Income Tax Assessment Act 1936* and of 'Part X Australian resident' at section 317 of the same Act.

- (d) After the paragraph, insert new paragraph 13A:

13A. Australia's DTAs also generally contain a *Source of Income* Article, or other provisions, to clarify the source of the various categories of income subject to the 'distributive' rules and other double tax relief provisions in the DTA.^{9A} In the case of some DTAs, those source provisions are to be found in the Agreements Act.^{9B}

- (e) After 'double tax relief provisions in the DTA.' in new paragraph 13A, insert new footnote 9A:

^{9A} See, for example, Article 22 of the *Vietnamese Agreement*.

- (f) After 'are to be found in the Agreements Act.' in new paragraph 13A, insert new footnote 9B:

^{9B} Examples are section 11S of the Agreements Act, in relation to the *Chinese Agreement* and subsections 11ZF(2) and (3) of the Agreements Act, in relation to the *Taipei Agreement*.

13. Paragraph 14

- (a) Omit the final sentence, excluding footnote 11; substitute 'Pensions are also often taxable only in the country of residence of the pensioner under Australia's DTAs.'
- (b) In footnote 11, after 'paragraph 21', omit 'below'; substitute 'of this Ruling'.

14. Paragraph 15

- (a) Omit the first sentence, excluding footnote 12; substitute:
The DTAs provide, as a more complex example, that a country may not tax 'business profits' derived by an enterprise of the other DTA party unless the profits are attributable to a permanent establishment ('PE')¹² situated in the first ('host') country through which the enterprise carries on business.'
- (b) In footnote 12, omit the first instance of the word 'OECD'.

15. Paragraph 18

- (a) Omit the first sentence; substitute:
The *Alienation of Property* Article in Australian DTAs negotiated during the period after the introduction of the general Australian 'capital gains tax' also incorporated a 'sweep-up' provision.
- (b) Omit the final sentence, excluding footnote 13; substitute:
However some of Australia's more recent DTAs, concluded since 2006, include a *residence* country-only sweep-up based on the OECD Model.^{13A}
- (c) Omit the wording of footnote 13; substitute:

See, for example, Article 13(5) of the *Vietnamese Agreement*. This provision differs from the OECD Model Convention, which provides a residence country-only sweep-up in these circumstances. Until 2008, Australia had a 'Reservation' to the OECD Model expressing its different approach on this issue. As to Reservations, see paragraphs 109 to 111 of this Ruling. The Australian provision which reflected that Reservation is closely related to the alternative 'sweep-up' provision provided for in the United Nations Commentary on Article 13 of the UN Model Tax Convention (Department of Economic and Social Affairs, 2011, *United Nations Model Double Taxation Convention between Developed and Developing Countries*, United Nations, New York, p 237 (UN Model)).

- (d) At the end of the paragraph, insert new footnote 13A:

^{13A} See, for example, Article 13(5) of the *German Agreement*. Australia withdrew its Reservation in relation to the residence country-only sweep-up provision in the 2008 update to the OECD Model and its Commentaries.

16. Paragraph 19

- (a) Omit 'required of it by the DTA and provides a full exemption'; substitute 'required of it by the DTA and provides an exemption'.
- (b) Omit the wording in footnote 14; substitute:

By making the relevant income 'exempt income' or 'non-assessable non-exempt income' under the Assessment Act. Even where there is no DTA, double tax is often in practice avoided through a 'unilateral' foreign tax credit or exemption system under a country's domestic law (such as Division 770 and Subdivision 768-A of the *Income Tax Assessment Act 1997* and sections 23AG and 23AH of the *Income Tax Assessment Act 1936* in Australia's case). A DTA may sometimes simply confirm that domestic law position in an instrument binding at international law.

17. Paragraph 20

- (a) In footnote 15, omit '(Schedule 35 to the Agreements Act)'.
- (b) In the second sentence, omit:

(such as fully franked dividends flowing to a treaty partner resident company shareholder, directly holding at least 10% of the voting power in the Australian company paying the dividends).

- (c) In footnote 16, omit the first sentence: substitute:

Where, for example, dividends flow to a treaty partner resident company shareholder, directly holding at least 10% of the voting power in the Australian company paying the dividends (see Article 10(2) of the *Swiss Convention*).

- (d) Omit the wording of footnote 17; substitute:

Where, for example, dividends flow to a treaty partner resident company shareholder, holding at least 80% of the voting power in the Australian company paying the dividends (and where certain other conditions are also met). See Article 10(3) of the *Swiss Convention*.

- (e) Omit footnote 18.

18. Paragraph 21

Omit footnote 19.

19. Paragraph 22

- (a) Omit 'It is important to note that the' from the first sentence; substitute 'The'.
- (b) In the second sentence, omit '*Chong v FC of T*²⁰'; substitute '*Chong v Commissioner of Taxation*²⁰ (*Chong*)'.
- (c) Omit the wording of footnote 20; substitute '[2000] FCA 635.'

20. Paragraph 25

- (a) In the first sentence, omit 'but, '; substitute '. However, '.
- (b) In footnote 21, omit 'Schedule 27 to the Agreements Act, '.

