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Tax Essentials

An Australian perspective on the Multilateral Instrument (MLI)

July 2022 | Australia

Overview

- Under the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS), more than 125 countries are collaborating.
- The MLI is an outcome of BEPS Action 15 and is designed to swiftly implement the tax treaty-related measures arising from the G20/OECD BEPS project, without the need to renegotiate each double tax treaty.
- A total of 99 jurisdictions[1] have signed the MLI, and three others have expressed intent to do so. The MLI is expected (over time) to modify more than 1,600 double tax treaties.
- The way that the MLI impacts a particular double tax treaty will depend upon the respective MLI positions of the two countries – so the impact of the MLI will differ from treaty to treaty.
- The timing of the impact of the MLI on a particular tax treaty will firstly depend upon when the MLI is formally ratified by the two relevant countries, and then will differ as between withholding taxes, other taxes and mutual agreement procedure/arbitration.
- The MLI is already in effect for many of Australia's tax treaties. This Tax Essentials provides an overview of the way the MLI will affect double tax treaties, considers some practical issues and provides an overview on which of Australia's tax treaties are impacted.
- The MLI was a product of the BEPS reports published in October 2015. Subsequently, a further BEPS process (BEPS 2.0) has continued, resulting in the OECD/G20 Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy on 8 October 2021. It is expected that further multilateral instruments or multilateral conventions will be developed as part of that process.

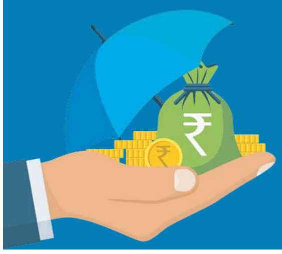
Broad Architecture of the MLI

MLI consists of 39 Articles (MLI Articles):

- MLI Articles 1 & 2 set out the scope of MLI and the interpretation of terms used therein
- MLI Articles 3-17 deal with BEPS-related treaty measures
- MLI Articles 18-26 cover provisions related to mandatory binding arbitration
- MLI Articles 27-39 contain procedural provisions such as provisions relevant to adoption & implementation of the MLI including ratification, entry into force, entry into effect dates, withdrawal, etc.

Explanatory Statement to the MLI amplifies the understanding of MLI Articles

OECD website includes a list of signatories of the MLI, information on the Articles of the MLI that these signatories have chosen to opt, and an MLI Matching Database (link)



1. OECD status as of 30 June 2022: 76 jurisdictions have deposited their instruments of ratification, acceptance or approval with the OECD along with the list of their MLI positions (reservations and notifications)

Structure of the MLI

The various articles in the MLI are generally based upon the post-BEPS treaty provisions as included in the November 2017 update to the OECD Model Convention.

1

Minimum standard MLI provisions
Jurisdictions that sign the MLI are required to adopt MLI provisions forming part of the agreed minimum standards.

- MLI Articles 6 and 7 reflect the minimum standard for prevention of treaty abuse under BEPS Action 6
- MLI Article 16 reflects the minimum standard for improvement of dispute resolution under BEPS Action 14

2

Opting out of these MLI provisions (forming part of agreed minimum standards) is possible only in limited circumstances

3

Optional MLI provisions
The MLI allows countries to opt into additional provisions in the MLI. The impact on a particular tax treaty will depend upon various opt in/opt out choices made by both countries. Optional changes to tax treaties in the MLI include changes to modify tax treaties in respect of:

- Permanent establishments (PEs)
- Transparent entities
- Residency tiebreakers
- Minimum shareholding periods
- Capital gains derived from immovable property and,
- Mandatory binding arbitration.

4

For such MLI provisions, there is generally flexibility to opt out of either all or part of the provision. These choices will form a country's MLI positions.

MLI structure overview

MLI Part	BEPS Action	Deals with	Minimum standard	Includes	
I		Scope and interpretation		Definitions	
II	2	Hybrid mismatches	No	Transparent entities	Dual resident entities
III	6	Treaty abuse	Yes	Purpose (preamble)	Treaty abuse
			No	• Dividend transfer transactions • PEs in third States	• Capital gains from the alienation of shares, etc. • Restriction of a right to tax its own residents
IV	7	Avoidance of PE status	No	Expanded scope dependent agent PE Contract splitting	Preparatory & auxiliary activities
V	14	Improving dispute resolution	Yes	Mutual agreement procedure	Corresponding adjustments
VI		Arbitration	No		
VII		Final provisions			

Each party to the MLI must notify tax treaties to which the MLI provisions apply. The MLI provisions will apply to a tax treaty only if both parties to the tax treaty notify it as Covered Tax Agreement [CTA]

