IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 134 OF 2016**

On Appeal From
the Full Court of the Federal Court of Australia

BETWEEN: **BYWATER INVESTMENTS LIMITED**
First Appellant

CHEMICAL TRUSTEE LIMITED
Second Appellant

DERRIN BROTHERS PROPERTIES LIMITED
Third Appellant

AND: **COMMISSIONER OF TAXATION**
First Respondent

SUBMISSIONS OF THE RESPONDENT

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PART I PUBLICATION

1. The following submission is in a form suitable for publication on the internet.

PART II ISSUES ON THE APPEAL

2. The determinative issue in this appeal is whether any of the Appellants are entitled to protection from liability to tax under a relevant double tax agreement (**treaty**).

3. The issue in the appeal arises in these circumstances:

   3.1. The Federal Court found that the profits made by the Appellants from the sale of listed securities in Australia were ordinary income. Special leave to contest that finding was denied and it is uncontested in the grounds of appeal.

   3.2. It was and is uncontested that the profits had an Australian source.

   3.3. In consequence, whether the Appellants are resident, or not resident, in Australia under s 6(1) of the *Income Tax Assessment Act 1936* (Cth) (**the 1936 Act**), the profits are included in their assessable income by s 6-5 of the *Income Tax Assessment Act 1997* (Cth) (**the 1997 Act**): see [19] below.

4. Only if relief under a treaty is available to them can the Appellants obtain an order that their objections to their assessments be allowed.

5. There are three relevant treaties, each given the force of law[1] by the *International Tax Agreements Act 1953* (Cth):

   5.1. Under the 1967 UK treaty[2] the protection of the treaty[3] was relevantly available only to a "United Kingdom resident," relevantly defined as "any company which is managed and controlled in the United Kingdom".[4]

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1 By s 4 of the *International Tax Agreements Act 1953* (Cth) (**Treaty Act**), the "provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in the Assessment Act". Sections 5 and 11E gave the UK and Swiss treaties the force of law.

2 Treaty Act Sch 1 (replaced with effect from 1 July 2004 by the 2003 treaty); [1968] ATS 9. Relevant portions are attached.

3 Article 5(1) of the 1967 UK treaty provided that "Industrial or commercial profits of a United Kingdom enterprise shall be exempt from Australian tax". By Article 3(5) a UK enterprise was one carried on by a UK resident.

4 Article 3(1)(c) with 3(1)(b), which added the requirement that the company "is not an Australian company". By Article 3(1)(a) an Australian company is one which "(i) is incorporated in Australia and has its centre of administrative or practical management in Australia ... or (ii) is managed and controlled in Australia".

5.2. Under the 2003 UK treaty[5] the protection of the treaty[6] is relevantly available only to "a person [who] is a resident of the United Kingdom for the purposes of United Kingdom tax". If a company is also "a resident of Australia for the purposes of Australian tax," the tie-break provision is attracted: the company "shall be deemed to be a resident only of the State in which its place of effective management is situated".[7]

5.3. Under the Swiss treaty[8] the protection of the treaty[9] was relevantly available only to a resident of Switzerland, defined as a person "subject to unlimited tax liability in Switzerland". If a company is "a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated".[10]

The primary Judge found that a company is subject to unlimited liability in Switzerland if it has its place of effective management in Switzerland.[11]

6. Accordingly for any of the Appellants to claim treaty relief it must establish:

6.1. Under the 1967 UK treaty, that it was "managed and controlled" in the UK;

6.2. Under the 2003 UK treaty, that it was not a resident of Australia for domestic purposes (because it did not have its central management and control in Australia), or that it had its "place of effective management" in the UK; or

6.3. Under the Swiss treaty, that it had its "place of effective management" in Switzerland.

7. The Appellants at [2] of their submissions (**AS**) state the issue in a manner which is both too narrow and question-begging. It is too narrow because residence under s 6 of the 1936 Act is only one, incidental, issue in the appeal; the Appellants make no material submissions concerning the treaties.[12] It is question begging because both alternatives postulated assume as a premise a matter in contest, that the "lawful organs" play an operative role in decision

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5 Treaty Act Sch 1; [2003] ATS 22. Relevant portions are attached.

6 Article 7(1) of the 2003 UK treaty provides that "The profits of an enterprise of a Contracting State shall be taxable only in that State..." Article 3(1)(i) provides that "'enterprise of a Contracting State' [means] an enterprise carried on by a resident of a Contracting State".

7 Article 1 and Article 4(1), 4(4).

8 Treaty Act Sch 15; [1981] ATS 5. Relevant portions are attached.

9 Article 7 of the Swiss treaty provides that "The profits of an enterprise of a Contracting State shall be taxable only in that State". Article 3(f) provides that "'enterprise of a Contracting State' means an enterprise carried on by a resident of Australia or a resident of Switzerland, as the context requires".

10 Article 4(1)(b), 4(3).

11 Primary Judgment at [438]; cf [439] for findings on what this means under Swiss law and [440] for application to the facts here.

12 AS at [69]-[70] are assertion, not argument, and do not attempt to deal with the primary Judge's findings concerning Mr Borgas.

making. Neither limb of the dichotomy in AS at [2] captures the facts of this case.

8. The question posed by this appeal is better expressed as whether, for the purposes of the tests of residence of a company in the treaties (or in s 6 of the 1936 Act so far as relevant), management and control, effective management or central management and control is exercised by the person who makes all deliberative decisions in the company's affairs, or by persons who hold formal office in the company but make no deliberative decisions and only implement or transmit decisions made by another.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

9. The Respondent certifies that he considers that no notice is required to be given under s 78B of the *Judiciary Act*.

PART IV MATERIAL FACTS

10. The account of the facts in Part V of the Appellants' submissions is materially incomplete and unhelpful. At the heart of this case was a factual dispute. The Appellants asserted, relying on Mr Borgas' testimony, that he, acting as director in Switzerland, made every decision for the Appellants and that he was their ultimate owner, Mr Gould being no more than an advisor. The Respondent asserted that Mr Gould was the true owner and controller of the Appellants, that he in Australia made every business decision for them, and that Mr Borgas' role was no more than to act as a "cipher" or "puppet" for Mr Gould while making it appear as though he was genuinely exercising director functions.[13]

11. The primary Judge rejected the Appellants' case on the facts. The Notice of Appeal (Ground 3) accepts the primary findings of fact. They need to be restated here as the Appellants largely ignore them, and instead impute to Mr Borgas a process of decision making inconsistent with such findings.[14] Indeed the Appellants' argument proceeds as if the opposite findings had been made: that Mr Borgas had made decisions, and had executed meaningful and effective documents. Where passages in the Primary Judgment are cited, they are taken out of context[15] or misreported.[16]

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13 Primary Judgment at [11]-[14], [56]-[68].

14 AS at [9], [27], [36], [48], [52], [59], [70].

15 Compare his Honour's reasons at [129] with AS at [27]; at [68] and [77] with AS at [55] and [57]; at [129]-[130] with AS at [59]. His Honour did not at [339] (read with [311]-[314] ("the same conclusions")), find that "Mr Borgas implemented Mr Gould's instructions" to "make a decision" or implement a "transaction," as implied in AS at [9].

16 The characterisation in AS at [52] of his Honour's reasons at [145]-[309] as "revealing that Mr Borgas engaged in conduct ... in a manner consistent with the interests of Mr Gould" is simply misleading. The statement (AS at [52]) that his Honour found at [153]-[161] that "*Mr Borgas, on behalf of* Chemical, advanced loan funds" is inaccurate. The citation of [55] and [66] (but not [67]) as a finding that "Mr Borgas executed almost all relevant documents by which the appellants engaged in business" is false and misleading.

12. The primary Judge found:

12.1. The Appellants generally: "the directors of the taxpayers exercised no independent judgment in the discharge of their offices but instead merely carried into effect Mr Gould's wishes in a mechanical fashion";[17] "...Mr Gould used the services of Mr Borgas' company Anglore in Switzerland to assist him in creating the impression that decisions were being made in Switzerland...";[18] "Mr Borgas' evidence about this [making the decisions for these companies] was false and ... the document trail generated by Mr Borgas is false too. All of these taxpayers' decisions were made by Mr Gould."[19]

12.2. Chemical Trustee Ltd: "it was Mr Gould who controlled Chemical Trustee"; "Mr Borgas' role [was] as a person whose job was to carry out steps at Mr Gould's behest then to make it appear as if they were his own.... What was involved was a charade"; "Mr Borgas deliberately attempted to conceal Mr Gould's true role. He did this in two ways: first, by generating a large amount of contemporaneous, but essentially deceitful, correspondence to make it appear that he had made decisions which I am abundantly satisfied he did not make; secondly, by giving deliberately false evidence to this Court." "Mr Borgas provides the service of providing persons who desire it with the façade that their business is conducted by Mr Borgas from Neuchâtel. It is this service that Mr Borgas provided to Mr Gould"; "all of the decisions of Chemical Trustee were made by Mr Gould and ... Mr Borgas was not involved in them in the slightest way. In short, the structure was fake. Nothing happened in Neuchâtel but the generation of pieces of paper."[20]

12.3. Derrin Brothers Properties Ltd: "Mr Borgas testified that it was he who made the decisions on its behalf and Mr Gould was to be seen as merely as an advisor. ... I regard Mr Borgas a thoroughly discreditable witness and I do not accept this evidence"; "Mr Borgas' role was to transact Mr Gould's business as if it were his own to conceal Mr Gould's role. Mr Borgas was himself not in the slightest involved in the decision making process. The entire structure of Derrin was a façade to conceal Mr Gould's role."[21]

12.4. Bywater Investments Ltd: "Mr Borgas gave evidence that he made the decisions for Bywater. ... I reject his evidence"; "I draw the same conclusions about the role and behaviour of Mr Borgas and Mr Gould in respect of the affairs of Bywater as I have in relation to Chemical Trustee and Derrin."[22]

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17 Primary Judgment at [60].

18 Primary Judgment at [346].

19 Primary Judgment at [67].

20 Primary Judgment at [236], [253], [311]-[314].

21 Primary Judgment at [315]-[317], [339].

22 Primary Judgment at [341], [343].

13. The primary Judge, at [405]-[411], summarised his factual findings as follows:

> Chemical Trustee's real business was conducted from Sydney by Mr Gould. The role of Mr Borgas was fake. He made no decision of any kind but simply implemented Mr Gould's instructions after which he generated a false document trail to make it appear otherwise. ...
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> Mr Borgas took no part to any extent in Chemical Trustee's decision-making processes. ... Mr Borgas' position was to do as he was told by Mr Gould without thought. I reject entirely the idea that Mr Borgas might have declined a transaction which he believed or suspected to be improper. ...
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> Mr Vara's mechanical tasks in London [were] handling bank accounts as instructed or settling Australian share transactions. ... Mr Vara's role was to do as he was told by Mr Gould. This is what he did. ...
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> Mr Gould ran this taxpayer in its every aspect from Sydney. ... he went to great lengths to conceal his role... . I find that Chemical Trustee had its place of central management and control in Sydney with Mr Gould and nowhere else.
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> The same reasoning as in the case of Chemical Trustee applies [to Derrin Brothers], there being no material difference.
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> The same analysis again applies [to Bywater Investments].

14. This is the factual basis on which the legal questions fall to be decided.

PART V RELEVANT LEGISLATION

15. Appended is a copy of statutory provisions additional to those appended to the Appellants' submissions.

PART VI ARGUMENT FOR THE RESPONDENT

(a) Respondent's submissions in summary

16. As Australian sourced ordinary income, the gains assessed to each Appellant are assessable income unless the Appellant is entitled to treaty relief, and an Appellant is only entitled to treaty relief if it is treated as resident in the other country under the relevant treaty.