21. Paragraph 27

- (a) In the introductory sentence, omit '*v. FC of T*'.
- (b) Omit the wording of footnote 23, substitute '[2000] FCA 635 at [26].'

22. Paragraph 28

In the first sentence, omit the words 'It appears to follow'; substitute 'It follows'.

23. Paragraph 30

- (a) Omit the paragraph, substitute:

30. For example, in *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)*^{23A} the Court considered whether Article 9 (*Associated Enterprises*) of the *United States Convention* could be relied on, effectively as a 'sword', independently of the domestic transfer pricing provisions. Having considered a number of cases in relation to the 'permissive' manner in which DTAs allocate taxing rights, as well as the terms of the particular treaty, Robertson J concluded that Article 9 did not have any freestanding substantive operation that could be relied on to support the relevant amended assessments.^{23B}
- (b) After '*Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)*', insert new footnote 23A:

^{23A} [2015] FCA 1092.
- (c) At the end of the paragraph, insert new footnote 23B:

^{23B} [2015] FCA 1092 at [51–61].
- (d) After the paragraph, insert new paragraph 30A:

30A. Nevertheless, there may be instances where the countries could, if they wished, provide, through the clear words of a treaty, to expand the existing areas of domestic tax liability, and (once implemented in a way that alters the pre-existing domestic laws) this would expand the areas of domestic tax liability as compared to

those existing before. This could only occur within constitutional limits, of course, and the constitutions of some countries may entirely prevent such an expansion of applicable domestic law.

24. Paragraph 31

Omit 'there will be some examples where this can occur'; substitute 'there may be some instances where this can occur'.

25. Paragraphs 32 and 33

Omit the paragraphs, including footnotes 24, 25 and 26.

26. Paragraph 34

(a) Omit the paragraph, excluding footnote 27; substitute:

34. However one approaches the 'shield, but not a sword' issue discussed above, some of Australia's DTAs may operate to have what amounts to some 'sword-like' effect in practice because of the inclusion in them of a *Source of Income* Article (or the existence of corresponding provisions in the Agreements Act itself) of the type already noted.²⁷

(b) In footnote 27, omit 'above'; substitute 'of this Ruling'.

27. Paragraph 35

At the end of the first sentence, insert new footnote 27A:

^{27A} The *Source of Income* Articles in some of Australia's more recent DTAs only apply for the purposes of domestic law. For example, see Article 21 of the *Swiss Convention*.

28. Paragraph 37

(a) Omit 'it is an Australian 'specialty' to'; substitute 'it has been an Australian 'specialty' to'

(b) After the paragraph, insert new paragraph 37A:

37A. In *Satyam Computer Services Limited v Commissioner of Taxation* [2018] FCAFC 172, the Full Federal Court held that the *Source of Income* Article in the *Indian Agreement*^{28A} was effective in deeming certain royalties to have an Australian source for the purposes of the Assessment Act. The Court also noted that the *Source of Income* Article prevails in the event of any inconsistency with the provisions of the Assessment Act.^{28B}

(c) After '*Indian Agreement*' in new paragraph 37A, insert new footnote 28A:

^{28A} Article 23.

(d) At the end of new paragraph 37A, insert new footnote 28B:

^{28B} [2018] FCAFC 172 at [15–16].

29. Paragraph 38

Omit the wording in footnote 29; substitute '*Nathan v Federal Commissioner of Taxation* [1918] HCA 45; (1918) 25 CLR 183 at 189-190; *Commissioner of Taxation v Mitchum* [1965] HCA 23'

30. Paragraph 39

Omit the paragraph.

31. Paragraph 41

- (a) Omit the words 'the sharing of taxing rights under a DTA, but where the resulting allocated rights'; substitute 'where allocated rights'.
- (b) Omit the second sentence, excluding footnote 31.
- (c) Omit the wording of footnote 31; substitute:
'In the case of a United Kingdom resident shareholder, for example, the specified rate is 15% under Article 10(2)(b) of the *United Kingdom Convention*.'
- (d) In the third sentence, omit 'In fact'; substitute 'However'.
- (e) In footnote 32, omit 'Section'; substitute 'section'.

32. Paragraph 43

- (a) In the first sentence, omit 'a taxpayer's' and 'income'.
- (b) In the second bullet point:
 - (i) after the words 'any Article of the DTA', insert '(as relevantly modified by the MLI)'
 - (ii) omit 'Assessment Act and Rates Acts'.
- (c) In the third bullet point, after the words 'whether a provision of the DTA', insert '(as relevantly modified by the MLI)'.

33. Paragraph 45

Omit the paragraph; substitute:

45. The general domestic law and the terms of the DTAs may at various stages inform the meaning and operation of each other, and they must often be kept in mind simultaneously, in the sense of requiring 'parallel processing' and a disciplined approach to interpretation.

34. Paragraph 46

In the second sentence, omit 'While, therefore'; substitute 'Accordingly, while'.