For a specific bilateral tax treaty, the MLI will have effect after both parties to a CTA have deposited their ratification instruments with the OECD Secretariat

The MLI will modify the application of all CTAs at least to the extent of the implementation of the BEPS minimum standards:
1) Counter treaty abuse through MLI Article 6 (purpose of a CTA) and MLI Article 7 (prevention of treaty abuse)
2) Improve dispute resolution through MLI Article 16 (mutual agreement procedure)

Flexibility to implement BEPS tax treaty measures in various ways:
- Choices to apply optional and alternative provisions
- Reservations to opt out of provisions or parts of provisions that are not minimum standards (either for all CTAs, or selected CTAs)

The MLI functions differently than a protocol to an existing treaty. The MLI sits alongside an existing double tax treaty, modifying its application on BEPS matters. The MLI provisions apply in place of, or in the absence of particular provisions in a CTA, or apply to modify an existing provision of a CTA. As a practical matter, the process of determining which MLI Articles modify a CTA, and how they do so, is complex.

Some tax authorities, including the Australian Taxation Office (ATO) have started to publish "synthesised texts", reflecting the modifications made by the MLI to a particular tax treaty to simplify the interpretation and application of the MLI to a tax treaty. These synthesised texts are typically prepared jointly by both tax authorities and represent their shared understanding of the modifications made to a particular tax treaty by the MLI. However, the synthesised text is not legally binding.

Applying the MLI to a tax treaty

The way that the MLI impacts a particular CTA will depend upon the respective MLI positions of the two countries – so the impact of the MLI will differ from treaty to treaty. Generally, it is only where both countries have adopted a MLI provision that the MLI will relevantly modify the particular tax treaty.

As such, where Australia has opted out of a MLI provision, that provision will generally not impact the relevant treaty, irrespective of the position of the treaty partner. For example, New Zealand has adopted the expanded scope PE definition under MLI Article 12. However, as Australia has made a reservation on this matter, the Australia/New Zealand treaty is not modified on this matter, as only one country has agreed to the expanded scope definition.

2. Refer http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm
3. For a taxable period ending 30 June (such as Australia), the MLI should apply to taxes levied by that country for taxable periods commencing on or after 1 July 2019. If a taxable period in a country follows a calendar year, the MLI should apply to taxes levied by that country for taxable periods commencing on or after 1 January 2020

Entry into force of the MLI

Countries which have signed the MLI need to ratify the MLI in line with their domestic arrangements and the OECD ratification process. Thereafter, the MLI can enter into force for a specific treaty three clear months after ratification by both countries.

Preconditions for the entry into force is that a country must have:

1. Completed its domestic law requirements to ratify the MLI
2. Deposited the Instrument of Ratification, Acceptance or Approval with the OECD

The OECD acts as the 'depositary' of the MLI and any subsequent protocols (Article 39 of the MLI). The depositary publishes and updates on a regular basis the list of all signing countries, the signing date, the date of deposit of the Instrument of Ratification, Acceptance or Approval, and the date of entry into force of the MLI for a signing country. The depository also maintains lists of reservations and notifications to the MLI provisions made by each country both at the time of signature and ratification of the MLI[2].

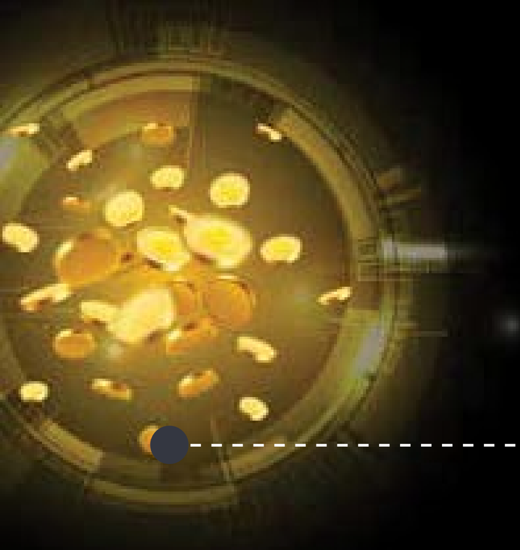
MLI entry into effect for a particular tax treaty

Once the MLI has entered into force between Australia and a treaty partner country, the MLI enters into effect with respect to that particular CTA as follows:

A. For withholding taxes: where the event giving rise to such taxes occurs in the calendar year that begins on or after the later date of entry into force of the MLI for Australia and the treaty partner. For example, if both treaty partners ratified the MLI in September 2018, the MLI will enter into force on 1 January 2019, and the MLI should apply to withholding tax events occurring on or after 1 January 2019

