

**PROTOCOL AMENDING THE CONVENTION BETWEEN AUSTRALIA  
AND CANADA FOR THE AVOIDANCE OF DOUBLE TAXATION AND  
THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES  
ON INCOME**

The Government of Australia and the Government of Canada,

Desiring to amend the Convention between Australia and Canada for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed at Canberra on 21 May 1980 (in this Protocol referred to as the "Convention"),

Have agreed as follows:

**ARTICLE 1**

Article 2 of the Convention shall be deleted and replaced by the following:

"ARTICLE 2

Taxes Covered

(1) The existing taxes to which this Convention shall apply are:

(a) in the case of Australia:

the income tax, and the resource rent tax in respect of offshore projects relating to exploration for or exploitation of petroleum resources, imposed under the federal law of Australia;

(b) in the case of Canada:

the income taxes imposed by the Government of Canada under the Income Tax Act.

(2) This Convention shall apply also to any identical or substantially similar taxes which are imposed under the federal law of Australia or the law of Canada after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any substantial changes which have been made in the law of their respective States relating to the taxes to which this Convention applies within a reasonable period of time after those changes."

## ARTICLE 2

1. Subparagraphs (a) and (k) of paragraph (1) of Article 3 of the Convention shall be deleted and respectively replaced by the following:

"(a) 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 the exploitation of any of the natural resources of the seabed and subsoil of the continental shelf;"; and

"(k) the term "international traffic" means any voyage of a ship or aircraft operated by an enterprise of a Contracting State to transport passengers or property except where the principal purpose of the voyage is to transport passengers or property between places within the other Contracting State."

2. Paragraph (3) of Article 3 of the Convention shall be deleted and replaced by the following:

"(3) As regards the application of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State concerning the taxes to which

the Convention applies, any meaning under the applicable tax law of that State prevailing over a meaning given to the term under other law of that State."

### **ARTICLE 3**

Paragraphs (1) and (2) of Article 4 of the Convention shall be deleted and replaced by the following:

"(1) Subject to paragraph (2), for the purposes of this Convention, a person is a resident of a Contracting State if that person is a resident of that State for the purposes of its tax. A Contracting State or any political subdivision or local authority thereof or any agency or instrumentality of any such State, subdivision or authority 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 the person is liable to tax in that State in respect only of income from sources in that State."

### **ARTICLE 4**

Subparagraph (b) of paragraph (4) of Article 5 of the Convention shall be deleted and replaced by the following:

"(b) substantial equipment is being used in that State by, for or under contract with the enterprise other than in connection with a building site or construction, installation or assembly project of the enterprise."

### **ARTICLE 5**

Article 6 of the Convention shall be deleted and replaced by the following:

### **"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) For the purposes of this Convention, the term "real property" in relation to a Contracting State, shall have the meaning which it has under the law of that State and shall include:

- (a) a lease of land and any other interest in or over land, whether improved or not, including a right to explore for mineral, oil or gas deposits or other natural resources, and a right to mine those deposits or resources; and
- (b) a right to receive variable or fixed payments either as consideration for or in respect of the exploitation of, or the right to explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources.

(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 paragraphs (1) and (3) 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 6**

1. Paragraph (6) of Article 7 of the Convention shall be deleted and replaced by the following:

"(6) Where profits include items 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."

2. A new paragraph (8) shall be added to Article 7 of the Convention as follows:

"(8) Where:

- (a) a resident of Canada is beneficially entitled, whether directly or through one or more interposed trusts, to a share of the business profits of an enterprise carried on in Australia by the trustee of a trust other than a trust which is treated as a company for tax purposes; and

- (b) in relation to that enterprise, that trustee would, in accordance with the principles of Article 5, have a permanent establishment in Australia,

the enterprise carried on by the trustee shall be deemed to be a business carried on in Australia by that resident through a permanent establishment situated in Australia and that share of business profits shall be attributable to that permanent establishment."

#### **ARTICLE 7**

Paragraph (4) of Article 8 of the Convention shall be deleted and replaced by the following:

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

#### **ARTICLE 8**

1. Paragraphs (2), (4) and (6) of Article 10 of the Convention shall be deleted and respectively replaced by the following:

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

- (a) (i) in the case of dividends paid by a company that is a resident of Australia for the purposes of its tax, 5 per cent of the gross amount of the dividends, to the extent to which the dividends have been fully

franked in accordance with the law of Australia, if a company that holds directly at least 10 per cent of the voting power of the company paying the dividends is beneficially entitled to those dividends; and

- (ii) in the case of dividends paid by a company that is a resident of Canada for the purposes of its tax, except in the case of dividends paid by a non-resident-owned investment corporation that is a resident of Canada for the purposes of its tax, 5 per cent of the gross amount of the dividends if a company that controls directly or indirectly at least 10 per

cent of the voting power in the company paying the dividends is beneficially entitled to those dividends; and