17. On the factual findings of the primary Judge, the sole repository of management and control was Mr Gould, in Australia; both for Australian domestic purposes and for the purposes of the Swiss and 1967 UK treaties the Appellants were resident only in Australia. If it is assumed (as the primary Judge did[23]) that an Appellant was resident in the UK for UK domestic purposes, then under the tie-break provisions it was resident in Australia for the purposes of the 2003 UK treaty.

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23 Primary Judgment at [424].

18. Each of the concepts of management and control, central management and control, and effective management, whether under domestic law or treaty standards, requires an informed and deliberate making of the decisions comprised in the carrying on of its business. Mere adoption, without informed deliberation, of a proposal or direction coming from another is not an exercise of any of them. Reasoning to the contrary (if any) in earlier decisions should not be adopted in this Court.

(b) Statutory context

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19. The profits in issue were derived from a source in Australia[24] and were on revenue account, and so "ordinary income".[25] By s 6-5(2) and (3) of the 1997 Act ordinary income derived from sources within Australia is included in the assessable income of a company ("you"), whether it is resident or non-resident. The company is relieved of tax liability only if it is protected by a treaty.

20. Residence of a company for Australian domestic tax purposes is fixed by s 6 of the 1936 Act: materially to the present facts, "a company ... which, not being incorporated in Australia, carries on business in Australia, and has ... its central management and control in Australia".

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21. It is settled law[26] that the business of a company is carried on where its central management and control is found. While there may be more than one place of central management and control,[27] if the central management and control is to any extent exercised in Australia then under the 1936 Act the company is resident in Australia.

(c) The role of residence in the Assessment Acts

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22. The Income Tax Assessment Acts take as the fundamental nexus supporting their territorial reach either or both (i) that the income or gain taxed has a source in Australia, or (ii) that the party taxed has a sufficient connection with Australia. The connection chosen is residence,[28] but residence as a defined term, not limited to its ordinary meaning. The definition extends, in the case of an individual, to sufficient physical presence; and in the case of a company, to incorporation and also to central management and control within Australia. The policy reason for a broad conception of residence is "to ensure that a person

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24 They were made on dealings in shares in companies listed on the ASX, Primary Judgment at [3], [12], [24], [30], [42]. As to source (which was not in contest in the Federal Court), see *Inland Revenue Commissioners v Hang Seng Bank Ltd* [1991] 1 AC 306 at 323 (Lord Bridge), "if the profit was earned by the exploitation of property assets as by ... dealing in commodities or securities by buying and reselling at a profit, the profit will have arisen in or derived from the place where ... the contracts of purchase and sale were effected".

25 Primary Judgment at [448], [460]. The ambit of the grant of special leave forecloses any contest of that finding, and there is no ground of appeal contesting it. They were "income according to ordinary concepts" and therefore "ordinary income" for the purposes of s 6-5.

50 26 See [23]-[26] below.

27 *North Australian Pastoral Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 623 (Dixon J).

28 Others are possible: the United States selected, inter alia, citizenship as a taxpayer nexus.

who enjoys the legal, political and economic benefits of associating with [Australia] will pay their appropriate share for the costs of this association".[29] The definition is to be construed according to its terms,[30] not constrained by preconceptions of "ordinary" residence or "organic" structure.

(d) Authority on central management and control

23. In *De Beers Consolidated Mines Ltd v Howe*[31] Lord Loreburn said "... a company resides for purposes of income tax where its real business is carried on ... I regard that as the true rule, and the real business is carried on where the central management and control actually abides. ... This is a pure question of fact to be determined, not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading".

24. The subsequent decisions of the House of Lords adopting this criterion (which in Australia had been given statutory force by the 1936 Act[32]) were traced by Dixon J in *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation*,[33] in a judgment in which his Honour addressed but did not decide the question whether the company was resident in more than place, observing that "it would seem to be proper to conclude that residence of a company depends upon the existence within the country for which it is claimed of some part at least of the superior administration or control of the company's general affairs."[34] His Honour's conclusion that on the evidence the company was resident only in Australia was upheld on appeal,[35] where the English authorities were adopted. His Honour's reasoning was also endorsed in the House of Lords in *Unit Construction Co Ltd v Bullock*,[36] where it was observed that the formulation of Lord Loreburn "must be treated today as if the test which it laid down was as precise and as unequivocal as a positive statutory injunction".[37]

25. *Unit Construction Co Ltd v Bullock* is of particular persuasive significance in the present case because the argument which found favour at first instance and in the Court of Appeal is very close to that pressed by the Appellants: that "only constitutional, and therefore authorised, management and control are relevant

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29 *Goerz & Co v Bell* [1904] 2 KB 136, 145 (Channell J); *Fundy Settlement v Canada* [2012] 1 SCR 520 at 523 [7] (LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ), citing Krishna, V, *The Fundamentals of Income Tax Law* (2009) at 85.

30 For the purpose of imposing a fiscal liability, the legislature may set whatever nexus it chooses, and decide whether it has "relevance to the exercise of the power" (*Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, 375 (Dixon J); it is not constrained to some "ordinary" or "organic" meaning of the term selected as the criterion.

31 [1906] AC 455, 458.

32 The definition was inserted into the *Income Tax Assessment Act 1922* by the *Income Tax Assessment Act 1930*, s 2(i). The explanatory memorandum to that Act does no more than recite the provisions.

33 (1940) 64 CLR 15.

34 (1940) 64 CLR 15, 22.

35 (1940) 64 CLR 214.

36 [1960] AC 351.

37 [1960] AC 351, 366.

to an inquiry as to the residence of a company".[38] Their Lordships unanimously rejected that argument. Viscount Simonds said "The business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution, however imperative. ... it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company".[39]

26. This was the state of authority on which *Esquire Nominees Ltd v The Commissioner of Taxation of the Commonwealth*[40] was argued. Justice Gibbs noted the "well settled" course of authority and that "The question where a company is resident is one of fact and degree."[41] His Honour found that the company's actions were "done in the course of carrying out a scheme formulated in Australia and that [the Australian accountants] not only communicated to the appellant particulars of the scheme but advised the appellant in detail of the manner in which it should be carried out ... the firm had power to exert influence, and perhaps strong influence, on the appellant."[42]

27. However, his Honour, speaking obiter, found[43] that the facts fell short or establishing residence in Australia:

> it does not follow that the control and management of the appellant lay with Messrs. Wilson, Bishop, Bowes and Craig. That firm *had no power* to control the directors of the appellant in the exercise of their powers .... The firm had power to exert influence, and perhaps strong influence, on the appellant, but that is all. The directors in fact complied with the wishes of Messrs. Wilson, Bishop, Bowes and Craig because *they accepted that it was in the interest of the beneficiaries, having regard to the tax position, that they should give effect to the scheme.* If, on the other hand, Messrs. Wilson, Bishop, Bowes and Craig had instructed the directors to do something which they considered improper or inadvisable, *I do not believe that they would have acted on the instruction.* It was apparent that it was intended that the appellant should carry on its business of trustee company on Norfolk Island. It was in my opinion managed and controlled there, none the less because the control was exercised in a manner which accorded with the wishes of the interests in Australia. The appellant was, in my opinion, a resident of Norfolk Island.

28. On appeal, Barwick CJ "fully agreed" with this finding, and concluded that the companies directly and indirectly owned by the appellant, incorporated in

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38 [1060] AC 351, 369.

39 [1960] AC 351, 363. Lord Radcliffe agreed at 370 ("The articles prescribe what ought to be done, but they cannot create an actual state of control and management in Africa which does not exist in fact"), as did Lord Goddard (at 371), Lord Cohen (at 374) and Lord Keith (at 375, despite some reservations about the facts in that case).

40 (1972-3) 129 CLR 177.

41 (1972-3) 129 CLR 177, 189-90.

42 (1972-3) 129 CLR 177, 190, 191. The detail extended to "not infrequently prepar[ing] in detail the agenda of a meeting of the directors of the appellant or of the company itself".

43 (1972-3) 129 CLR 177, 191 (emphasis added).

Norfolk Island with the same directors, also had their central management and control there.[44] Menzies J also agreed, as to the appellant and the other companies.[45] Stephen J agreed that the wholly owned company was resident in Norfolk Island.[46] None considered it necessary to do more than agree with the conclusion of Gibbs J.

29. That conclusion rested on questions of fact, not on any novel legal principle. Justice Gibbs cited and accepted the proposition, restated in *Unit Construction Co Ltd v Bullock*,[47] that a company's residence is where "the central management and control *actually* abides". His Honour found that the directors were the persons who actually made the substantive decisions (such as they were) of the appellant; that they had regard to the wishes and advice of the accountants, and to the accountants' purpose in setting up the scheme and the tax advantages which flowed from it, but did not cede control of their decisions to the accountants and would have rejected instructions to do anything regarded as "improper or inadvisable".

30. Contrary to the submission of the present Appellants, neither *Esquire Nominees* nor any other decision of this Court establishes any principle that "the *lawfully appointed* board of directors" of the company, or the board as "the *lawful* organ with authority to bind" it, is necessarily the repository of the company's central management and control[48], nor that the test for residence collapses into "where a company's organs *lawfully* and regularly exercise their authority".[49] *Esquire Nominees* decides no more than that on the facts before the court, the only *actual* decision maker was the board.[50]

(e) A factual, not a merely formal, criterion

31. In *Unit Construction Co Ltd v Bullock*[51] Viscount Simonds emphasised that the location of its central management and control was to be found by a factual enquiry into the company's acts: "Nothing can be more factual and concrete than the acts of management which enable a court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that in greater or less degree they are irregular or unauthorised or unlawful". The other members of the House agreed, Lord Keith

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44 (1972-3) 129 CLR 177, 209, 210, 212.

45 (1972-3) 129 CLR 177, 220.

46 (1972-3) 129 CLR 177, 225.

47 [1960] AC 351, 360; cited at (1972-3) 129 CLR 177, 189. At 190 his Honour records the Commissioner's argument that *Unit Construction Co Ltd v Bullock* establishes "that it is the actual place of management of a company and not the place where it ought to be managed which fixes its residence," but at 190-191 rejects the conclusion pressed on the facts of the case.

48 AS at [14].

49 AS at [13].

50 AS at [26] misrepresent the findings of Gibbs J in *Esquire Nominees*: the directors did not "do what they were told," see the passage at 129 CLR 191 set out at [27] above.

51 [1960] AC 351, 362-3.

observing that "It is the facts of the case that have to be considered with the legal results that follow".[52]

32. The Appellants' contention that "*Bullock* involved an exception to the true rule from *De Beers*"[53] is wrong.[54] *Unit Construction Co Ltd v Bullock* was not an exception, but an application, of the rule laid down by Lord Loreburn that residence "is a pure question of fact". Each of the speeches rejects the proposition that there is a "true rule" that the "formal organs" must always be viewed as the seat of management and control.[55] In most cases the board will in fact control and manage the company, but where it does not, central management and control, the "real business" and the residence of the company in fact lie elsewhere.

33. Justice Gibbs in *Esquire Nominees* adopted the same approach as had the House of Lords; the company succeeded in establishing its Norfolk Island residence not because of what was in its constitution, but because on the evidence accepted by his Honour the "acts of management" and control were those of Mr McIntyre and his fellow Norfolk Island directors, and not those of the Australian accountants.

34. In *Wood v Holden*[56] the distinctions addressed below at [36]-[38] were drawn, but on the facts, the Court found that the relevant decisions, few in number, were actually made by the directors, albeit after receiving advice and recommendations. In *R v Dimsey*[57] a jury direction that central management and control was a question of fact, with the test being "where the companies were in fact centrally managed and controlled and not where they should have been managed or where they appear to have been managed" was upheld.[58] In *HMRC v Smallwood*[59] the Court of Appeal (by majority) held that the Special

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52 [1960] AC 351, 375.