B. For all other taxes: the MLI will apply to taxable periods beginning on or after 6 months after the later date of entry into force of the MLI for Australia and the treaty partner. For example, if the MLI entered into force for both countries on 1 January 2019, the MLI should apply to taxable periods starting on or after 1 July 2019[3]

C. For MAP and mandatory binding arbitration: the MLI will apply on or after the latest of the dates of entry into force of the MLI for Australia and the treaty partner. For example, if both treaty partners ratified the MLI in September 2018, the MLI entered into effect on 1 January 2019 for MAP and arbitration purposes. Notably, cases may be eligible even where the dispute relates to a period before the MLI was in force



The Australian Story

24 November 2016
Publication of the MLI

7 June 2017 – Signing ceremony
68 jurisdictions including Australia signed the MLI

1 July 2018
MLI entered into force

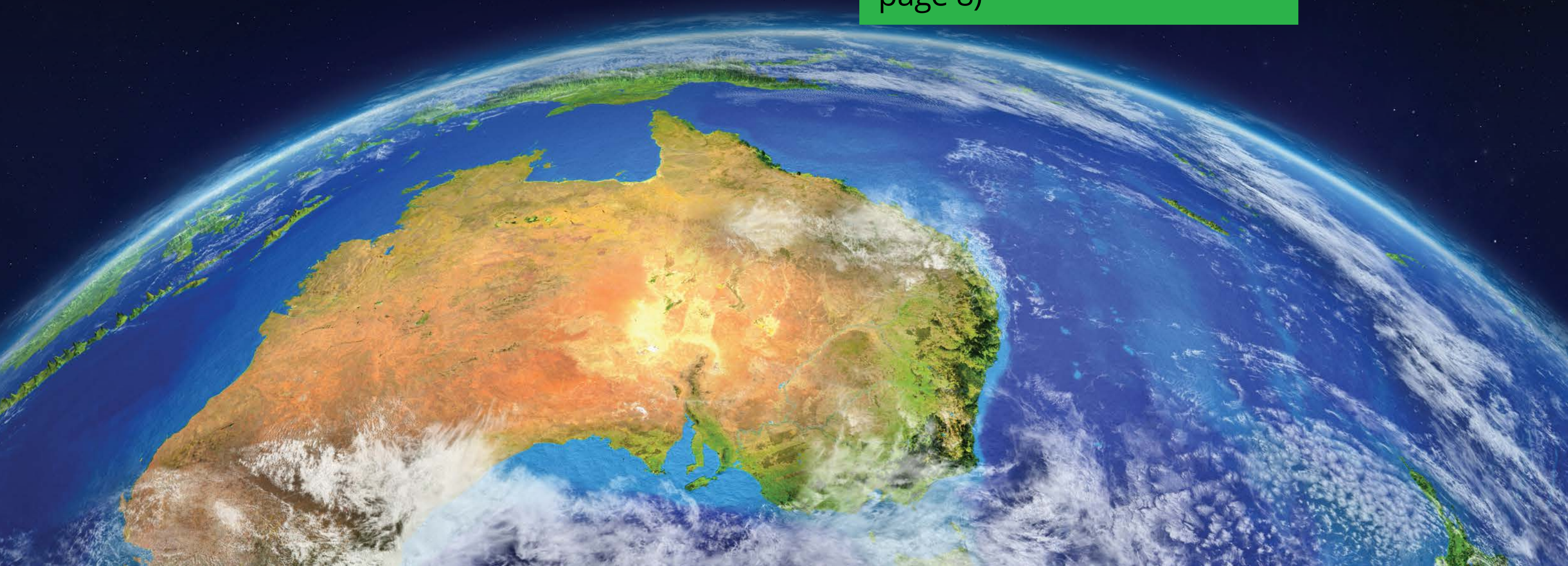
24 August 2018
The MLI was given the force of law in Australia by the Treasury Laws Amendment (OECD Multilateral Instrument) Act 2018, which received Royal Assent on 24 August 2018.