- (b) 15 per cent of the gross amount of the dividends in all other cases,

and if the relevant law of either Contracting State is varied in a manner that bears upon this provision, otherwise than in minor respects so as not to affect its general character, the Contracting States shall consult each other with a view to agreeing to any amendment of this paragraph that may be appropriate.";

"(4) The term "dividends" as used in this Article means income from shares, as well as other amounts which are subjected to the same taxation treatment as income from shares by the law of the State of which the company making the distribution is a resident for the purposes of its tax."; and

"(6) Canada may impose, on the earnings attributable to a permanent establishment in Canada of a company which is a resident of Australia or on the earnings of such company attributable to the alienation of real property situated in Canada where the company is carrying on a trade in real property, a tax (in this paragraph referred to as a "branch tax") in addition to the tax that would be chargeable on the earnings of a company that is a resident of Canada, except that any branch tax so imposed shall not exceed 5 per cent of the amount of such earnings that have not been subjected to such branch tax in previous taxation years. For the purposes of this provision, the term "earnings" means the earnings attributable to the alienation of such real property situated in Canada as may be taxed by Canada under the provisions of Article 6 or paragraph (1) of Article 13, and the profits, including any gains, attributable to a permanent establishment in Canada in a year and previous years after deducting therefrom all other taxes, other than the branch tax referred to herein, imposed on such profits in Canada.".

- 2. The reference in paragraph (7) of Article 10 of the Convention to "15 per cent" shall be deleted and replaced by a reference to "5 per cent".

## **ARTICLE 9**

The reference in paragraph (2) of Article 11 of the Convention to "15 per cent" shall be deleted and replaced by a reference to "10 per cent".

## ARTICLE 10

1. Paragraph (3) of Article 12 of the Convention shall be deleted and replaced by the following:

"(3) The term "royalties" as used in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:

- (a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark or other like property or right; or
- (b) the use of, or the right to use, any industrial, commercial or scientific equipment; or
- (c) the supply of scientific, technical, industrial or commercial knowledge or information; or
- (d) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph (a), any such equipment as is mentioned in subparagraph (b) or any such knowledge or information as is mentioned in subparagraph (c); or
- (e) the use of, or the right to use:
  - (i) motion picture films; or
  - (ii) films or videotapes or other means of reproduction for use in connection with television; or
  - (iii) tapes for use in connection with radio broadcasting; or
- (f) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph."

2. A new paragraph (7) shall be added to Article 12 of the Convention as follows:

"(7) Without prejudice to whether or not such payments would be dealt with as royalties under this Article in the absence of this paragraph, the term "royalties" as used in this Article shall not include payments or credits made as consideration for the supply of, or the right to use, source code in a computer software program, provided that the right to use the source code is limited to such use as is necessary to enable effective operation of the program by the user."

3. A new paragraph (8) shall be added to Article 12 of the Convention as follows:

"(8) Without prejudice to whether or not such payments would be dealt with as royalties under this Article in the absence of this paragraph, the term "royalties" as used in this Article shall include payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:

- (a) the reception of, or the right to receive, visual images or sounds, or both, that are transmitted to the public by satellite or by cable, optic fibre or similar technology; or
- (b) the use of, or the right to use, in connection with television or radio broadcasting, visual images or sounds, or both, that are transmitted by satellite or by cable, optic fibre or similar technology; or
- (c) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph."

## **ARTICLE 11**

Article 13 of the Convention shall be deleted and replaced by the following:

### **"ARTICLE 13**

#### **Alienation of Property**

(1) Income, profits or gains derived by a resident of a Contracting State from the alienation of real property situated in the other Contracting State may be taxed in that other State.

(2) Income, profits or gains from the alienation of property, other than real property, that forms part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or pertains to a fixed base available in that other State to a resident of the first-mentioned State for the purpose of performing independent



personal services, including income, profits or gains from the alienation of that permanent establishment (alone or with the whole enterprise) or of that fixed base, may be taxed in that other State.

(3) Income, profits or gains from the alienation of ships or aircraft operated in international traffic, or of property, other than real property, pertaining to the operation of

those ships or aircraft, shall be taxable only in the Contracting State of which the enterprise alienating such ships, aircraft, or other property is a resident.

(4) Income, profits or gains derived by a resident of a Contracting State from the alienation of any shares or other interests in a company, or of an interest of any kind in a partnership, trust or other entity, where the value of the assets of such entity is derived principally, whether directly or indirectly (including through one or more interposed entities, such as, for example, through a chain of companies), from real property situated in the other Contracting State, may be taxed in that other State.

(5) Nothing in this Convention shall affect the application of a law of a Contracting State relating to the taxation of gains of a capital nature derived from the alienation of any property other than that to which any of the preceding paragraphs of this Article apply.

(6) Where an individual who ceases to be a resident of a Contracting State, and immediately thereafter becomes a resident of the other Contracting State, is treated for the purposes of taxation in the first-mentioned State as having alienated a property and is taxed in that State by reason thereof, the individual may elect to be treated for the purposes of taxation in the other State as if the individual had, immediately before becoming a resident of that State, disposed of and re-acquired the property for an amount equal to its fair market value at that time."