35. Paragraph 49

At the end of the first sentence, insert new footnote 33A:

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^{33A} See also, for example, *Undershaft (No 1) Limited v Commissioner of Taxation* [2009] FCA 41 where Lindgren J stated (at [61]) that there was no difference in substance between the expressions the 'Commonwealth income tax' and 'the Australian income tax' in the former *United Kingdom Agreement* and the *Netherlands Agreement* respectively.

36. Paragraph 52

At the end of the sentence, insert:

Accordingly, Australia may have a taxing right under the *Business Profits* Article of one DTA but not under another DTA in respect of like profits of a comparable enterprise.

37. Paragraph 53

Omit the paragraph, including footnotes 37 and 38.

38. Paragraph 54

Omit the words 'it is usual for Australian DTAs to'; substitute 'some Australian DTAs'.

39. Paragraph 55

- (a) In footnote 39, omit 'Schedule 2 to the Agreements Act, at'; substitute 'At'.
- (b) In footnote 40, omit 'Schedule 30 to the Agreements Act, at'; substitute 'At'.

40. Paragraph 56

- (a) Omit the paragraph; substitute:

56. Although the two DTAs contain similar conditions that need to be satisfied before Australia is prevented from taxing the consultants, the *Thai Agreement* contains an *extra* condition not found in the *United States Convention*, namely that the income is not deductible in determining taxable profits of an enterprise or a permanent establishment situated in Australia (Article 14(2)(c)).^{40A}

- (b) At the end of the paragraph insert new footnote 40A:

^{40A} The rationale for that condition is that if the amount *paid* to the consultant is tax deductible (for Australian tax purposes) for the payer, Australia should not be obliged to then exempt from tax the corresponding income *earned* by the consultant in Australia.

41. Paragraphs 57 to 59

Omit the paragraphs.

42. Paragraph 62

- (a) Before the paragraph, in the first heading, omit 'legislation', insert 'into Australian law'.
- (b) At the end of the wording in footnote 41, insert 'of this Ruling'.

- (c) In the fourth bullet point:
- (i) omit footnote 43
 - (ii) omit the wording of footnote 44; substitute:
See, for example, *Indian protocol (No. 1)* which amended the *Indian Agreement*.
- (d) In the fifth bullet point:
- (i) omit '3(7)'; substitute '3(2)'
 - (ii) at the end of the first sentence, insert new footnote 44A:
^{44A} See, for example, subsection 3(5) of the Agreements Act in relation to the meaning of 'immovable property'.

43. Paragraph 63

Omit 'that of whether'; substitute 'the extent to which'.

44. Paragraph 65

- (a) Omit '(beginning with the *Chinese Agreement*).
- (b) Omit footnote 45.
- (c) In the second sentence omit 'The usual formulation provides'; substitute 'For example, Article 3(3) of the *Chinese Agreement* provides'.

45. Paragraph 67

Omit 'The OECD Model changes reflect the fact that the OECD Members'; substitute 'These changes reflect the fact that the OECD members'.

46. Paragraph 68

- (a) Omit the wording of the paragraph; substitute:
Second, the OECD members sought to clarify that where the context allows a specific domestic tax law meaning and a domestic non-tax law meaning, the former should prevail.
- (b) Omit footnote 46.
- (c) After the paragraph, insert new paragraphs 68A and 68B:
68A. While both these changes are now reflected in Australian practice, they are regarded by the ATO as only reflecting what is implicit in earlier DTAs anyway.
68B. Support for the ambulatory approach discussed above can be found in the decisions of *Virgin Holdings SA v Commissioner of Taxation* [2008] FCA 1503 at [43] and *Undershaft (No 1) Limited v Commissioner of Taxation* [2009] FCA 41 at [108-109].^{46A}
- (d) At the end of new paragraph 68B, insert new footnote 46A:
^{46A} In *Virgin Holdings* Edmonds J preferred an ambulatory approach, however he did not consider it necessary to decide.

47. Paragraph 70

- (a) After 'The OECD Commentaries', insert 'also'
- (b) After 'support this general approach'; insert new footnote 46B:
^{46B} As recognised by Edmonds J in *Virgin Holdings* at [43].

48. Paragraph 71

Omit the last sentence, including footnote 48; substitute:

This could, in Australia's case, involve consideration of sections 15AA and 15AB of the *Acts Interpretation Act 1901*, which are addressed at paragraphs 80 to 82 of this Ruling.

49. Paragraph 72

- (a) Omit the first sentence; substitute:
The undefined terms provision of the *General Definitions* Article picks up the meaning that the relevant term has for the purposes of the domestic tax laws of the country applying the DTA 'unless the context otherwise requires'.
- (b) Omit the last sentence, including footnote 49; substitute:
For the reasons dealt with at paragraphs 101 to 111 of this Ruling, it is therefore highly relevant to consider what the OECD Commentaries to that Model say about this provision.

50. Paragraph 73

- (a) In the first sentence, omit the word 'further'.
- (b) Omit ', the point just made, and a proviso that is often overlooked or not given its full force. The paragraph'; substitute 'and'.