26 Sep 2018
Deposit of ratification instrument with the OECD Secretariat by Australia

1 Jan 2019[4]
MLI enters into force for Australia

35 of Australia's treaties will be modified by the MLI (see page 8)

4. That is, on the first day of the month following the expiration of three months beginning on the date of deposit of ratification instrument by Australia with the OECD Secretariat



Impact of the MLI on Australia's tax treaties as at 1 July 2022

Australia has 45 tax treaties

Tax treaties modified by the MLI	Treaties already/will be affected				Treaties not yet affected	
35 tax treaties	• New Zealand	• Singapore	• Belgium	• Hungary	• Argentina	• Turkey
	• UK	• Malta	• Denmark	• Malaysia	• Fiji	• Vietnam
	• Japan	• Canada	• Russia	• China	• Italy	
	• France	• Finland	• Indonesia	• Thailand	• Mexico	
	• Norway	• Ireland	• Czech Republic	• Spain	• Papua New Guinea	
	• Slovak Republic	• Netherlands	• Chile	• Romania	• South Africa	
	• Poland	• India	• Korea			

Tax treaties not impacted by the MLI	2 treaties excluded from being a CTA by Australia	3 treaty partners did not list the treaty with Australia as a CTA	5 treaty partners have not signed the MLI	
• 10 tax treaties	• Germany	• Austria	• US	• Taiwan
	• Israel	• Switzerland	• Kiribati	
	These treaties are broadly 'BEPS compliant'	• Sweden	• Philippines	
			• Sri Lanka	

With respect to treaties modified by the MLI, the ATO has to date published synthesised texts of Australia's tax treaties with Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, India, Indonesia, Ireland, Japan, Korea, Malta, the Netherlands, New Zealand, Norway, Poland, Russia, Singapore, the Slovak Republic, Malaysia and the United Kingdom, see here.

In late 2021, the Government announced that it was planning to enter into 10 new tax treaties by 2023, including with Luxembourg, Iceland, Greece, Portugal and Slovenia. In addition, it was announced by the Australian Government in April 2022 that Australia would make changes to Australian tax laws in connection with the Australia/India treaty.

Australia's tax treaties impacted by the MLI

The table below summarises the key relevant dates for Australia's tax treaties that are impacted by the MLI.

	Treaty partners	Relevant joint entry into force date	MLI Entry into effect	
			Withholding events: occurring on or after	Other taxes: taxable periods starting on or after
1	UK	1 Jan 2019	1 Jan 2019	1 Jul 2019
2	Japan	1 Jan 2019	1 Jan 2019	1 Jul 2019
3	France	1 Jan 2019	1 Jan 2019	1 Jul 2019
4	New Zealand	1 Jan 2019	1 Jan 2019	1 Jul 2019
5	Poland	1 Jan 2019	1 Jan 2019	1 Jul 2019
6	Slovak Republic	1 Jan 2019	1 Jan 2019	1 Jul 2019
7	Singapore	1 Apr 2019	1 Jan 2020	1 Oct 2019
8	Malta	1 Apr 2019	1 Jan 2020	1 Oct 2019
9	Ireland	1 May 2019	1 Jan 2020	1 Nov 2019
10	Finland	1 Jun 2019	1 Jan 2020	1 Dec 2019
11	The Netherlands	1 Jul 2019	1 Jan 2020	1 Jan 2020
12	Russia	1 Oct 2019	1 Jan 2021	30 Nov 2020
13	India	1 Oct 2019	1 Jan 2020	1 Apr 2020
14	Belgium	1 Oct 2019	1 Jan 2020	1 Apr 2020
15	Norway	1 Nov 2019	1 Jan 2020	1 May 2020
16	Canada	1 Dec 2019	1 Jan 2020	1 Jun 2020
17	Denmark	1 Jan 2020	1 Jan 2020	1 Jul 2020
18	Indonesia	1 Aug 2020	1 Jan 2021	26 Jun 2021
19	Czech Republic	1 Sep 2020	1 Jan 2021	1 Mar 2021
20	Korea	1 Sep 2020	1 Jan 2021	1 Mar 2021
21	Chile	1 Mar 2021	1 Jan 2022	1 Sep 2021
22	Malaysia	1 Jun 2021	1 Jan 2022	1 Dec 2021
23	Hungary	1 Jul 2021	1 Jan 2022	1 Jan 2022
24	Spain	1 Jan 2022	1 Jan 2023	1 Jan 2023
25	Thailand	1 Jul 2022	1 Jan 2023	1 Jan 2023
26	Romania	1 Jun 2022	1 Jan 2023	1 Dec 2022
27	China	1 Sep 2022	1 Jan 2023	1 Mar 2023

Key impact areas for Australian Tax Treaties

Key modifications in Australian Tax Treaties

Preventing tax treaty abuse

- Minimum standard under BEPS Action 6 to tackle treaty abuse, i.e., **insertion of new preamble and principal purpose test** (PPT) in all Australian CTAs
- PPT to replace/supersede existing general anti-abuse provisions in CTAs, or to be added in the absence of such provisions

Dual residency & new tie breaker test

- **Tie breaker test in case of dual residency of person** (other than an individual) to be now decided by competent authority of the CTA parties

Improving dispute resolution

- Improved mutual agreement procedure (MAP) outcomes [Minimum standard under BEPS Action 14]
- In some cases supplemented by arbitration.