53 AS at [43].

54 The citations in AS at [43] do not support the account in that paragraph of their Lordships' speeches.

55 Viscount Simonds at 362-363, "Its residence is determined by the solid facts, not by the terms of its constitution, however imperative"; Lord Radcliffe at 370, "The articles prescribe what ought to be done, but they cannot create an actual state of control and management"; Lord Cohen at 373-374 rejected the reasoning of the courts below, held that "the question where the central control actually abides is a question of fact" and construed an earlier observation of the Master of the Rolls as referring to what ordinarily is the case in fact, not to any principled rule; Lord Keith at 375, residence does not turn on "whether the powers of directors of a company are exercised in accordance with the constitution of the company. ... It is the facts of the case that have to be considered".

56 [2006] 1 WLR 1393; the judgment was that of Chadwick LJ, Moore-Bick LJ and Sir Christopher Staughton agreeing.

57 [2000] QB 744.

58 [2000] QB 744, 759. At 760 Laws LJ, giving the judgment of the Court, said: "So long as the prosecution could satisfy the jury that it was sure that Mr Chipping was not a consultant but in fact not only undertook the day to day running of the business but [also] made all the decisions whilst Mr Dimsey carried out the functions of administration in Jersey, no sophisticated or difficult questions of central management and control arose".

59 [2010] EWCA Civ 778 at [48] (Hughes and Ward LJJ) (Patten LJ dissenting).

Commissioners were entitled to find facts which placed the effective management of a trust estate in the UK, whence the scheme was "carefully orchestrated" and, save for a brief interval between appointment and replacement of a Mauritius trustee, where its trustee was located.[60]

35. Other appellate courts have emphasised the factual nature of the enquiry. The Supreme Court of Canada in *Fundy Settlement v Canada*[61] treated the test of residence of a trust as being the same as that for a company, being "where its real business is carried on ... which is where the central management and control of the trust actually takes place," a matter to be determined on the facts. On the factual findings of the primary Judge, the trustee's "role was to execute documents as required, and to provide incidental administrative services. It was generally not expected that [it] would have responsibility for decision-making beyond that". The trustee "had agreed from the outset that it would defer to the recommendations" of the Canadian principals, "who made the substantive decisions respecting the Trusts, either directly or indirectly through advisers that they directed".[62] The trust was resident in Canada, where the principals were.

(f) The company's "lawful organs" as the necessary repository of central management and control?

36. The Appellants' "lawful organs" contention may have its origin in the view taken in *Wood v Holden* of the significance of *Esquire Nominees* and some later decisions sharing "common features". Lord Justice Chadwick drew a distinction[63] among three categories of case: where the functions of the "constitutional organs" (the board and general meeting) are "usurped" (such as happened in *Unit Construction Co Ltd v Bullock*); where the constitutional organs exercise power but under dictation from an outsider as to their acts; and where those organs exercise power and are influenced by advice and proposals, but do not take orders, from an outsider. The distinction is descriptive, not normative; not every case can be analysed in this way.[64]

37. The decisions in *Esquire Nominees* and *Wood v Holden* (and the dissenting judgment in *Smallwood*) turn in each case on a factual finding[65] that the

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60 The passage relied on by the Appellants in AS at [49] is in the dissenting judgment of Patten LJ, but in any event goes no further than a factual finding (like that of Gibbs J) that the directors did not "cede any discretion" they had in decision making to the "outsider."

61 [2012] 1 SCR 520 at 526-7 [14]-[16] (LeBel, Deschamps, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ).

62 *Garron Family Trust v R* [2009] TCC 450 at [189], [194], [252] (Woods J).

63 [2006] 1 WLR 1393 at 1410-1411 [27].

64 The present case is closest to the first of his Lordship's categories, but is better described as one in which the "formal organ" (Mr Borgas) was never intended, expected, required or permitted to exercise central management and control, or effective management; his position was, as the primary Judge found, "a façade to conceal Mr Gould's role". He "was not in the slightest involved in the decision making process" (Primary Judgment at [339]). He was not "usurped" because there was no role to be usurped.

65 The factual finding elicited from the Special Commissioners' decision in *Wood v Holden* ([2006] 1 WLR at 1470 [40]), that because the Mauritius directors signed the documents presented to them

relevant decisions were actually made by the directors of the company, acting at the place where the company was claimed to be resident. As such, those decisions do not stand in conflict with the reasoning of the House of Lords in *Unit Construction Co Ltd v Bullock*.

38. The Appellants seek to erect on the foundation of these decisions on the facts a wider rule that where the "lawful organ" – such as the board of directors – records a decision, it must follow that central management and control is thereby exercised by that organ, no matter how close the supervision of an outsider, how precisely the acts of the organ conform to the outsider's program, or how little or absent is the involvement of the organ in the decision making process. No such rule is established by the decisions, nor should it be accepted.

39. Merely declaring that a decision has been made and affixing a signature to documents is not enough to comprise an effective decision; a decision made elsewhere does not become that of the "lawful organ" by mechanical acts such as reducing it to writing. Central management and control involves deliberative decision making,[66] not merely the formality of preparing and signing minutes and other documents. If the decisions comprising the conduct of the company's business are made elsewhere and communicated to the persons comprising the "formal organs," on whose part there is no real consideration of, and no dissent nor any genuine prospect of dissent from, those decisions, the "real business is carried on" and the central management and control abides at the place where the decisions are made and whence they are communicated, not where formal documents are prepared or signed.

40. To accord primary or exclusive significance to the acts of the directors, individually or meeting as a board, or of the members in general meeting, simply because they are the "formal organs" of the company, and to give no or lesser significance to the making elsewhere of considered decisions which are then adopted or recorded by the board or members, is to elevate form over substance, contrary to preference that has been expressed in judgments of this Court in matters across the full range of its jurisdiction;[67] there is no reason in

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by the London accountants "they must in fact have decided to do so" and that this amounted to an exercise of central management and control, was reached in a case where the facts were exceedingly thin. As Sir Christopher Staughton observed at [49], "there might have been further facts" but they were not in evidence. On the facts, this was a case where the director did make a decision and did so without dictation; see [41].

66 By way of example, decisions to acquire or dispose of material assets, to incur, perform or discharge obligations, engaging staff or contactors, or to make distributions. In *Bedford Overseas Freighters Ltd* v *MNR* [1970] CTC 69 the directors negotiated the company's agreements and operated its bank accounts, "albeit in large measure to carry out [the] instructions and policy decisions" of its sole shareholder. In *Birmount Holdings Ltd v R* [1978] CTC 358, where the company's only activity was to acquire, lease and sell a property, the directors "leased the property, collected the rents, inspected the property, paid the taxes and made the mortgage payments" without reference to the foreign sole shareholder. In each case the directors were held to exercise central management and control.

67 For example, in constitutional issues (*Coleman v Power* (2004) 220 CLR 1 at [65] (McHugh J), *Magaming v R* (2013) 252 CLR 381 at [62], [81] (Gageler J)), contractual penalties (*Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at [13]), criminal law

principle or practicality to single out corporate residence for fiscal purposes as an area in which to accord priority to form, or to the acts of "formal organs," over the substance of actual management and control.

41. The preference of the Court of Appeal for the formality of what was permitted by the constitution of the company over the substance of actual decision making was rejected by the House of Lords in *Unit Construction Co Ltd v Bullock:*

> The articles prescribe what ought to be done, but they cannot create an actual state of control and management in Africa which does not exist in fact. ...
>
> Ought we, then, to adopt this principle that evidence of what has happened in fact must be excluded by a rule of law if what has been done is inconsistent with the regulations of a company? In my opinion, it would be wrong to do so. I cannot see how the corollary of such a principle could fail to be that, if you cannot look beyond what the regulations of the company provide for, it is only those regulations which need to be or indeed can be referred to when a question of residence arises. Companies could be equipped with the most comprehensive sets of constitutions providing for management to be located in this or that selected taxing jurisdiction, and, however much the written requirements were in fact departed from for reasons of convenience or otherwise, all efforts to establish the true facts relating to the actual seat of management would founder on the ground that what had been done was merely 'unconstitutional.'[68]

Viscount Simonds rhetorically asked:[69]

> In how many cases would a limited company register in a foreign country, prescribe by its articles that its business should be carried on by its directors meeting in that country, and then claim that its residence was in that country though every act of importance was directed from the United Kingdom?

42. The concern as to "manipulation" expressed both in the Supreme Courts of Canada (in *Fundy Settlement*) and the United States (in *Hertz Corp v Friend*)[70] and in the House of Lords is well founded. From almost immediately after it was delivered, the judgment of Gibbs J in *Esquire Nominees* was (wrongly) taken (by some) as a template for establishing corporate residence outside

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(*Maloney v R* (2013) 252 CLR 168 at [204] (Bell J), [305] (Gageler J), restitution (*Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at [94] (Hayne, Crennan, Kiefel, Bell and Keane JJ), [137] (Gageler J), taxation of trust income (*Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 at [58] (Gleeson CJ, Gummow and Crennan JJ)) and validity of franchise taxes (*Ha v New South Wales* (1997) 189 CLR 465 Brennan CJ, McHugh, Gummow and Kirby JJ (Dawson, Toohey and Gaudron JJ dissenting)).

68 At 370 (Lord Radcliffe).

69 [1960] AC 351, 363.

70 559 U.S. 77 (2010); see [48] below.

Australia while retaining "capacity" to resume control, and effective direction, of the company's activities.[71]

43. The Appellants' "formal organs" argument may reflect tax lore that has developed over the past four decades; but it does not accurately represent the law established in *De Beers Consolidated Mines,*[72] *Koitaki Para Rubber Estates,*[73] *North Australian Pastoral,*[74] *Malayan Shipping,*[75] *Unit Construction Co Ltd v Bullock*[76] and *Esquire Nominees,*[77] in all of which it was the fact of actual control and management, not the mere corporate structure or "lawful organs," which determined corporate residence for fiscal purposes. In all of those cases, except *Unit Construction Co Ltd v Bullock*, it was the directors who actually exercised central management and control; but none was decided on the basis that the directors were the repository of central management and control merely because they were the "lawful organ" of the company.

44. There is no foundation in principle for a holding that rote review and mechanical recording or transmission of a decision amounts, because it is done by the "lawful organ" of a company, to the exercise of central management and control of the company; and any contention that it is supported by authority should firmly and expressly be rejected. So far as *Wood v Holden* or any of the decided cases referred to in it (including *Esquire Nominees*) may be said to reduce the enquiry to the place where a "lawful organ" resides without more (which is denied), their reasoning should not be adopted in this Court; and so far as it may be necessary to do so, the decision in *Esquire Nominees* should be departed from: see Part VII below.

45. In summary the tests of residence in both the 1936 Act and the treaties look to what is actually done, not to what "lawfully" may be done: to the acts which comprise management and control, central management and control or effective management, and not to whether there is a power or capacity to give directions to a "lawful organ" as to its actions. The question in the present appeal is not whether Mr Gould *could* give directions to Mr Borgas as a director of the Appellants, but whether Mr Gould's *actual* conduct amounted to exercising management and control central management and control, or effective management, of the Appellants.

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71 See, for example, W Bratby, "The determination of the residence of companies" (1972) 7 Taxation in Australia 73; M Leibler, "International transactions in tax practice" (1979) 8 Aust Tax Rev 8; on the risks of manipulation, see M Collett, "Developing a New Test of Fiscal Residence for Companies" (2003) 26 UNSWLJ 622.

72 [1906] AC 455, 459.