51. Paragraph 74

Omit the second sentence, insert:

Reliance cannot necessarily be placed on an undefined term in a DTA being interpreted according to its domestic law meaning as the context of its use in the DTA may indicate that such a meaning is inappropriate (in that it would not be an accurate representation of the 'bargain' or '*consensus ad idem*' which objective evidence shows has been reached by the negotiating countries).

52. Paragraph 75

- (a) Omit the paragraph, including footnote 50 but excluding footnotes 51 and 52; substitute:
Although there is some debate concerning the meaning of 'context' when used in the 'undefined terms' provision at Article 3(2) or similar in our DTAs, the ATO view

is that it is to be broadly interpreted and that it includes the full range of materials open to consideration under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention – considered at paragraphs 95 to 100A of this Ruling) and not just those specifically referred to as the ‘context’ in Article 31 of that Convention.⁵¹ This broad approach to ‘context’ is also consistent with the approach of Australian courts in domestic law cases.⁵²

- (b) Omit the wording of footnote 51; substitute:

See on this point: Avery Jones et al, ‘The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model – Part II’ 1984 *British Tax Review*, vol 90 pp 90-105 (*Avery Jones et al Part II*). See also, to similar effect, Michael Edwardes-Ker, 1994, Tax Treaty Interpretation, Queen Mary and Westfield College, University of London, London (*Edwardes-Ker*) at paragraphs 7.06 and 23.15, noting the wide meaning of the term ‘context’ implicit in paragraph 13 of the OECD Commentary on Article 3. The interpretative significance of the OECD Commentaries is addressed at paragraphs 101 to 111 of this Ruling.

- (c) In footnote 52, omit ‘[2001] FCA 54’; substitute ‘[2001] FCA 554’ and after the words ‘*CIC Insurance Ltd v. Bankstown Football Club Ltd*’ insert [1997] HCA 2;.

53. Paragraph 77

- (a) Before the paragraph, in the heading, omit ‘*Interpreting*’.
- (b) Omit the paragraph, including footnote 53.

54. Paragraph 78

- (a) Omit the paragraph; substitute:

78. Where a treaty is implemented by Australian legislation it is critical to determine precisely the extent to which that legislation adopts, qualifies or modifies the treaty.^{53A} Therefore, although the Agreements Act generally gives force of law to the provisions of Australia’s DTAs, it is important to note that this is subject to other sections of that Act which may bear on the DTA specifically, or on it as one of many affected DTAs.

- (b) After the new first sentence, insert new footnote 53A:

^{53A} *NGBM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54 at [61] and *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [146].

55. Paragraph 79

- (a) Omit ‘DTA implementing *legislation* is clear, however’; substitute ‘the implementing *legislation* is clear’.
- (b) In footnote 54, omit:
- (i) ‘*Horta v. The Commonwealth* (1994) 181 CLR 183; substitute ‘*Horta v Commonwealth* [1994] HCA 32’
- (ii) ‘(at p 295)’; substitute ‘(at [10])’.

56. Paragraph 81

After 'the Vienna Convention rules', insert '(discussed at paragraphs 95 to 100A of this Ruling)'.

57. Paragraph 82

Omit ', as noted above'.

58. Paragraphs 83 and 84

Omit the paragraphs.

59. Paragraph 85

(a) At the end of the second bullet point, insert new footnote 56A:

^{56A} See also TR 2002/5 which notes that the definition of PE in subsection 6(1) of the *Income Tax Assessment Act 1936* is based on the concept of PE used in Australia's DTAs.

(b) Omit the wording of footnote 57; substitute 'See paragraphs 101 to 111 of this Ruling.'

(c) Omit the wording of footnote 58; substitute 'See paragraph 112 of this Ruling.'

60. Paragraph 86

Omit the second and third sentences, including footnote 60.

61. Paragraph 87

Omit the paragraph, including footnote 61.

62. Paragraph 88

(a) Omit the paragraph, including footnote 62; substitute:

88. The legislature, when legislating the DTA into domestic law (by giving force of law to its provisions), is taken to expect that it be interpreted in the light of the normal rules for interpreting treaties. As the Full Federal Court said in *Commissioner of Taxation v SNF (Australia) Pty Ltd*^{62A}:

[I]t is crucial to observe that the whole text of each treaty has been given domestic effect. In cases where the exact text of a whole treaty has been given effect by domestic legislation it would be surprising if it were interpreted without keeping that fact in mind. It should be noted that these taxation treaties stand in a very different position to, for example, the Refugee Conventions whose text is not given the force of law. Where Parliament expressly decides to incorporate the whole text of a treaty in domestic law and makes it plain, as here, that it is doing so, then it is appropriate to construe the provisions in accordance with the ordinary principles governing the interpretation of treaties. This is because the Parliament's use of the treaty shows its intention to fulfil its international obligations. This has been

accepted by the High Court in respect of the double taxation treaties: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338.