These processes should lead to greater certainty for taxpayers

For evaluating the extent of the MLI impact on Australia's tax treaties, Australia's MLI positions need to be compared with the MLI positions taken by its counterpart.

Australia's key CTAs' MLI positions

The impact of the MLI on a particular double tax treaty (also referred to as a Covered tax Agreement or CTA) will depend upon the various MLI positions adopted by both countries. Broadly, where Australia and a treaty partner have differing MLI positions with respect to a specific provision, the relevant MLI provision will not apply. Appendix 1 includes a detailed description of Australia's MLI positions.

The Table below sets out Australia's key CTAs' MLI positions and the likely impacts on a number of Australia's tax treaties.

MLI Art.	Matter	Canada	China	India	Ireland	Japan	NZ	Sing.	UK	Australia MLI positions
Hybrid mismatch										
3	Transparent entities				✓		✓		✓	✓
4	Dual resident entities	✓	✓	✓		✓	✓		✓	✓
Treaty abuse										
5	Elimination of double taxation									
6	Preamble	✓	✓	✓	✓	✓	✓	✓	✓	✓
7	PPT	✓	✓	✓	✓	✓	✓	✓	✓	✓
8	Dividend transfer	✓	✓				✓			✓
9	Capital gains: Land rich	✓	✓	✓	✓	✓	✓			✓
10	Third State PE									
11	Taxation of own residents				✓		✓		✓	✓
Permanent establishment status										
12	Dependent agent PE									
13(1)	Preparatory & auxiliary			✓		✓				✓
13(4)	Anti-fragmentation rule			✓	✓	✓	✓		✓	✓
14	Contract splitting			✓	✓		✓			✓
15	Closely related			✓	✓	✓	✓		✓	✓
Improving dispute resolution										
16	MAP	✓	✓	✓	✓	✓	✓	✓	✓	✓
17	Corresponding adjustments									✓
Arbitration										
	Part VI	✓	✓		✓	✓	✓	✓	✓	✓

Some practical issues

At the initial stage, much of the MLI focus is on the initial entry into force and effect. It is however expected that many issues will emerge as taxpayers grapple with the meaning and operation of the new MLI provisions. We comment below on two matters.

1) Principal purpose test

PPT – A source of uncertainty

Under the PPT (Article 7 of the MLI), a treaty benefit in respect of an item of income may be denied if it is reasonable to conclude, having regard to the facts and circumstances, that obtaining that benefit was "one of the principal purposes" of the arrangement or transaction, where that arrangement or transaction resulted directly or indirectly in that treaty benefit. However, the PPT will not be triggered if the granting of that treaty benefit in the circumstances is in accordance with the 'object and purpose' of the relevant tax treaty.

The updated OECD Commentary contains examples of the operation of the PPT that suggest that "object and purpose" considerations should be interpreted as equating with the existence of economic substance in the relevant treaty country. However, this is not expressly stated in the PPT itself and thus there could very well be some variance of approaches.

Whilst Australian taxpayers are familiar with the concept of sole or dominant purpose via the general anti-avoidance rule, the lower test of "one of the principal purposes" is increasingly being adopted, including under the MAAL and the Diverted Profits Tax (DPT) and the Targeted Integrity Rule.

The positive limb has such a low threshold ("one of the principal purposes"), that it could well be applied by tax authorities to many transactions and structures which involve treaty benefits. The PPT could potentially apply to an arrangement or transaction, even where that arrangement or transaction was entered into a number of years ago (i.e., prior to the MLI modifying the relevant tax treaty). It also remains to be seen how much comfort can be taken from the exclusion under the second limb.

It can be expected that the PPT will become the source of uncertainty, debate and dispute as taxpayers and tax authorities around the world grapple with coming to a common understanding as to the meaning of "one of the principal purposes". The updated OECD Commentary discusses the potential application of the PPT with reference to various examples, however the outcomes in practice will ultimately depend on the specific facts and circumstances of each case.

In October 2020, the ATO released Law Administration Practice Statement (PS LA) 2020/2, which explains the ATO's proposed approach to administering general anti-abuse rules, including the PPT. Whilst a PS LA is primarily an instruction to ATO staff, it contains some important markers on the ATO views on interpretative matters. For more details on the ATO guidance, refer to the Deloitte Tax Insights publication that can be accessed here.