## **ARTICLE 12**

1. Paragraphs (2) and (3) of Article 15 of the Convention shall be deleted and replaced by the following:

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

- (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the year of income or taxation year of that other State; and
  - (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and
  - (c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State."
2. Paragraph (4) of Article 15 of the Convention shall be renumbered as paragraph (3).

### **ARTICLE 13**

Article 22 of the Convention shall be deleted and replaced by the following:

#### "ARTICLE 22

##### Source of Income

(1) Income, profits or gains derived by a resident of a Contracting State which, under any one or more of Articles 6 to 8 and 10 to 19, may be taxed in the other Contracting State, shall for the purposes of the law of that other Contracting State relating to its tax be deemed to be income from sources in that other Contracting State.

(2) Income, profits or gains derived by a resident of a Contracting State which, under any one or more of Articles 6 to 8 and 10 to 19, may be taxed in the other Contracting State, shall for the purposes of Article 23 and of the law of the first-mentioned Contracting State relating to its tax be deemed to be income from sources in the other Contracting State."

### **ARTICLE 14**

Article 23 of the Convention shall be deleted and replaced by the following:

#### "ARTICLE 23

### Elimination of Double Taxation

(1) In the case of Australia, double taxation shall be avoided as follows:

- (a) subject to the provisions of the law of Australia from time to time in force which relate to the allowance of a credit against Australian tax of tax paid in a country outside Australia (which shall not affect the general principle of this Article), Canadian tax paid under the law of Canada and in accordance with this Convention, whether directly or by deduction, in respect of income derived by a person who is a resident of Australia from sources in Canada shall be allowed as a credit against Australian tax payable in respect of that income;
- (b) subject to the provisions of the law of Australia from time to time in force which relate to the allowance of a credit against Australian tax of tax paid in a country outside Australia (which shall not affect the general principle of this Article), where a company which is a resident of Canada and is not a resident of Australia for the purposes of Australian tax pays a dividend to a company which is a resident of Australia and which controls directly or indirectly at least 10 per cent of the voting power of the first-mentioned company, the credit referred to in subparagraph (a) shall include the Canadian tax paid by that first-mentioned company in respect of that portion of its profits out of which the dividend is paid.

(2) In the case of Canada, double taxation shall be avoided as follows:

- (a) subject to the existing provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof) and unless a greater deduction or relief is provided under the laws of Canada, tax payable in Australia on profits, income or gains from sources in Australia shall be deducted from any Canadian tax payable in respect of such profits, income or gains;
- (b) subject to the existing provisions of the law of Canada regarding the allowance as a credit against Canadian tax of tax payable in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof) where a company which is a resident of Australia pays a dividend to a company which is a resident of Canada and

which controls directly or indirectly at least 10 per cent of the voting power in the first-mentioned company, the credit shall take into account the tax payable in Australia by that first-mentioned

company in respect of the profits out of which such dividend is paid;  
and

- (c) where, in accordance with any provision of this Convention, income derived by a resident of Canada is exempt from tax in Canada, Canada may nevertheless, in calculating the amount of tax on other income, take into account the exempted income."

## **ARTICLE 15**

A new paragraph (6) shall be added to Article 24 of the Convention as follows:

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

## **ARTICLE 16**

A new Article 26A shall be added to the Convention immediately after Article 26 as follows:

"ARTICLE 26A

### Various Interests of Canadian Residents

Nothing in this Convention shall be construed as preventing Canada from imposing a tax on amounts included in the income of a resident of Canada with respect to a partnership, trust, or controlled foreign affiliate, in which that resident has an interest."

## **ARTICLE 17**

The Government of Australia and the Government of Canada shall notify each other through the diplomatic channel of the completion of their respective internal

procedures required for the bringing into force of this Protocol which shall form an integral part of the Convention. The Protocol shall enter into force on the date of the later of these notifications and its provisions shall thereupon have effect:

(a) in Australia:

- (i) in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January in the calendar year next following that in which the Protocol enters into force; and
- (ii) in respect of other Australian tax, in relation to income, profits or gains of any year of income beginning on or after 1 July in the calendar year next following that in which the Protocol enters into force;

(b) in Canada:

- (i) in respect of tax withheld at the source on amounts paid or credited to non-residents, on or after 1 January in the calendar year next following that in which the Protocol enters into force; and
- (ii) in respect of other Canadian tax, for taxation years beginning on or after 1 January in the calendar year next following that in which the Protocol enters into force.

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

DONE at Canberra, this twenty-third day of January 2002, in the English and French languages, the two versions being equally authentic.

FOR THE GOVERNMENT  
OF AUSTRALIA:

Helen Lloyd Coonan

FOR THE GOVERNMENT  
OF CANADA:

Jean T Fournier