73 *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241, 248-249, 251 (Williams J; McTiernan J agreeing at 247); affirming (1941) 64 CLR 15, 17.

74 *North Australian Pastoral Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 623, 630, 633 (Dixon J).

75 *Malayan Shipping Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 156, 159-160 (Williams J).

76 [1959] AC 351, 363.

77 (1973) 129 CLR 177, 190.

(g) Residence and central management and control in other contexts

46. That the "lawfully appointed" board is not the sole possible manager or controller of a company has long been recognised in company law[78] and (although its deeming provisions do not apply for income tax purposes) in corporations legislation, most recently in the *Corporations Act 2001* (Cth), s 9 of which[79] defines "director" to include "a person who is not validly appointed as a director if (i) they act in the position of a director; or (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes".[80] If "the locus of effective decision making" resides in a person who has not been appointed a director, that person will nevertheless be a director,[81] and subject to the liabilities of a director.[82]

47. While a corporation (being a wholly artificial person) is not recognised as having "residence" as a matter of common law,[83] the need to ascribe residence or an equivalent has arisen in a variety of regulatory contexts, ranging from litigation procedure to commercial arbitration[84] to workers' compensation[85] and beyond.[86] On occasion the legislature has prescribed a criterion, sometimes

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78 *Gibson v Barton* (1875) LR 10 QB 329, *In re Canadian Land Reclaiming and Colonising Co (Coventry and Dixon's case)* (1880) 14 ChD 660. See further the Respondent's submissions in appeal S135 of 2016, Part VI (d)(i).

79 Antecedent provisions include s 60 of the Corporations Law, s 5 of the Companies Code, s 5 of the uniform Companies Acts of 1961-2 and the definition provisions of the State Acts variously of 1920-1936. Recognition of the existence of de facto directors can be found as early as *Mangles v Grand Collier Dock Co* (1840) 10 Sim 519; (1840) 59 ER 716; and cf the statement of Lord Ellenborough in *The King v Corporation of Bedford Level* (1805) 6 East 356 at 368; (1805) 107 ER 1323 at 1328, that "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law".

80 The definition adds the qualification that a person is not a director "merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity".

81 *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1, 52-53 (the passage is not reproduced in the report at (1995) 62 FCR 504), where Finn J also held that if the appointed directors are accustomed to act according to the instructions or wishes of another in material, not necessarily all, matters, the other will be a director. *AS Nominees* was applied in *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47, 74 (Young JA).

82 *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236; *Grimaldi v Chameleon Mining NL and Another (No 2)* (2012) 200 FCR 296 at 314-325.

83 *Australasian Temperance & General Mutual Life Assurance Society v Howe* (1922) 31 CLR 290, *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22; but see *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [37] (McHugh, Gummow and Hayne JJ). Compare *Bank of United States v Deveaux* (1809) 5 Cranch 61, 86 and the subsequent US history traced in *Hertz Corp v Friend* 559 US 77 (2010), sections III and IV.

84 The *Commercial Arbitration Act 2010* (NSW), s 41, defines a "domestic arbitration agreement" by reference to a party's place of business.

85 The *Workers' Compensation and Injury Management Act 1981* (WA), s 20, provides that if no other of its criteria is met a worker's employment is connected with "the State in which the employer's principal place of business in Australia is located". In *Ethnic Interpreters and Translators Pty Ltd v Sabri-matanagh* [2015] WASCA 186 (at [72] and [94]) the WA Court of Appeal held that to be the place from which the business was principally managed and controlled.

86 The *Spam Act 2003* (Cth), s 7, provides that a message has an "Australian link" if authorised by "an organisation whose central management and control is in Australia".

that of Lord Loreburn, sometimes "principal place of business". In none of the decisions in which the various criteria have been considered has it been held that the question is to be resolved solely by reference to the constitutional structure of the company; rather, it is to the actual exercise of management and control that regard is had. So in *The Polzeath (No 2)*[87] it was held that the "principal place of business" was the place from where control is exercised, and in determining where a company is "resident" for the purposes of considering an application for security for costs, Lindsay J in *In re Little Olympian Each-Ways Ltd*[88] adopted the criterion of central management and control, "looking to the activity as it is" whether or not "contrary to that required by the company's constitution".

48. Addressing the question of the State of which a company is a "citizen" for Federal jurisdictional purposes, the United States Supreme Court in *Hertz Corp v Friend*[89] canvassed possible bases for identifying a company's "principal place of business" and concluded that the phrase "is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. ... not simply an office where the corporation holds its board meetings". The test would "point courts in a single direction, towards the center of overall direction, control, and coordination". The Court expressly rejected the contention that filing a form with the SEC "listing a corporation's 'principal executive offices' would, without more, be sufficient proof to establish a corporation's 'nerve center'" pointing out that allowing such a formality to satisfy the test "would readily permit jurisdictional manipulation," or what the Court had earlier described as "gamesmanship," and that the object was to achieve "results and settlements [that] will reflect a claim's legal and factual merits".

(h) Resident under the Double Tax Agreements

49. On the facts as found by the primary Judge, none of the Appellants was resident in Switzerland or in the UK in any of the years in issue:

    49.1. None had a place of effective management in Switzerland, so that none was subject to unlimited tax in Switzerland and, in consequence, none was a resident of Switzerland for treaty purposes.[90] No protection under Art 7 of that treaty was available to them.

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87 [1916] P 241; cf *Palmer v Caledonian Railway Company* [1892] 1 QB 823 where it was held for service of process purposes that the "principal office" of the company was located where it was controlled or managed.

88 [1995] 1 WLR 560, 568. The same approach was taken in *Global Access Ltd v Educationdynamics, LLC* [2010] 1 Qd R 525.

89 559 US 77 (2010).

90 Article 4(1)(b); Primary Judgment at [433]-[440]. Note in particular Primary Judgment at [439] for the meaning of "effective management under Swiss law.

49.2. In the years before 1 July 2004, none of the Appellants was managed and controlled in the UK, so that none was a "United Kingdom resident"[91] nor in consequence entitled to the benefit of Article 5 of the 1967 UK treaty.

49.3. In the years after 30 June 2004, making the assumption that the Second and Third Appellants were resident in the UK for its domestic purposes,[92] the Appellants were also resident in Australia (because of central management and control here).[93] The tie-breaker provision is then resolved in favour of the Appellants being residents only of Australia.[94] Thus neither is entitled to the benefit of Article 7 of that treaty.

50. The only appellate consideration of "effective management" in Article 4 and its equivalents is in the Court of Appeal decision in *HMRC v Smallwood*,[95] where the court accepted the submission of both parties that guidance should be taken from the OECD Commentary on the Model Convention from which the provision is derived:

> It would not be an adequate solution to attach importance to a purely formal criterion like registration. Therefore paragraph 3 attaches importance to the place where the company is *actually* managed.
>
> The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are *in substance* made. ... no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An entity may have more than one place of management, but it can have only one place of effective management at any one time.[96]

51. In the Respondent's submission that guidance (in which the location of the "formal organs" has no necessary determinative role) should be accepted. On the findings of fact made by the primary Judge, the effective management of each of the Appellants was at all times in Australia, and the treaties afford them no protection.

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91 Article 3(1)(b) and 3(1)(c). Note that despite the breadth of Ground 3 of the Notice of Appeal, the Appellants do not argue for the UK as the place of management and control: AS at [16], [69].

92 Primary Judgment at [423]-[424] assumes incorporation in the UK means residence in the UK.

93 Article 4(1)(b).

94 Article 4(4): note again the Appellants do not contend for UK as a place of effective management: AS at [16], [69].

95 [2010] EWCA Civ 778 at [48]-[50].

96 OECD, *Commentaries on the Articles of the Model Tax Convention* (2015), Article 4 paras 22-3 (emphasis added).

(i) Summary responses to the Appellants' other arguments on appeal

(i) The relevance of ownership

52. The Appellants' submissions concerning ownership[97] address a false issue: a putative proposition, neither advanced by the Respondent nor relied on by the Federal Court at any stage, that a controlling ownership is determinative of central management and control. The Appellants' submissions seek to show error in reasoning which was not that of the courts below. The primary Judge did not find, and the Respondent did not argue, that the circumstance that Mr Gould had complete (albeit concealed) ownership of the Appellants was sufficient to establish his central management and control of the Appellants. Of course there can be cases where, on the facts, directors with no ownership of a company, exercise central management and control.[98]

53. What his Honour did deal with was ownership as an evidentiary matter. He found that, despite Mr Borgas' ostensible and asserted ownership and control of the Appellants, it was Mr Gould, and not Mr Borgas, who had their central management and control.

54. This enquiry into ownership was provoked by the question which presented itself, set out at [68] of the Primary Judgment, why if Mr Borgas owned the companies as he claimed would he cede control of the companies to Mr Gould?[99] It was to answer that question, by penetrating the elaborate façade they had erected, that his Honour examined and reached conclusions as to the true ownership of the Appellants.

55. It does not follow that ownership can never be relevant to central management and control. The Appellant repeatedly asserts that Mr Gould did not have a contractual or other power to require Mr Borgas to make any decision in any particular way.[100] It is enough to answer that proposition that the findings of fact are that on every occasion that a company decision was made, it was Mr Gould who made it, while Mr Borgas was a mere cipher in implementing or transmitting it. But if one goes behind those facts to ask why it was so, ownership is a part of the larger explanation. Why was Mr Borgas prepared to be a mere cipher and to participate in creating the façade that he was the decision maker? Answer: Mr Gould owned the Appellants; Mr Gould wanted this to occur (for obvious tax reasons); Mr Gould was prepared to pay Mr Borgas handsomely to do his bidding;[101] and Mr Borgas was prepared (to his discredit) to take on such role. This was the deal between the two men that gave Mr Gould the "power" over Mr Borgas. If Mr Borgas stopped doing Mr

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97 AS at [13], [54]-[57].

98 As submitted in AS at [56].

99 As is explained in the Primary Judgment at [76]-[77], this disjunct and the evidentiary contest (especially as to the evidence of Mr Borgas), which went to credit and to a rational basis for the Appellants' case, was "central" to acceptance of that case. The submission in AS at [57] misstates the judgment.

100 AS at [9], [23], [28] and [53].

101 Primary Judgment at [286]-[289], [311]-[314].

Gould's bidding he would quickly have found Mr Gould using his power as Appointor to remove him, and his stream of fees cut off.

(ii) The Appellants' "policy" arguments

56. Recommendations of a review committee which are not carried into legislation are of no assistance in construing earlier legislation,[102] nor is subsequent legislation imposing tax not on putatively non-resident companies but on individuals associated with such companies (Part X of the 1936 Act). The attempted imputation to the legislature of a policy decision not to amend the law does not assist in applying the definition of "resident," or in eliciting its meaning.

(j) Orders sought

57. The Respondent submits that the appeal should be dismissed with costs.

58. In the Respondent's submission the occasion for their making does not arise, but in any event the alternative orders sought in AS at [72(d)(ii)(B)] are beyond the grant of special leave and beyond the Appellants' grounds of appeal. No error has been shown in the reasons of the primary Judge or the Full Court concerning the character of the taxed profits and the Respondent has had no opportunity to challenge the implicit but unsubstantiated assertion that there is error. Whether the First Appellant is a resident of Switzerland for treaty purposes is a matter for the First Appellant to demonstrate on this appeal, not a matter for remission.

PART VII NOTICE OF CONTENTION

59. The Respondent has submitted above that the decision in *Esquire Nominees* does not support the arguments advanced by the Appellants, but rather supports the argument of the Respondent that on the findings of fact of the primary Judge (not challenged in the Appellants' notice of appeal) each of the Appellants was a company resident in Australia at all material times.