Interaction with existing laws

From an Australian perspective, there are already a range of domestic law provisions and treaty provisions that may address some of the perceived abuses at which the PPT is targeted, including:

- Australia's general anti-avoidance rule (Part IV A) could potentially operate to deny treaty related benefits, if there is a sole or dominant purpose to obtain an Australian tax advantage. Whilst TD 2010/20 is necessarily general, it indicates that the ATO considers that, at least in certain circumstances, the relevant purpose in connection with an Australian tax benefit in some treaty shopping cases may rise to the level of being a sole or dominant purpose for the purposes of Part IV A.
- The DPT could potentially operate to deny related treaty benefits, if there is a principal purpose to obtain an Australian tax advantage.
- The MAAL is Australia's unilateral BEPS response aimed at the avoidance of PE status in Australia by overseas entities.
- A number of Australia's existing treaties include a specific main purpose test provision that applies to the Dividend, Interest and Royalty Articles, i.e. benefits under such Article can be denied if it is a main purpose of the arrangement to take advantage of this Article. Further, Australia's double tax treaties with Germany, Switzerland and Israel already contain a comprehensive PPT that applies across all provisions of the treaty.
- The commencement of the MLI will allow the PPT to apply across all Australia's CTAs (subject to the treaty partner's ratification of the MLI and entry into effect). Therefore, the commencement of the MLI will raise an additional risk for the allowance of treaty benefits by Australia.

Additional risks and uncertainties will also arise for multinational groups that are claiming treaty benefits under a number of different treaties, as it is likely that various tax authorities around the world will bring different approaches to the application of the PPT.

2) Dual resident companies (Article 4(1) of the MLI) – new tiebreaker rule

Given the ATO's new interpretation of the Central Management and Control (CMAC) test (including split CMAC) in Taxation Ruling TR2018/5 and PCG 2018/9, circumstances of dual residence are likely to increase. For example, a foreign incorporated subsidiary of an Australian parent may be tax resident in a foreign country (based on an incorporation test) and may also be tax resident in Australia (based on a CMAC test).

Where a company is a dual resident and is looking to apply the provisions of a tax treaty impacted by the MLI, this will require careful analysis.

The ATO and the New Zealand Inland Revenue released on 27 May 2019 a joint administrative approach dealing with how the corporate residency tiebreaker under MLI Article 4(1) will be jointly exercised (ATO). This joint administrative approach is intended to provide certainty and minimise compliance costs for "lower materiality" taxpayers as to their residency status for treaty purposes. As such, the administrative approach applies where a "taxpayer's group annual accounting income is less than AUD $250 million. Taxpayers that satisfy all the eligibility criteria can self-determine their place of POEM for the purposes of the Australia/New Zealand tax treaty. At this stage, this approach will only be implemented between Australian and New Zealand.

The ATO has also updated its webpage as to how to apply for a Competent Authority determination in relation to, in particular, corporate residency tiebreaker matters due to the impact of MLI Article 4(1). In relation to the AU/NZ treaty, this would be relevant where the taxpayer does not fit within the conditions of the administrative approach outlined above.

In 2019, the Board of Tax (BoT) undertook a review of the Corporate Residency Rules. The purpose of the review was to ensure these rules are operating appropriately, in light of modern, international, commercial board practices and international tax integrity rules. The BoT's final report was released in October 2020. The BoT made six recommendations which were supported by the Government.

As part of the 2020-21 Federal Budget on 6 October 2020, the Government announced that it will make technical amendments to clarify the corporate residency test.

The Government also stated that it will amend the law to provide that a company that is incorporated offshore will be treated as an Australian tax resident if it has a "significant economic connection to Australia".

This test will be satisfied where both the company's core commercial activities are undertaken in Australia and its CMAC is in Australia.

MLI's Challenges

Immediate action is required:
Analyse the impact of MLI modifications on existing arrangements