This conclusion is unsurprising. The double tax treaties are designed to ensure that the taxing regimes of two jurisdictions do not result in double taxation. If they were to be interpreted in a manner which would permit or foster conflicting outcomes between the two States in question their point would be frustrated. It is true, as Dorsett J has observed in *Russell* (at 455-456), that the High Court has indicated in the context of the Refugee Conventions that domestic courts must recall that their task is to interpret the *Migration Act 1958* (Cth) and not the Conventions. But, unlike the present legislation, that Act does not adopt and apply the whole text of a treaty.

- (b) At the end of the second (introductory) sentence, insert new footnote 62A:

^{62A} *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74 at [119–120]; see also, for example, *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 at [2–4]; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [34] and *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [147–150].

63. Paragraph 89

- (a) Omit the wording of footnote 63; substitute 'At paragraphs 79 to 82 of this Ruling.'
 (b) Omit the third sentence, including footnote 64.

64. Paragraph 90

- (a) Omit the first sentence, including footnote 65; substitute:
 The High Court first endorsed reference to broader international law principles when interpreting tax treaties in *Thiel v Commissioner of Taxation*.^{65A}
 (b) At the end of the first sentence, insert new footnote 65A:
^{65A} [1990] HCA 37 (*Thiel*); 90 ATC 4717.
 (c) Omit the wording of footnote 66; substitute:
 [1990] HCA 37; 90 ATC 4717 at 4727. See also the similar comments of Dawson J at 4722.
 (d) In the quoted text, omit '(1981) A.C. 251 at pp 276, 213-214'; substitute '(1981) A.C. 251 at pp. 276, 282, 290; *The Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 155 C.L.R. 1 at p. 222; *Golder case* (1975) 57 I.L.R. 201 at pp. 213-214.'

65. Paragraph 91

- (a) Omit the paragraph, excluding footnotes 67 and 68; substitute:
 The importance of examining DTAs as international law agreements to which the Vienna Convention applies has been restated and emphasised in several more recent Court decisions, such as, *Commissioner of Taxation v Lamesa*⁶⁷, *Chong v Commissioner of Taxation*⁶⁸, *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation*^{68A}, *Commissioner of Taxation v SNF (Australia) Pty Ltd*^{68B}, *Task Technology Pty Ltd v Commissioner of Taxation*^{68C}, *Tech Mahindra Limited v*

Commissioner of Taxation^{68D}, and *Bywater Investments Limited v Commissioner of Taxation*.^{68E}

- (b) Omit the wording of footnote 67; substitute '[1997] FCA 785 (*Lamesa*)'.
- (c) Omit the wording of footnote 68; substitute '[2000] FCA 635'.
- (d) After the words '*McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation*', insert new footnote 68A:
^{68A} [2005] FCAFC 67.
- (e) After the words '*Commissioner of Taxation v SNF (Australia) Pty Ltd*', insert new footnote 68B:
^{68B} [2011] FCAFC 74.
- (f) After the words '*Task Technology Pty Ltd v Commissioner of Taxation*', insert new footnote 68C:
^{68C} [2014] FCAFC 113.
- (g) After the words '*Tech Mahindra Limited v Commissioner of Taxation*', insert new footnote 68D:
^{68D} [2016] FCAFC 130.
- (h) At the end of the paragraph, insert new footnote 68E:
^{68E} [2016] HCA 45

66. Paragraph 92

- (a) Before the first sentence, insert 'The rules applicable to the interpretation of DTAs are now well settled.'
- (b) After the word 'courts', omit 'to the interpretation of treaties in these and other cases'.
- (c) Omit the wording of footnote 69; substitute:
This analysis is drawn primarily from the approach adopted by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 at [67–78], which was referred to with approval by the Full Court of the Federal Court in *Lamesa* [1997] FCA 785; 97 ATC 4752 at 4758–4759, in relation to DTAs. The first listed principle is drawn from cases such as *Thiel* and *Lamesa*.
- (d) Omit the wording of footnote 70; substitute:
Lamesa (Full Federal Court), citing McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 at [78].
- (e) Omit the wording of footnote 71; substitute:
The 'textual' method looks to determine the intent of the negotiators primarily through analysing what they said in the text, which is presumed to be the final, authentic and most reliable expression of their intent. It only looks beyond the text in limited cases, such as where the text leaves the question unanswered. See, for example, McHugh J in *Applicant A* at [52]: '... Art 31 does not justify, to adopt the words of the International Law Commission, "an investigation *ab initio* into the intentions of the parties" in order to achieve a result which is thought to further those intentions' [footnote omitted]. The Full Federal Court in *Lamesa*, citing McHugh J's judgment, accepted this principle (at 4759).

67. Paragraph 93

- (a) Omit first two sentences; substitute 'The requirement that DTAs be interpreted 'liberally' does not mean that the terms of DTAs are to be read as *broadly* as possible.'
- (b) In the last sentence, omit ', however,' and 'of a DTA'.

68. Paragraph 95

After the first instance of 'The *Vienna Convention*', omit 'on the *Law of Treaties* (the *Vienna Convention*').