60. If the Court does not accept that submission as to the effect of *Esquire Nominees*, and treats it as authority for the "lawful organs" argument, the Respondent submits, for the reasons above, that the decision should not now be followed.[103]

61. *First,* while the line of authority to the effect that a company is resident where its central management and control is found can be traced back to 1876, *Esquire Nominees* was the first case to consider directors acting under close supervision; of another. *Second*, the issue of residence was dealt with obiter by

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102 Cf *Chippendale Printing Co Pty Ltd v Federal Commissioner of Taxation* (1996) 62 FCR 347, 360-1, 369.

103 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) citing *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 56-58 (Gibbs CJ, with whom Stephen J and Aickin J agreed). See also *Alqudsi v The Queen* [2016] HCA 24 at [66] (French CJ).

Gibbs J and not argued in the Full Court in *Esquire Nominees*. *Third*, for the reasons at [40]-[42] above, if the decision has the effect contended for by the Appellants, it is a potential source of mischief. *Fourth* The decision has not been followed in respect of residence in this country, nor by any superior appellate court in any other country.

PART VIII ORAL ADDRESS

62. The Respondent estimates the time required to present its oral argument in this appeal and the concurrent appeal in S135 of 2016 to be three hours.

Dated: 30 June 2016

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Income Tax Assessment Act 1997

Act No. 38 of 1997 as amended

This compilation was prepared on 6 July 2007
taking into account amendments up to Act No. 117 of 2007

Volume 1 includes:	Table of Contents Sections 1-1 to 36-55

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes:	Table of Contents Sections 40-1 to 55-10
Volume 3 includes:	Table of Contents Sections 58-1 to 122-205
Volume 4 includes:	Table of Contents Sections 124-1 to 152-430
Volume 5 includes:	Table of Contents Sections 164-1 to 220-800
Volume 6 includes:	Table of Contents Sections 240-1 to 410-5
Volume 7 includes:	Table of Contents Sections 700-1 to 727-910
Volume 8 includes:	Table of Contents Sections 768-100 to 995-1

(2) Some ordinary income, and some statutory income, is exempt income.

(3) Exempt income is not assessable income.

(4) Some ordinary income, and some statutory income, is neither assessable income nor exempt income.

For the effect of the GST in working out assessable income, see Division 17.

(5) An amount of ordinary income or statutory income can have only one status (that is, assessable income, exempt income or non-assessable non-exempt income) in the hands of a particular entity.

Operative provisions

6-5 Income according to ordinary concepts (*ordinary income*)

(1) Your ***assessable income*** includes income according to ordinary concepts, which is called ***ordinary income***.

Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.

(2) If you are an Australian resident, your assessable income includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

(3) If you are a foreign resident, your assessable income includes:

(a) the *ordinary income you *derived directly or indirectly from all *Australian sources during the income year; and

(b) other *ordinary income that a provision includes in your assessable income for the income year on some basis other than having an *Australian source.

(4) In working out whether you have ***derived*** an amount of *ordinary income, and (if so) when you ***derived*** it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct.

*To find definitions of asterisked terms, see the Dictionary, starting at section 995-1.

Income Tax Assessment Act 1936

Act No. 27 of 1936 as amended

This compilation was prepared on 5 July 2007
taking into account amendments up to Act No. 113 of 2007

Volume 1 includes:	Table of Contents Sections 1 – 78A

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes:	Table of Contents Sections 79A – 121L
Volume 3 includes:	Table of Contents Sections 124K – 202G
Volume 4 includes:	Table of Contents Sections 204 – 624
Volume 5 includes:	Table of Contents Schedules 2, 2C – 2H, 2J and 3 – 5
Volume 6 includes:	Note 1 Table of Acts Act Notes Table of Amendments Repeal Table Notes 2 – 7 Tables A and B

An Act to consolidate and amend the law relating to the imposition assessment and collection of a tax upon incomes

Part I—Preliminary

1 Short title [*see* Note 1]

This Act may be cited as the *Income Tax Assessment Act 1936.*

6 Interpretation

(1AA) So far as a provision of the *Income Tax Assessment Act 1936* gives an expression a particular meaning, the provision does *not* also have effect for the purposes of the *Income Tax Assessment Act 1997* (the ***1997 Act***), or for the purposes of Schedule 1 to the *Taxation Administration Act 1953*, except as provided in the 1997 Act or in that Schedule.

(1) In this Act, unless the contrary intention appears:

100% subsidiary has the same meaning as in the *Income Tax Assessment Act 1997.*

accrued leave transfer payment has the meaning given by section 6G.

AFOF means an Australian venture capital fund of funds within the meaning of subsection 118-410(3) of the *Income Tax Assessment Act 1997.*

agent includes:

(a) every person who in Australia, for or on behalf of any person out of Australia holds or has the control, receipt or disposal of any money belonging to that person; and

(b) every person declared by the Commissioner to be an agent or the sole agent of any person for any of the purposes of this Act.

allowable deduction means a deduction allowable under this Act.

reportable fringe benefits total for a year of income for a person who is an employee (within the meaning of the *Fringe Benefits Tax Assessment Act 1986*) means the employee's reportable fringe benefits total (as defined in that Act) for the year of income.

resident or ***resident of Australia*** means:

(a) a person, other than a company, who resides in Australia and includes a person:

(i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;

(ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or

(iii) who is:

(A) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; or

(B) an eligible employee for the purposes of the *Superannuation Act 1976*; or

(C) the spouse, or a child under 16, of a person covered by sub-subparagraph (A) or (B); and

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

resident trust for CGT purposes has the same meaning as in the *Income Tax Assessment Act 1997*.

return on a debt interest or equity interest has the same meaning as in the *Income Tax Assessment Act 1997*.

return of income means a return of income, or of profits or gains of a capital nature, or of both income and such profits or gains.

royalty or ***royalties*** includes any amount paid or credited, however described or computed, and whether the payment or credit is

International Tax Agreements Act 1953

Act No. 82 of 1953 as amended

Volume 1 includes: Sections 1–22
Schedules 1–24

Volume 2 includes: Schedules 25–45
Table of Acts
Act notes
Table of Amendments
Endnotes

This compilation was prepared on 14 January 2003
taking into account amendments up to Act No. 129 of 2002

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

An Act to give the force of Law to certain Conventions and Agreements with respect to Taxes on Income and Fringe Benefits, and for purposes incidental thereto

1 Short title [*see* Note 1]

This Act may be cited as the *International Tax Agreements Act 1953*.

2 Commencement [*see* Note 1]

This Act shall come into operation on the day on which it receives the Royal Assent.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

agreement means:

(a) a convention or agreement a copy of which is set out in a Schedule to this Act;

(b) the previous United Kingdom agreement;

(c) the 1960 New Zealand agreement;

(ca) the 1972 New Zealand agreement;

(d) the previous Canadian agreement; or

(e) the previous United States convention.

Australian tax means:

(a) income tax imposed as such by an Act; or

(b) fringe benefits tax imposed by the *Fringe Benefits Tax Act 1986*.

calendar year means a year commencing on 1 January.

foreign tax means tax, other than Australian tax, which is the subject of an agreement.

the previous United Kingdom agreement means the Agreement between the Government of the United Kingdom and the Government of Australia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income that was signed at London on 29 October 1946.

the previous United States convention means the Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income that was signed at Washington on 14 May 1953.

the Romanian agreement means the Agreement between Australia and Romania for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and the protocol to that agreement, being the agreement and protocol a copy of each of which in the English language is set out in Schedule 45.

the Russian agreement means the Agreement between the Government of Australia and the Government of the Russian Federation for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and the protocol to that agreement, being the agreement and protocol a copy of each of which in the English language is set out in Schedule 46.

the second Finnish protocol means the Protocol to amend the agreement between Australia and Finland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the protocol a copy of which in the English language is set out in Schedule 25A.

the second Malaysian protocol means the Protocol, signed 28 July 2002, amending the agreement between Australia and Malaysia for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the protocol a copy of which in the English language is set out in Schedule 16B.

the second Netherlands protocol means the protocol a copy of which in the English language is set out in Schedule 10A, being the Second Protocol amending the Agreement between Australia and the Kingdom of the Netherlands for the avoidance of double

the Swedish agreement means the Agreement between the Government of Australia and the Government of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the agreement a copy of which in the English language is set out in Schedule 17.

the Swiss agreement means the Agreement between the Government of Australia and the Swiss Federal Council for the avoidance of double taxation with respect to taxes on income and the protocol to that agreement, being the agreement and protocol a copy of each of which in the English language is set out in Schedule 15.

the Taipei agreement means:

(a) the Agreement between the Australian Commerce and Industry Office and the Taipei Economic and Cultural Office concerning the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; and

(b) the annex to that agreement;

a copy of each of which in the English language is set out in Schedule 41.

the Thai Agreement means the Agreement between Australia and the Kingdom of Thailand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the agreement a copy of which in the English language is set out in Schedule 30.

the United Kingdom means the United Kingdom of Great Britain and Northern Ireland.

the United Kingdom agreement means the Agreement between the Government of the Commonwealth of Australia and the Government of the United Kingdom for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains (being the agreement a copy of which is set out in Schedule 1), as amended by the United Kingdom protocol.

the United Kingdom protocol means the Protocol between the Government of the Commonwealth of Australia and the

Government of the United Kingdom amending the agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, being the protocol a copy of which is set out in Schedule 1A.

the United States convention means the Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the convention a copy of which is set out in Schedule 2, as amended by the United States protocol.

the United States protocol means the Protocol amending the Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the protocol a copy of which is set out in Schedule 2A.

the Vietnamese agreement means the Agreement between the Government of Australia and the Government of the Socialist Republic of Vietnam for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the agreement a copy of which in the English language is set out in Schedule 38, as amended by the Vietnamese notes.

the Vietnamese notes means the Exchange of Notes between the Government of Australia and the Government of the Socialist Republic of Vietnam amending the Vietnamese agreement, that was carried out on 22 November 1996. A copy of the Notes is set out in Schedule 38A.

United Kingdom tax has the same meaning as in the United Kingdom agreement.

(2) For the purpose of this Act and the Assessment Act, a reference in an agreement to profits of an activity or business shall, in relation to Australian tax, be read, where the context so permits, as a reference to taxable income derived from that activity or business.

(3) For the purposes of this Act, an amount of income derived by a person, being income other than interest or royalties, shall be

5 Agreement with United Kingdom

(1) Subject to this Act, the provisions of the United Kingdom agreement, so far as those provisions affect Australian tax, have the force of law in relation to tax in respect of:

(a) dividends that have been derived by non--residents on or after 1 July 1967, and in relation to which the agreement remains effective;

(b) interest subject to withholding tax, being interest that has been derived on or after 1 January 1968, and in relation to which the agreement remains effective; and

(c) income to which neither paragraph (a) nor (b) applies, being income of the year of income that commenced on 1 July 1967, or of a subsequent year of income in relation to which the agreement remains effective.

(2) The provisions of the previous United Kingdom agreement, so far as those provisions affect Australian tax, continue to have the force of law in relation to tax in respect of income in relation to which the agreement remains effective.

5A Protocol with the Government of the United Kingdom

(1) Subject to this Act, on and after the date of entry into force of the United Kingdom protocol, the provisions of the protocol, so far as those provisions affect Australian tax, have, and shall be deemed to have had, the force of law.

(3) Where an amount of tax credit is to be treated as assessable income of a taxpayer in accordance with paragraph (2) of Article 8 of the United Kingdom agreement:

(a) the amount of the tax credit shall be included in the assessable income of the taxpayer of the year of income in which the dividend to which the tax credit relates is paid; and

(b) the amount of the tax credit shall be added to the amount of the dividend to which the tax credit relates and the sum of the two amounts shall be deemed to be one dividend for the purposes of this Act and the Assessment Act.