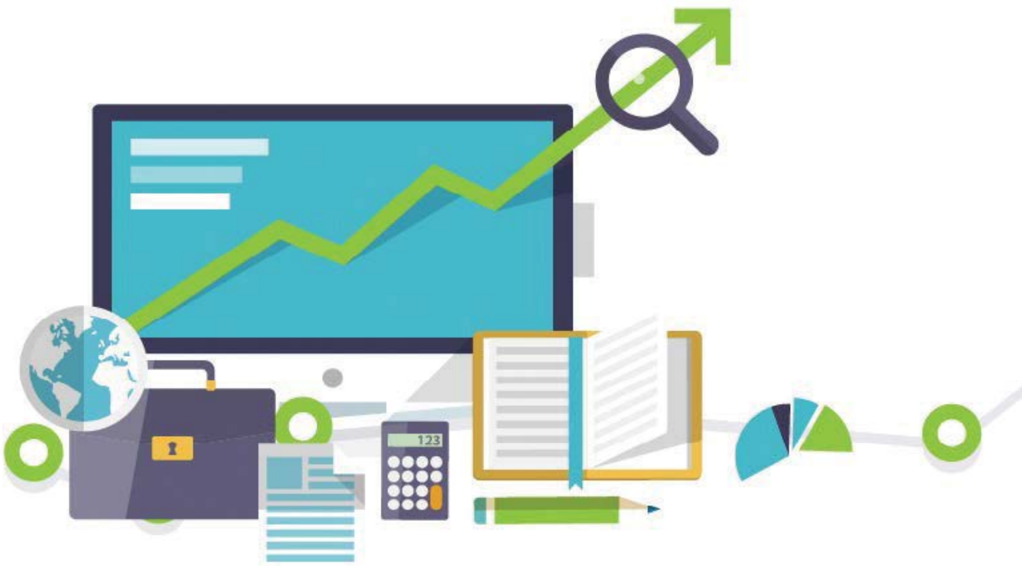
MLI is now a reality:
Impact on existing & prospective cross-border arrangements

CMAC & new tie breaker rules interaction
Where a company is a dual resident & is looking to apply a tax treaty impacted by the MLI, this will require careful analysis

PPT & GAAR rules interplay
How will PPT rules interplay with Australia's general anti-avoidance rules (GAAR) including MAAL & DPT

MLI impact will grow over the coming years:
MLI PPT will progressively become a powerful tool to deny treaty benefits

Innovative but complex tool:
Disputes/Uncertainties/Issues will emerge over time



Appendix 1: Australia’s MLI positions

	MLI Article	Brief description of the Article	Australia’s final position
	Article 2: Interpretation of terms	Notification of tax treaties covered by MLI convention	Australia has notified **43 out of 45 tax treaties** Tax treaties not notified by Australia: Germany and Israel (both are BEPS compliant).
Hybrid Mismatches	**Article 3: Transparent entities** (Optional Article)	Treaty benefits will be granted for income derived through fiscally transparent entities, such as partnerships or trusts, but only where one of the two countries treats the income as income of one of its residents under its domestic law. These rules will not prevent either country from taxing its own residents.	Australia has adopted Article 3 but will preserve existing corresponding bilateral detailed rules where appropriate.
	Article 4: Dual resident entities (Optional Article)	Most treaties use an entity's place of effective management (POEM) as the key tiebreaker test to determine a dual resident's country of tax residence for treaty purposes. Under Article 4, the tiebreaker will instead be determined pursuant to mutual agreement of both countries, having regard to prescribed factors, i.e. POEM, the place of incorporation and any other relevant factors. Countries have the option to allow their tax authorities to grant treaty benefits in the absence of such a mutual agreement.	Australia has adopted Article 4 but not the rule that would allow the two tax administrations to grant treaty benefits in the absence of such an agreement.
Treaty Abuse	**Article 5: Application of methods to eliminate double taxation** (Optional Article)	Three options will ensure that countries relieve double taxation by crediting foreign tax against domestic tax rather than by exempting foreign income from domestic tax.	Australia has not adopted: • Article 5 because all of its treaties apply the credit method in relieving double taxation for Australian residents • The provisions that would prevent other countries from applying their chosen positions under Article 5.
	Article 6: Purpose of CTA (Minimum standard)	Introduces preamble text in CTA stating that the jurisdictions intend to avoid creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance, and through treaty shopping arrangements.	Australia has adopted Article 6, including the optional text indicating a desire to further develop its economic relationships with other signatories and enhance cooperation in tax matters.