69. Paragraph 96

- (a) In footnote 74 omit the words '90 above'; substitute '90 of this Ruling'.
- (b) Omit the wording of footnote 75; substitute:
[1990] HCA 37; 90 ATC 4717 at 4723 and 4727. See also *Tech Mahindra Limited v Commissioner of Taxation* [2015] FCA 1082 at [53].
- (c) In footnote 76 omit the words '(2000) 98 FCR 168 at 187-188, paragraphs 90-91'; substitute '[2000] FCA 478 at [90–91]'.

70. Paragraph 99

Omit 'attached to the Agreements Act'; substitute 'set out in the Australian Treaty Series'.

71. Paragraph 100

- (a) Omit the first sentence of footnote 77, insert '[1990] HCA 37; 90 ATC 4717 from 4719'.
- (b) At the start of footnote 78, insert '[1997] FCA 785;'.
- (c) Omit the wording of footnote 79; substitute '[2000] FCA 635 at [47]'.
- (d) Omit the last sentence, including footnote 80.
- (e) After the paragraph, insert new paragraph 100A:
100A. Sometimes a DTA provides that one text, usually the English language one, prevails in the event of a conflict between the two texts in different languages.^{80A}
- (f) At the end of the paragraph 100A, insert new footnote 80A:
^{80A} See, for example, the *Indian Agreement* (which states '*both texts being equally authentic, the English text to be the operative one in any case of doubt*').

72. Paragraph 101

- (a) In the second sentence omit the words
 - (i) 'binding on OECD Members'; substitute binding on OECD members'.
 - (ii) 'expectation that OECD Members'; substitute 'expectation that OECD members'.

- (b) In the fourth sentence omit the words '(like Observations and Reservations lodged by other OECD Member countries)'; substitute '(like Observations and Reservations lodged by other OECD member countries)'.
- (c) Omit the wording of footnote 81; substitute 'At paragraphs 109 to 111 of this Ruling.'

73. Paragraph 102

- (a) In the first sentence, omit the words 'the OECD Model Taxation Convention's'; substitute 'the OECD Model's'.
- (b) Omit the wording of footnote 82; substitute '*Thiel v Commissioner of Taxation* [1990] HCA 37; (1990) 90 ATC 4717, at 4727 and 4720.'

74. Paragraph 103

- (a) In footnote 85, omit the words '*Thiel v. FC of T* (1990) 90 ATC 4717, at 4723'; substitute '*Thiel v Commissioner of Taxation* [1990] HCA 37; 90 ATC 4717, at 4723'.
- (b) After the paragraph, insert new paragraph 103A:

103A. The courts have referred to the OECD Model and Commentaries in a number of cases since *Thiel* to assist in ascertaining the meaning of DTA provisions. For example, in *Bywater Investments* Gordon J referred to the Commentaries as a supplementary means of interpretation under Article 32 of the Vienna Convention (to confirm, in that case, the meaning of 'place of effective management' resulting from the application of Article 31).^{85A}

- (c) At the end of paragraph 103A, insert new footnote 85A:

^{85A} *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [167]; (2016) 260 CLR 169. See also, for example, *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [42]; *Commissioner of Taxation v Seven Network Limited* [2016] FCAFC 70 at [85]; and *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCAFC 113 at [35].

75. Paragraph 104

- (a) Omit the word 'Member'; substitute 'member'.
- (b) Omit the wording of footnote 86; substitute 'Paragraphs 109 to 111 of this Ruling.'
- (c) In footnote 87 omit the words 'Paragraph 94 above'; substitute 'paragraph 94 of this Ruling'.

76. Paragraph 105

- (a) In second sentence, omit all text after the words 'by other means'.
- (b) After the paragraph, insert new paragraph 105A:

105A. It is important to remember, however, that the text of the DTA has primacy in the interpretative process because the ordinary meaning of the words used 'are presumed to be the authentic representation of the parties' intentions'.^{87A} It follows

that the Commentaries should not be considered to the exclusion of the words in the treaty.^{87B}

- (c) At the end of the first sentence of paragraph 105A, insert new footnote 87A:
^{87A} *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 at 252-253.
- (d) At the end of paragraph 105A, insert new footnote 87B:
^{87B} *Russell v Commissioner of Taxation* [2011] FCAFC 10 at [31].

77. Paragraph 106

- (a) Omit all text after first sentence including footnote 88.
- (b) After the paragraph, insert new paragraph 106A:

106A. On one hand, there is the view that the OECD Commentaries are only relevant to those DTAs subsequently concluded. Einfeld J expressed this view in the Federal Court decision of the first instance in *Lamesa Holdings BV v Commissioner of Taxation*.^{88A} His Honour referred to the Full High Court decision in *Thiel* and to the comments made by Dawson J in that case^{88B}:

Further extrinsic material, referred to in *Thiel* as permissible by Mason CJ, Brennan and Gaudron JJ, who agreed with McHugh J, is consideration of the 1977 OECD Model and Commentaries in construing a double tax agreement. Dawson J added an important caveat to this view, namely that the OECD model and commentaries are only applicable to those bilateral treaties subsequently concluded.