REPRINT No. 2

INCOME TAX (INTERNATIONAL AGREEMENTS) ACT 1953

Reprinted as at 31 March 1988

TABLE OF PROVISIONS

SCHEDULES

SCHEDULE 1

Section 3

AGREEMENT BETWEEN THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS

The Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland,

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

Have agreed as follows:

ARTICLE 1

(1) The taxes which are the subject of this Agreement are—

(a) in the United Kingdom of Great Britain and Northern Ireland:
the income tax (including surtax), the corporation tax and the capital gains tax;

(b) in Australia:
the Commonwealth income tax, including the additional tax upon the undistributed amount of the distributable income of a private company.

(2) This Agreement shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes by either Government or by the Government of any territory to which the present Agreement is extended under Article 22.

ARTICLE 2

(1) In this Agreement, unless the context otherwise requires—

(a) the term "United Kingdom" means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom which in accordance with international law has been or may hereafter be designated, under the laws of the United Kingdom concerning the Continental Shelf, as an area within which the rights of the United Kingdom with respect to the sea-bed and sub-soil and their natural resources may be exercised;

(b) the term "the Commonwealth" means the Commonwealth of Australia;

(c) the term "Australia" means the whole of the Commonwealth and includes—

(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; and

(v) any area outside the territorial limits of the Commonwealth and the said Territories in respect of which there is for the time being in force a law of the Commonwealth or of a State or part of the Commonwealth or of a Territory aforesaid dealing with the exploitation of any of the natural resources of the sea-bed and sub-soil of the Continental Shelf;

(d) the terms "territory", "one of the territories" and "the other territory" mean the United Kingdom or Australia as the context requires;

(e) the term "taxation authority" means, in the case of the United Kingdom, the Commissioners of Inland Revenue or their authorised representative; in the case of Australia, the Commissioner of Taxation or his authorised representative;

(f) the term "United Kingdom tax" means tax imposed by the United Kingdom being tax to which this Agreement applies by virtue of Article 1; the term "Australian tax" means tax imposed by the Commonwealth being tax to which this Agreement applies by virtue of Article 1;

SCHEDULE 1—continued

(g) the term "tax" means United Kingdom tax or Australian tax as the context requires;

(h) the term "person" includes any body of persons corporate or not corporate;

(i) the term "company" means any body corporate;

(j) the term "resident in the United Kingdom" has the meaning which it has under the laws of the United Kingdom relating to United Kingdom tax;

(k) the term "resident of Australia" has the meaning which it has under the laws of Australia relating to Australian tax;

(l) words in the singular include the plural, and words in the plural include the singular.

(2) The terms "Australian tax" and "United Kingdom tax" do not include any amount which represents a penalty or interest imposed under the law of either territory relating to the taxes which are the subject of the present Agreement.

(3) Where under this Agreement income is relieved from tax in one of the territories and, under the law in force in the other territory an individual, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in that other territory and not by reference to the full amount thereof, then the relief to be allowed under this Agreement in the first-mentioned territory shall apply only to so much of the income as is remitted to or received in the other territory.

(4) In the application of the provisions of this Agreement by one of the Contracting Governments any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Government relating to the taxes which are the subject of this Agreement.

ARTICLE 3

(1) For the purposes of this Agreement—

(a) the term "Australian company" means any company which being a resident of Australia—

(i) is incorporated in Australia and has its centre of administrative or practical management in Australia whether or not any person outside Australia exercises or is capable of exercising any overriding control or direction of the company or of its policy or affairs in any way whatsoever; or

(ii) is managed and controlled in Australia;

(b) the term "United Kingdom company" means any company which is managed and controlled in the United Kingdom and which is not an Australian company;

(c) the term "United Kingdom resident" means any United Kingdom company and any person (other than a company) who is resident in the United Kingdom but the term does not include any individual, not being ordinarily resident in the United Kingdom, who is liable to tax in the United Kingdom only if he derives income from sources therein; and

(d) the term "Australian resident" means any Australian company and any other person (other than a United Kingdom company) who is a resident of Australia but the term does not include any individual, not being ordinarily resident in Australia, who is liable to tax in Australia only if he derives income from sources therein.

(2) Where by reason of the provisions of paragraph (1) of this Article an individual is both a United Kingdom resident and an Australian resident—

(a) he shall be treated solely as a United Kingdom resident—

(i) if he has a permanent home available to him in the United Kingdom and has not a permanent home available to him in Australia;

(ii) if sub-paragraph (a) (i) of this paragraph is not applicable but he has an habitual abode in the United Kingdom and has not an habitual abode in Australia;

(iii) if neither sub-paragraph (a) (i) nor sub-paragraph (a) (ii) of this paragraph is applicable but the territory with which his personal and economic relations are closest is the United Kingdom;

(b) he shall be treated solely as an Australian resident—

(i) if he has a permanent home available to him in Australia and has not a permanent home available to him in the United Kingdom;

(ii) if sub-paragraph (b) (i) of this paragraph is not applicable but he has an habitual abode in Australia and has not an habitual abode in the United Kingdom;

SCHEDULE 1—continued

(iii) if neither sub-paragraph (b) (i) nor sub-paragraph (b) (ii) of this paragraph is applicable but the territory with which his personal and economic relations are closest is Australia.

(3) Where by reason of the provisions of paragraph (1) of this Article a person other than an individual is both a United Kingdom resident and an Australian resident—

(a) it shall be treated solely as a United Kingdom resident if it is managed and controlled in the United Kingdom;

(b) it shall be treated solely as an Australian resident if it is managed and controlled in Australia.

(4) The terms "resident of one of the territories" and "resident of the other territory" mean a person who is a United Kingdom resident or a person who is an Australian resident as the context requires.

(5) The terms "United Kingdom enterprise" and "Australian enterprise" mean respectively an industrial or commercial enterprise or undertaking carried on by a United Kingdom resident and an industrial or commercial enterprise or undertaking carried on by an Australian resident, and the terms "enterprise of one of the territories" and "enterprise of the other territory" mean a United Kingdom enterprise or an Australian enterprise, as the context requires.

ARTICLE 4

(1) For the purposes of this Agreement the term "permanent establishment" means a fixed place of trade or business in which the trade or business of the enterprise is wholly or partly carried on.

(2) The term "permanent establishment" includes—

(a) a management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, quarry or other place of extraction of natural resources;

(g) an agricultural, pastoral or forestry property;

(h) a building site or a construction, installation or assembly project which exists for more than six months.

(3) The term "permanent establishment" shall not be deemed to include—

(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 for collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of activities which have a preparatory or auxiliary character for the enterprise, such as advertising or scientific research.

(4) An enterprise of one of the territories shall be deemed to have a permanent establishment in the other territory if it carries on supervisory activities in that other territory for more than six months in connection with a building site, or a construction, installation or assembly project which is being undertaken, in that other territory.

(5) A person acting in one of the territories on behalf of an enterprise of the other territory (other than an agent of independent status to whom paragraph (6) of this Article applies) shall be deemed to be a permanent establishment of that enterprise in the first-mentioned territory—

SCHEDULE 1—continued

(a) if he has, and habitually exercises in that first-mentioned territory, an authority to conclude contracts on behalf of the enterprise, unless his activites are limited to the purchase of goods or merchandise for the enterprise; or

(b) if he habitually fills orders from a stock of goods or merchandise maintained in that first-mentioned territory; or

(c) if in so acting he manufactures or processes in that first-mentioned territory any goods for the enterprise.

(6) An enterprise of one of the territories shall not be deemed to have a permanent establishment in the other territory merely because it carries on trade or business in that other territory through a broker, a general commission agent or any other agent of independent status, where such a person is acting in the ordinary course of his business as a broker, a general commission agent or other agent of independent status.

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

(8) Where an enterprise of one of the territories sells to a person in the other territory goods manufactured, assembled, processed, packed or distributed in the other territory by an industrial or commerical enterprise for, or at, or to the order of, that first-mentioned enterprise and—

(a) either enterprise participates directly or indirectly in the management, control or capital of the other enterprise; or

(b) the same persons participate directly or indirectly in the management, control or capital of both enterprises,

then for the purposes of this Agreement that first-mentioned enterprise shall be deemed to have a permanent establishment in the other territory and to carry on trade or business in the other territory through that permanent establishment.

ARTICLE 5

(1) Industrial or commercial profits of a United Kingdom enterprise shall be exempt from Australian tax unless the enterprise carries on trade or business in Australia through a permanent establishment situated therein. If the enterprise carries on trade or business as aforesaid, Australian tax may be imposed on the industrial or commercial profits of the enterprise but only on so much of them as is attributable to that permanent establishment.

(2) Industrial or commercial profits of an Australian enterprise shall be exempt from United Kingdom tax unless the enterprise carries on trade or business in the United Kingdom through a permanent establishment situated therein. If the enterprise carries on trade or business as aforesaid, United Kingdom tax may be imposed on the industrial or commerical profits of the enterprise but only on so much of them as is attributable to that permanent establishment.

(3) Where an enterprise of one of the territories carries on trade or business in the other territory through a permanent establishment situated therein, there shall be attributed to that permanent establishment the industrial or commercial profits which it might be expected to derive in that other territory if it were an independent enterprise engaged in the same or similar activities and its dealings with the enterprise of which it is a permanent establishment were dealings at arm's length with that enterprise or an independent enterprise; and the profits so attributed shall be deemed to be income derived from sources in that other territory.

(4) In determining the industrial or commercial profits of an enterprise of one of the territories which are taxable in the other territory in accordance with the previous paragraphs of this Article, there shall be allowed as deductions all expenses of the enterprise (including executive and general administrative expenses) which would be deductible if the permanent establishment were an independent enterprise and which are reasonably connected with the profits so taxable, whether incurred in the territory in which the permanent establishment is situated or elsewhere, but where goods manufactured out of the other territory by the enterprise are imported into that territory, and the goods are, either before or after importation, sold in that territory by the enterprise, the profits of the enterprise taxable in that territory may be determined by deducting from the sale price of the goods the amount for which, at the date the goods were shipped to that territory,

SCHEDULE 1—continued

goods of the same nature and quality could be purchased by a wholesale buyer in the country of manufacture, and the expenses incurred in transporting them to and selling them in that territory.

(5) If the information available to the taxation authority concerned is inadequate to determine the profits to be attributed to the the permanent establishment, nothing in this Article shall affect the application of the law of either territory in relation to the liability of the permanent establishment to pay tax on an amount determined by the exercise of a discretion or the making of an estimate by the taxation authority of that territory. Provided that such discretion shall be exercised or such estimate shall be made, so far as the information available to the taxation authority permits, in accordance with the principle stated in this Article.

(6) 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.

(7) The term "industrial or commercial profits" means income derived by an enterprise from the conduct of a trade or business, including income derived by an enterprise from the furnishing of services of employees or other personnel, but it does not include—

(a) dividends, interest, royalties (as defined in Articles 8, 9 and 10) or rents other than dividends, interest, royalties or rents effectively connected with a trade or business carried on through a permanent establishment which an enterprise of one of the territories has in the other territory; or

(b) remuneration for personal (including professional) services; or

(c) income arising from, or in relation to, contracts or obligations to provide the services of public entertainers or athletes referred to in Article 13.

(8) Nothing in this Article shall apply to either territory to prevent the operation in the territory of any provisions of its law relating specifically to the taxation of any person who carries on a business of any form of insurance or to the taxation of a non-resident who derives income under any contract or agreement with any person in relation to the carrying on in the territory by that person of any form of film business controlled abroad. Provided that if the law in force in either territory at the date of signature of this Agreement relating to the taxation of such persons is varied (otherwise than in minor respects so as not to affect its general character, or by this Agreement), the Contracting Governments shall consult with each other with a view to agreeing to such amendment of this paragraph as may be necessary.

(9) This Article shall not apply to profits derived by a resident of one of the territories from the operation of ships or aircraft which are exempt from tax in the other territory under paragraph (1) of Article 6, nor shall it apply to profits to which paragraph (2) of Article 6 applies.

ARTICLE 6

(1) A resident of one of the territories shall be exempt from tax in the other territory on profits from the operation of ships or aircraft, other than profits from voyages or operations of ships or aircraft confined solely to places in the other territory, voyages of ships or aircraft between a place in Australia and a place in the Territory of Papua or the Territory of New Guinea being treated as voyages between places within Australia.

(2) The amount which shall be charged to tax in one of the territories as profits from voyages of ships in respect of which a resident of the other territory is not exempt from tax in the first-mentioned territory under paragraph (1) of this Article shall not exceed 5 per cent. of the amounts paid or payable (net of rebates) in respect of such voyages for the carriage of passengers, livestock, mails or goods shipped in the first-mentioned territory.

(3) Paragraph (2) of this Article shall not apply to the profits derived from the operation of ships by a United Kingdom enterprise whose principal place of business is in Australia, but there shall be excluded from the profits on which any such enterprise is charged to Australian tax any amounts of profits taxed in the Territory of Papua or the Territory of New Guinea.

ARTICLE 7

(1) Where—

(a) an enterprise of one of the territories participates directly or indirectly in the management, control or capital of an enterprise of the other territory; or

SCHEDULE 1—continued

(b) in Australia—

(i) in respect of withholding tax on income that is derived by a non-resident, in respect of income derived on or after the commencement of the financial year beginning on 1 July, in the calendar year next following that in which the notice is given;

(ii) in respect of other Australian tax, for any year of income beginning on or after 1 July, in the calendar year next following that in which the notice is given.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Agreement.

DONE in duplicate at Canberra on the Seventh day of December of the year One thousand nine hundred and sixty-seven.

FOR THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA:

WILLIAM McMAHON

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

C. H. JOHNSTON

SCHEDULE 1A

Section 3

PROTOCOL BETWEEN THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AMENDING THE AGREEMENT FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS, SIGNED AT CANBERRA ON 7 DECEMBER 1967

The Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to conclude a Protocol to amend the Agreement between the Contracting Governments for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains signed at Canberra on 7 December 1967 (hereinafter referred to as "the Agreement");

Have agreed as follows:

ARTICLE I

The following paragraph shall be added after paragraph (3) of Article 2 of the Agreement.

"(3) (A) Where under the law in force in one of the territories an individual's remuneration from an employment is reduced in charging it to tax in consequence of a period or periods of absence by the individual from that territory, or of the place where the employment is exercised, or of the domicile of the individual, by deducting either the whole or a fixed proportion of the amount arising, then

(a) where under this Agreement that remuneration would otherwise be relieved from tax in the other territory, the relief shall not extend to the amount so deducted; and

(b) the amount so deducted shall be regarded as income in repect of which the individual is exempt from and not subject to tax in the first-mentioned territory."

ARTICLE II

Article 8 of the Agreement shall be deleted and replaced by the following:

"ARTICLE 8

(1) (a) Dividends derived from a company which is resident in the United Kingdom by an Australian resident may be taxed in Australia.

(b) Where an Australian resident is entitled to a tax credit in respect of such a dividend under paragraph (2) of this Article tax may also be charged in the United Kingdom and according to the laws of the United Kingdom on the aggregate of the amount or

International Tax Agreements Act 1953

Act No. 82 of 1953 as amended

This compilation was prepared on 19 September 2006
taking into account amendments up to Act No. 100 of 2006

Volume 1 includes: Sections 1–23
Schedules 1–24

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes: Schedules 25–47
Note 1
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Act Notes
Table of Amendments
Note 2
Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

An Act to give the force of Law to certain Conventions and Agreements with respect to Taxes on Income and Fringe Benefits, and for purposes incidental thereto

1 Short title [*see* Note 1]

This Act may be cited as the *International Tax Agreements Act 1953*.

2 Commencement [*see* Note 1]

This Act shall come into operation on the day on which it receives the Royal Assent.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

agreement means:

(a) a convention or agreement a copy of which is set out in a Schedule to this Act;

(b) the 1946 United Kingdom agreement;

(ba) the 1967 United Kingdom agreement;

(bb) the 1967 United Kingdom agreement as amended by the 1980 Protocol to the 1967 United Kingdom agreement;

(c) the 1960 New Zealand agreement;

(ca) the 1972 New Zealand agreement;

(d) the previous Canadian agreement; or

(e) the previous United States convention.

Australian tax means:

(a) income tax imposed as such by an Act; or

(b) fringe benefits tax imposed by the *Fringe Benefits Tax Act 1986*.

calendar year means a year commencing on 1 January.

foreign tax means tax, other than Australian tax, which is the subject of an agreement.

prescribed trust estate, in relation to a year of income, means a trust estate that:

(a) is a corporate unit trust, within the meaning of Division 6B of Part III of the Assessment Act, in relation to the year of income; or

(b) is a public trading trust, within the meaning of Division 6C of Part III of the Assessment Act, in relation to the year of income.

the 1946 United Kingdom agreement means the Agreement between the Government of Australia and the Government of the United Kingdom for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income that was signed at London on 29 October 1946.

the 1967 United Kingdom agreement means the Agreement between the Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains that was signed at Canberra on 7 December 1967.

the 1980 Protocol to the 1967 United Kingdom agreement means the Protocol, signed at Canberra on 29 January 1980, between the Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland amending the 1967 United Kingdom agreement.

the 2003 United Kingdom convention means the Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains, as affected by the 2003 United Kingdom notes. A copy of the convention and of the notes is set out in Schedule 1.

the 2003 United Kingdom notes means the exchange of notes between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland in connection with the 2003 United Kingdom convention that was

carried out at Canberra on 21 August 2003. A copy of the notes is set out in Schedule 1.

the Argentine agreement means the Agreement between the Government of Australia and the Government of the Argentine Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and the protocol to that agreement, being the agreement and protocol a copy of each of which in the English language is set out in Schedule 44.

the Assessment Act means the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997*.

the Austrian agreement means the Agreement between Australia and the Republic of Austria for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the agreement a copy of which in the English language is set out in Schedule 27.

the Belgian agreement means the Agreement between Australia and the Kingdom of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (being the agreement a copy of which in the English language is set out in Schedule 13), as amended by the Belgian protocol.

the Belgian protocol means the Protocol amending the Agreement between Australia and the Kingdom of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the protocol a copy of which in the English language is set out in Schedule 13A.

the Canadian convention means the Convention between the Government of Australia and the Government of Canada for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the convention a copy of which in the English language is set out in Schedule 3, as amended by the Canadian protocol.

the Canadian protocol means the Protocol amending the Convention between the Government of Australia and the Government of Canada for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

the Swiss agreement means the Agreement between the Government of Australia and the Swiss Federal Council for the avoidance of double taxation with respect to taxes on income and the protocol to that agreement, being the agreement and protocol a copy of each of which in the English language is set out in Schedule 15.

the Taipei agreement means:

(a) the Agreement between the Australian Commerce and Industry Office and the Taipei Economic and Cultural Office concerning the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income; and

(b) the annex to that agreement;

a copy of each of which in the English language is set out in Schedule 41.

the Thai Agreement means the Agreement between Australia and the Kingdom of Thailand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the agreement a copy of which in the English language is set out in Schedule 30.

the United States convention means the Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the convention a copy of which is set out in Schedule 2, as amended by the United States protocol.

the United States protocol means the Protocol amending the Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the protocol a copy of which is set out in Schedule 2A.

the Vietnamese agreement means the Agreement between the Government of Australia and the Government of the Socialist Republic of Vietnam for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being

companies, and in any other entities, the value of whose assets is wholly or principally attributable, whether directly, or indirectly through one or more interposed companies or other entities, to such real property or interests.

(3) However, subsection (2) applies only if the real property or land concerned is situated in Australia (within the meaning of the relevant agreement).

(4) If, after the commencement of this section, this Act is amended so as to give the force of law to an amendment or substitution of a provision mentioned in subsection (1), this section ceases to apply to that provision from the time that the amendment of the Act takes effect.

(5) In this section:

entity has the same meaning as in the *Income Tax Assessment Act 1997*, but does not include an individual in his or her personal capacity.

4 Incorporation of Assessment Act

(1) Subject to subsection (2), the Assessment Act is incorporated and shall be read as one with this Act.

(2) The provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in the Assessment Act (other than section 160AO or Part IV of that Act) or in an Act imposing Australian tax.

4AA Incorporation of Fringe Benefits Tax Assessment Act

(1) Subject to subsection (2), the *Fringe Benefits Tax Assessment Act 1986* is incorporated and is to be read as one with this Act.

(2) The provisions of this Act have effect in spite of anything inconsistent with those provisions contained in the *Fringe Benefits Tax Assessment Act 1986* (other than section 67 of that Act).

4A Treasurer to notify entry into force of agreements, exchanges of letters under agreements etc.

(1) This section applies to the following events:

(a) the entry into force of an agreement;
(b) the giving of notice of termination of an agreement;
(c) the exchange of letters under a provision of an agreement;
(d) the exchange of instruments of ratification under an agreement;
(e) the confirmation of receipt of a notice under a provision of an agreement;
(f) the occurrence of any similar thing.

(2) As soon as practicable after any such event occurs, the Treasurer must cause to be published in the *Gazette* a notice setting out particulars of the event.

5 The 2003 United Kingdom convention

Subject to this Act, on and after the date of entry into force of the 2003 United Kingdom convention, the provisions of the convention, so far as those provisions affect Australian tax, have the force of law according to their tenor.

5A Previous United Kingdom agreements etc.

The provisions of:
(a) the 1946 United Kingdom agreement; and
(b) the 1967 United Kingdom agreement; and
(c) the 1967 United Kingdom agreement as amended by the 1980 Protocol to the 1967 United Kingdom agreement;

so far as those provisions affect Australian tax, continue to have the force of law for tax in respect of income in relation to which the agreements remain effective.

Note 1: Paragraph 3 of Article 29 of the 2003 United Kingdom convention preserves the operation of Article 16 of the 1967 United Kingdom agreement (which exempts from tax the income of visiting professors and teachers). This applies to individuals who are entitled to the exemption at the time when the 2003 United Kingdom convention enters into force. The exemption is preserved until the individual concerned would have ceased to be entitled to it under the 1967 United Kingdom agreement.

Note 2: Article 16 of the 1967 United Kingdom agreement is affected by Article I of the 1980 Protocol to the 1967 United Kingdom agreement.

which the agreement enters into force and in relation to which the agreement remains effective; and

(b) in relation to tax other than withholding tax—in respect of income of any year of income commencing on or after 1 July in the calendar year in which the agreement enters into force and in relation to which the agreement remains effective.

11E Agreement with the Swiss Federal Council

(1) Subject to this Act, on and after the date of entry into force of the Swiss agreement, the provisions of the agreement, so far as those provisions affect Australian tax, have, and shall be deemed to have had, the force of law:

(a) in relation to withholding tax—in respect of dividends or interest derived on or after 1 January 1979 and in relation to which the agreement remains effective; and

(b) in relation to tax other than withholding tax—in respect of income of the year of income that commenced on 1 July 1979 and of a subsequent year of income in relation to which the agreement remains effective.

11F Agreement with Malaysia

(1) Subject to this Act, on and after the date of entry into force of the Malaysian agreement, the provisions of the agreement, so far as those provisions affect Australian tax, have, and shall be deemed to have had, the force of law:

(a) in relation to withholding tax—in respect of dividends or interest derived on or after 1 July 1979 and in relation to which the agreement remains effective; and

(b) in relation to tax other than withholding tax—in respect of income of any year of income that commenced on or after 1 July 1979 and in relation to which the agreement remains effective.