- (c) At the end of the first sentence in new paragraph 106A, insert new footnote 88A:
^{88A} See also Logan J in *Russell v Commissioner of Taxation of the Commonwealth of Australia* [2009] FCA 1224 at [118]; and *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [42].
- (d) At the end of the second sentence, insert new footnote 88B:
^{88B} 97 ATC 4229 at 4237.

78. Paragraph 107

- (a) In the first sentence, omit 'OECD Member'; substitute 'OECD member'.
- (b) In the second sentence, omit the words 'Year 2000 update to the'; substitute 'The'.
- (c) Omit the quoted text; substitute:

35. Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles (see, for instance, paragraph 4 of the Commentary on Article 5). However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations.

36. Whilst the Committee considers that changes to the Commentaries should be relevant in interpreting and applying conventions concluded before the adoption of these changes, it disagrees with any form of a *contrario* interpretation that would necessarily infer from a change to an Article of the Model Convention or to the Commentaries that the previous

wording resulted in consequences different from those of the modified wording. Many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries, and such a *contrario* interpretations would clearly be wrong in those cases.

36.1 Tax authorities in member countries follow the general principles enunciated in the preceding ... paragraphs. Accordingly the Committee on Fiscal Affairs considers that taxpayers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties.

79. Paragraph 108

- (a) Omit the second sentence, excluding footnote 89; substitute:

Accordingly, unless it is apparent that the substance of the OECD Model has itself changed since a DTA was negotiated or the treaty in question does not conform to the OECD Model, or unless the Commentaries make clear that a former interpretation has actually been substantively altered, (rather than merely elaborated), the ATO considers it appropriate to consider, at least, the most recently adopted/published OECD Commentaries as well as others which may have been available at the time of negotiation.

- (b) In footnote 89 omit the words '(Schedule 10 to the Agreements Act).

- (c) Omit the wording of footnote 90; substitute:

An example is the 1992 amendment to paragraph 8 of the Model Commentaries on Article 5 (permanent establishments) (in response to a 1983 Report). The amendments treated the leasing of industrial, scientific and commercial equipment as a matter for the Business Profits Article, rather than the Royalties Article. Australia and some other countries disagreed at that time, and lodged a 'Reservation' (a concept discussed at paragraphs 109 to 111 of this Ruling) to the OECD Model *Royalties* Article, to this effect: see paragraph 39 of the OECD Model Commentary on Article 12. However Australia amended its Reservation to remove the reference to equipment royalties in 2005.

80. Paragraph 109

- (a) Omit the first sentence.

- (b) In the second sentence, omit 'OECD Member Countries'; substitute 'OECD member countries'.

81. Paragraph 110

- (a) In the first sentence, omit the words 'Non-Member; substitute 'Non-OECD Economies'.

- (b) In the quoted text:

- (i) omit 'non-Member countries'; substitute 'non-OECD economies'
- (ii) omit 'countries'; substitute 'economies'
- (iii) omit 'Member'; substitute 'member'
- (iv) omit 'a country'; substitute 'an economy'.

- (c) Omit the wording of footnote 91; substitute:

The term 'positions' is used since economies that are not OECD members cannot formally lodge Observations or Reservations to the OECD Model.

82. Paragraph 111

- (a) In the second sentence, omit 'They'; substitute 'They are a supplementary aid to interpretation as they'.
- (b) In the second sentence, omit 'under those provisions or when considering ambiguous provisions under Article 32 of the Vienna Convention or, possibly, under section 15AB of the *Acts Interpretation Act 1901*'; substitute:

'under those provisions (or when considering ambiguous provisions under Article 32 of the Vienna Convention or, possibly, under section 15AB of the *Acts Interpretation Act 1901*).'

83. Paragraph 112

At the end of the first sentence, insert new footnote 92A:

^{92A} For example, see *Tech Mahindra Limited v Commissioner of Taxation* [2016] FCAFC 130 at [36] where the Court considered Commentaries to the United Nations Model to confirm the meaning of Article 12(4) of the *Indian Agreement*.

84. Paragraph 113 to 115

- (a) Omit the heading before the paragraphs.
- (b) Omit the paragraphs, including footnote 93.

85. Paragraph 116

- (a) From the heading, omit 'etc'.
- (b) Omit 'Parliament's'; substitute 'Parliaments'.

86. Paragraph 117

- (a) Omit the paragraph, excluding footnotes 94 and 95; substitute:

117. The courts have been prepared to consider these Explanatory Memoranda, even to the extent that they bear upon *substantive* DTA provisions (that is, on matters other than the specific *implementing* provisions⁹⁴). For example, in *Task Technology*, Davies J used the relevant Explanatory Memorandum for the purposes of interpreting Article 12(7) of the *Canadian Convention*.⁹⁵
- (b) Omit the wording of footnote 94; substitute:

For an example of where an Explanatory Memorandum was considered in construing an *implementing* provision (section 3A of the Agreements Act) see *Resource Capital Fund IV LP v Commissioner of Taxation* [2018] FCA 41 at [149].
- (c) Omit the wording of footnote 95; substitute:

Task Technology Pty Ltd v Commissioner of Taxation [2014] FCA 38 at [16]. For other examples where Explanatory Memoranda were used to support the

interpretation of DTAs see *Satyam Computer Services Limited v Commissioner of Taxation* [2018] FCAFC 172 at [24]; *Tech Mahindra v Commissioner of Taxation* [2016] FCAFC 130 at [32-35] and *Resource Capital Fund III LP v Commissioner of Taxation* [2013] FCA 363 at [63]. See also *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 where the court considered the relevant explanatory memorandum but ultimately found that it offered little assistance.