(4) The provisions of the Malaysian agreement shall not have the effect of subjecting to Australian tax interest or royalties paid by a resident of Australia to a resident of Malaysia that, but for that agreement, would not be subject to Australian tax.

Schedules

Schedule 1—2003 United Kingdom convention and notes

Note: See section 3.

CONVENTION BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL GAINS

The Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland,

Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains,

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 3

General definitions

1 For the purposes of this Convention, unless the context otherwise requires:

(a) the term "United Kingdom" means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom which in accordance with international law has been or may hereafter be designated, under the laws of the United Kingdom concerning the Continental Shelf, as an area within which the rights of the United Kingdom with respect to the seabed and subsoil and their natural resources may be exercised;

(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 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 seabed and subsoil of the Continental Shelf;

(c) the term "Australian tax" means tax imposed by Australia, being tax to which this Convention applies by virtue of Article 2;

(d) the term "United Kingdom tax" means tax imposed by the United Kingdom, being tax to which this Convention applies by virtue of Article 2;

(e) the terms "a Contracting State" and "the other Contracting State" mean the United Kingdom or Australia, as the context requires;

(f) the term "person" includes an individual, a company and any other body of persons, but subject to paragraph 2 of this Article does not include a partnership;

(g) the term "company" means any body corporate or anything that is treated as a company or body corporate for tax purposes;

(h) the term "enterprise" applies to the carrying on of any business;

(i) 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;

(j) 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 from a place or between places in the other Contracting State;

(k) the term "competent authority" means:

(i) in the case of the United Kingdom, the Commissioners of Inland Revenue or their authorised representative;

(ii) in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner;

(l) the term "national" means:

(i) in relation to the United Kingdom, any British citizen, or any British subject not possessing the citizenship of any other Commonwealth country or territory, provided that individual has the right of abode in the United Kingdom; and any company deriving its status as such from the law in force in the United Kingdom;

(ii) in relation to Australia, an Australian citizen or an individual not possessing citizenship who has been granted permanent residency status; and any company deriving its status as such from the law in force in Australia;

meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 4

Residence

1 For the purposes of this Convention, a person is a resident of a Contracting State:

(a) in the case of the United Kingdom, if the person is a resident of the United Kingdom for the purposes of United Kingdom tax; and

(b) in the case of Australia, if the person is a resident of Australia for the purposes of Australian tax.

A Contracting State or a political subdivision or local authority of that State is also a resident of that State for the purposes of this Convention.

2 A person is not a resident of a Contracting State for the purposes of this Convention if that person is liable to tax in that State in respect only of income or gains from sources in that State.

3 The status of an individual who, by reason of the preceding provisions of this Article is a resident of both Contracting States, shall be determined as follows:

(a) that individual shall be deemed to be a resident only of the Contracting State in which a permanent home is available to that individual; but if a permanent home is available in both States, or

in neither of them, that individual shall be deemed to be a resident only of the State with which the individual's personal and economic relations are closer (centre of vital interests);

(b) if the Contracting State in which the centre of vital interests is situated cannot be determined, the individual shall be deemed to be a resident only of the 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.

4 Where by reason of the preceding provisions of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

5 Notwithstanding paragraph 4 of this Article, where by reason of paragraph 1 of this Article a company, which is a participant in a dual listed company arrangement, is a resident of both Contracting States then it shall be deemed to be a resident only of the Contracting State in which it is incorporated, provided it has its primary stock exchange listing in that State.

6 The term "dual listed company arrangement" as used in this Article 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:

(a) the appointment of common (or almost identical) boards of directors;

(b) management of the operations of the two companies on a unified basis;

(c) 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;

(d) the shareholders of both companies voting in effect as a single decision-making body on substantial issues affecting their combined interests; and

(e) 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.

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 an enterprise is wholly or partly carried on.

2 The term "permanent establishment" includes especially:

(f) a right to receive variable or fixed payments either as consideration for or in respect of the exploitation of, or the right to explore 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 of this Article 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 of this Article 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 State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated in that other State. If the enterprise carries on business in that manner, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2 Subject to the provisions of paragraph 3 of this Article, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated in that other State, 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.

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, whether 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 State is inadequate to determine the profits to be attributed to a permanent establishment. In such cases that law shall be applied, having regard to the information that is available, consistently with the principles of 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 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.

7 Nothing in this Article shall affect the operation of any law of a Contracting State relating to tax imposed on profits from insurance with non-residents provided that if the relevant law in force in either Contracting State at the date of signature of this Convention is varied (otherwise than in minor respects so as not to affect its general character) the Contracting States shall consult with each other with a view to agreeing to any amendment of this paragraph that may be appropriate.

ARTICLE 8

Shipping and air transport

1 Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.

2 Notwithstanding the provisions of paragraph 1 of this Article, profits of an enterprise of a Contracting State from the operation of ships or aircraft may be taxed in the other Contracting State to the extent that they are profits derived from ship or aircraft operations confined solely to places in that other State.

3 For the purposes of this Article, profits from the operation of ships or aircraft in international traffic include:

(a) profits from the rental on a bareboat basis of ships or aircraft; and

(b) profits from the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) used for the transport of goods or merchandise;

Schedule 15—Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income

Section 3

The Government of Australia and the Swiss Federal Council,

Desiring to conclude an Agreement for the avoidance of double taxation with respect to taxes on income,

Have agreed as follows:

Chapter I
SCOPE OF THE AGREEMENT

ARTICLE 1
Personal Scope

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

ARTICLE 2
Taxes Covered

(1) The existing taxes to which this Agreement shall apply are—

(a) in Australia:

The Australian income tax, including the additional tax upon the undistributed amount of the distributable income of a private company and also income tax upon the reduced taxable income of a non--resident company;

(b) in Switzerland:

The Federal, cantonal and communal taxes on income (total income, earned income, income from capital, industrial and commercial profits and other items of income).

(2) This Agreement shall also apply to any indentical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. At the end of each calendar year, the competent authority of each Contracting State shall notify the competent

authority of the other Contracting State of any substantial changes which have been made in the laws of his State relating to the taxes to which this Agreement applies.

(3) In this Agreement, the term "Australian tax" means tax imposed by Australia, being tax to which this Agreement applies; the term "Swiss tax" means tax imposed in Switzerland, being tax to which this Agreement applies; and the term "tax" means Australian tax or Swiss tax, as the context requires; but the terms "Australian tax" and "Swiss tax" do not include any penalty or interest imposed under the law in force in either Contracting State relating to the taxes to which this Agreement applies.

(4) This Agreement shall not apply to Federal anticipatory tax withheld in Switzerland at the source on prizes in a lottery.

Chapter II
DEFINITIONS
ARTICLE 3
General Definitions

(1) In this Agreement, unless the context otherwise requires—

(a) the term "Australia" means the Commonwealth of Australia and, when used in a geographical sense, includes—

(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 Coral Sea Islands Territory; and

(vi) any area adjacent to the territorial limits of Australia or of the said Territories in respect of which there is for the time being in force, consistently with international law, a law of Australia or of a State or part of Australia or of a Territory aforesaid dealing with the exploitation of any of the natural resources of the sea--bed and subsoil of the continental shelf;

(b) the term "Switzerland" means the Swiss Confederation;

(c) the terms "Contracting State, one of the Contracting States" and "other Contracting State" mean Australia or Switzerland, as the context requires;

(d) the term "person" includes an individual, a company and any other body of persons;

(e) the term "company" includes any body or association corporate or unincorporate which is treated as a company or body corporate for tax purposes;

(f) the terms "enterprise of one of the Contracting States" and "enterprise of the other Contracting State" mean an enterprise carried on by a resident of Australia or an enterprise carried on by a resident of Switzerland, as the context requires;

(g) the term "competent authority" means, in the case of Australia, the Commissioner of Taxation or his authorized representative, and in the case of Switzerland, the Director of the Federal Tax Administration or his authorized representative.

(2) In the application of this Agreement by one of the Contracting States, any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes to which this Agreement applies.

ARTICLE 4

Residence

(1)(a) For the purposes of this Agreement, a person is a resident of Australia if the person is a resident of Australia for purposes of Australian tax. However, in relation to income from sources in Switzerland, a person who is subject to Australian tax on income which is from sources in Australia shall not be treated as a resident of Australia unless the income from sources in Switzerland is subject to Australian tax or, if that income is exempt from Australian tax, it is so exempt solely because it is subject to Swiss tax.

(b) For the purposes of this Agreement, a person is a resident of Switzerland if the person is subject to unlimited tax liability in Switzerland.

(2) Where by reason of the preceding provisions of this Article an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

(a) he shall be deemed to be a resident solely of the Contracting State in which he has a permanent home available to him;

(b) if he has a permanent home available to him in both Contracting States, or if he does not have a permanent home available to him in either of them, he shall be deemed to be a resident solely of the Contracting State with which his personal and economic relations are the closer.

(3) Where by reason of the provisions of paragraph (1), a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated.

ARTICLE 5

Permanent Establishment

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

(2) The term "permanent establishment" shall include especially—

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, quarry or other place of extraction of natural resources;

(g) an agricultural, pastoral or forestry property;

(h) a building site or construction, installation or assembly project which exists for more than twelve months.

(3) 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 for collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of activities which have a preparatory or auxiliary character for the enterprise, such as advertising or scientific research.

Chapter III

TAXATION OF INCOME

ARTICLE 6

Income from Real Property

(1) Income from real property may be taxed in the Contracting State in which the real property is situated.

(2) The term "real property" shall have the meaning which it has under the laws in force in the Contacting State in which the property in question is situated. The term shall in any case include rights to royalties and other payments in respect of the operation of mines or quarries or of the exploitation of any natural resource, which rights shall be regarded as situated where the mines, quarries or natural resource are situated. Ships, boats or aircraft shall not be regarded as real property.

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

(4) Income from a lease of land and income from any other direct interest in or over land, whether or not improved, shall be regarded as income from real property situated where the land is situated.

(5) The provisions of paragraphs (1), (3) and (4) shall also apply to the income from real property of an enterprise and to income from real property used for the performance of independent personal services.

ARTICLE 7

Business Profits

(1) The profits of an enterprise of one of the Contracting States shall be taxable only in that 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 the other 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 one of the Contracting States carries on business in the other Contacting 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 the determination of 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 adminstrative expenses so incurred) and which would be deductible if the permanent establishment were an independent entity which paid those expenses, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

(4) 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.

(5) Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 8

Shipping and Air Transport

(1) Profits from the operation of ships or aircraft derived by a resident of one of the Contracting States shall be taxable only in that State.

(2) Notwithstanding the provisions of paragraph (1), such profits may be taxed in the other Contracting State where they are profits from operations of ships or aircraft confined solely to places in that other State.

(3) The provisions of paragraphs (1) and (2) shall apply in relation to the share of the profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organization or in an international operating agency.

(4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in one of the Contracting States for discharge at another place in that State shall be treated as profits from operations of ships or aircraft confined solely to places in that State.

(5) The amount which shall be charged to tax in one of the Contracting States as profits from the operation of ships or aircraft in respect of which a resident of the other Contracting State may be taxed in the first--mentioned State under paragraph (2) or (3) shall not exceed 5 per cent of the amount paid or payable (net of rebates) in respect of carriage in such operations.

(6) Paragraph (5) shall not apply to profits derived from the operation of ships or aircraft by a resident of one of the Contracting States whose principal place of business is in the other Contracting State, nor shall it apply to profits derived from the operation of ships or aircraft by a resident of one of the