- (d) After the paragraph, insert new paragraph 117A:

117A. In examining Explanatory Memoranda, it must be borne in mind that 'statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning'.^{95A}

- (e) At the end of new paragraph 117A, insert new footnote 95A:

^{95A} *SAEED v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 264-265 (per French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

87. Paragraph 118

At the end of the wording in footnote 96 insert 'This provision only applied to income years up to the year ended 30 June 2003 (see Article 23(8)).

88. Paragraph 119

- (a) In the first sentence, after the words 'court decisions on', insert words 'identical or'.
(b) In the second sentence, after 'with some caution', insert 'however'.
(c) Omit the wording of footnote 98; substitute 'See paragraph 92 of this Ruling'.

89. Paragraph 120

Omit the second sentence.

90. Paragraph 121

- (a) Omit the paragraph, excluding footnote 100; substitute:

118. There are also strong reasons to consider the decisions of courts from countries other than the treaty partner.^{99A} However, any such consideration would need to be consistent with the comments of the High Court in *Cook v Cook*¹⁰⁰ that:

Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.

- (b) At the end of the first sentence, insert new footnote 99A:

^{99A} In the first instance decision of *Tech Mahindra Limited v Commissioner of Taxation* [2015] FCA 1082 at [96], Perry J found support in a decision of the High Court of Karnataka at Bangalore in the case of *Commissioner of Income Tax v. De Beers India Minerals Pvt Ltd* that concerned the construction of a similar provision in a double tax treaty between India and the Netherlands.

- (c) Omit the wording of footnote 100; substitute '[1986] HCA 73; (1986) 162 CLR 376 at 390, Mason, Wilson, Deane and Dawson JJ.'

91. Paragraph 122

Omit the paragraph, including footnotes 101 and 102; substitute:

122. There are many advice products containing ATO views in relation to specific DTA issues, as well as other products that contain general guidance in relation to DTAs. The significance of any such materials in a particular case will, of course, depend upon the inherent status of those materials and their relevance to the issue under consideration. As with all such material, it is important to ensure that the material is up to date, and that any relevant addenda have been taken into account.

92. Paragraphs 123 and 124

Omit the paragraphs, including footnote 103.

93. Paragraph 125

- (a) Omit all after first sentence, including footnote 104.

- (b) After the paragraph , insert new paragraphs 125A and 125B:

125A. In *Resource Capital Fund IV LP v Commissioner of Taxation*¹⁰⁵ Pagone J referred to these 'Technical Explanations' as a supplementary means of interpretation under Article 32 of the Vienna Convention.

125B. As the 'Technical Explanations' are, however, developed as part of the internal processes of the United States when implementing a DTA, they are of little or no usefulness in objectively *proving* the intent of both parties to a DTA. They are primarily designed to reflect the views of the United States negotiators, upon which there may not necessarily be a *consensus ad idem* ('meeting of minds').¹⁰⁶ In any event, they may in some cases provide useful signposts to that *consensus* and better inform an understanding of the DTA as a whole.

- (c) After *Resource Capital Fund IV LP v Commissioner of Taxation* in new paragraph 125A, insert new footnote 105:

¹⁰⁵ [2018] FCA 41 at [63]. Davies J also referred to the Technical Explanations in the subsequent appeal.

- (d) After '(meeting of minds).' in new paragraph 125B, insert new footnote 106:

¹⁰⁶ In *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [66], the court doubted the appropriateness of using the views of a Treasurer of one of the Contracting States to support the interpretation of a bilateral treaty where the other Contracting State may have a different view.

94. Paragraph 126

Omit the paragraph; substitute:

126. This Ruling applies to years of income commencing both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of

issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling 2006/10 *Public Rulings*).

95. Paragraph 127

| | | |
|-----------|---|-----|
| (a) Omit: | | |
| | Ruling and explanations | 9 |
| | Substitute: | |
| | Ruling | 9 |
| (b) Omit: | | |
| | Part 3: DTAs as implemented legislation | 62 |
| | Substitute: | |
| | Part 3: DTAs as implemented into Australian law | 62 |
| (c) Omit: | | |
| | Interpreting Australian legislation implementing DTAs | 77 |
| | Substitute: | |
| | Australian legislation implementing DTAs | 77 |
| (d) Omit: | | |
| | Colonial Model DTAs | 113 |
| | Explanatory Memoranda etc | 116 |
| | Substitute: | |
| | Explanatory Memoranda | 116 |

This Addendum applies before and after date of issue.

Commissioner of Taxation18 March 2020

ATO references

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