	MLI Article	Brief description of the Article	Australia's final position
Treaty Abuse	**Article 7: Prevention of treaty abuse** (Minimum standard)	Introduces new anti-abuse rules that will enable tax administrations to deny treaty benefits in certain circumstances. Countries may choose between three options: A. The principal purpose test (PPT), B. The simplified limitation on benefits (LOB) provision plus PPT, or C. The detailed LOB plus anti-conduit mechanism.	Australia has adopted Article 7 and only the PPT, including the discretion not to apply the PPT in certain circumstances. If Australia's treaty partner has also chosen to adopt the PPT, there is a "match" with the Australian approach, and the CTA with Australia will be modified to effectively include the PPT. Note that the "PPT only" option was the most common choice of countries.
	Article 8: Dividend transfer transactions (Optional Article)	Introduces additional criteria of "365 days minimum holding period" for the shareholder to avail concessional tax rates under CTA	Australia has adopted Article 8 without reservation.
	Article 9: Capital gains from alienation of shares or interest of entities deriving their value principally from immovable property (Optional Article)	Introduces additional criteria of "365 days minimum holding period" in case of gains arising from alienation of shares or other participation rights if such shares or rights derive more than a specified percentage of their value from immovable property situated in the source jurisdiction Optional provision of inserting a minimum value derivation criterion of 50 percent of their value directly or indirectly from immovable property	Australia has adopted Article 9 but preserves existing bilateral rules that apply to the disposal of comparable interests (non-share interests) in land-rich entities.
	Article 10: Anti-abuse rule for PE in third jurisdiction (Optional Article)	Addresses abuse of CTAs in a triangular situation	Australia has not adopted Article 10 at this time, pending further review of its potential impacts in the Australian context. This is consistent with Australia's current treaty practice (i.e. this rule was not adopted in the new treaty with Germany and Israel)
	Article 11: Application of tax agreement to restrict a party's right to tax its own residents (Optional Article)	Preserves the right of jurisdiction to tax its own residents	Australia has adopted Article 11 without reservation.

	MLI Article	Brief description of the Article	Australia's final position
Permanent Establishment	**Article 12: Artificial avoidance of PE status through commissionaire and similar strategies** (Optional Article)	Counters artificial avoidance of PE status through commissionaire arrangements and similar strategies. This provision lowers the threshold at which a PE arises through broadening the scope of dependent agent PEs.	Australia has not adopted Article 12 at this time. Notably, Article 12 addresses arrangements similar to those targeted by Australia's Multinational Anti-Avoidance Law (MAAL). So, the application of MAAL will continue to safeguard Australian revenue from egregious tax avoidance arrangements that rely on a 'book offshore' model, but there will be no (broadly) equivalent provision via the MLI applying to Australian residents selling into foreign countries. However, it is expected that Australia will consider adopting these rules bilaterally in future treaty negotiations. For example, this provision was included in Australia's new treaty with Germany and Israel.
	Article 13: Artificial avoidance of PE through specific activity exemptions (Optional Article)	Most tax treaties include a list of exceptions to the definition of permanent establishment where a place of business is used solely for specifically listed activities such as warehousing or purchasing goods. Only genuine preparatory or auxiliary activities will be excluded from the definition of PE (Article 13(1) of the MLI). In addition, related entities will be prevented from fragmenting their activities in order to qualify for this exclusion (Article 13(4) of the MLI).	Australia has adopted Article 13 but preserve existing corresponding bilateral rules.
	Article 14: Splitting up of contracts (Optional Article)	Counters "contract splitting" avoidance where long-duration contracts are split into a series of shorter contracts.	Australia has adopted Article 14 but preserve existing bilateral rules that deem a PE to exist for offshore natural resource activities.
	Article 15: Definition of a person "closely related to an enterprise" (Optional Article)	Defines the term "person closely related", in the context of Articles 12, 13, and 14 of the MLI	Australia has adopted Article 15 without reservation.

	MLI Article	Brief description of the Article	Australia's final position
Mutual Agreement Procedure & Arbitration	**Article 16: Mutual agreement procedure (MAP)** [Minimum standard]	Provides that all CTAs will now include a minimum standard for MAPs. If a treaty-related case qualifies to be considered under the MAP, upon the request of a taxpayer, the competent authorities should endeavour to agree between themselves how double tax agreements should apply, and implement any agreement. This will provide taxpayers with a more effective tax treaty-based dispute resolution procedure.	Australia has adopted Article 16 without reservation
	Article 17: Corresponding adjustments (Optional Article)	Requires jurisdictions to make appropriate corresponding adjustments in transfer pricing cases	Australia has adopted Article 17 but has preserved existing corresponding bilateral rules
	Article 18-26: Mandatory binding arbitration (Optional Article)	Part VI of the MLI allows countries to adopt an Arbitration regime that allows taxpayers to request arbitration where a case has been subject to a MAP for at least two years, without resolution. Two different types of decision-making processes are facilitated: "final offer" approach (or 'baseball' arbitration) or the "independent opinion" approach.	Australia has adopted independent and binding arbitration subject to the following conditions: • Disputes which have been the subject of a decision by a court or administrative tribunal will not be eligible for arbitration, or will cause an existing arbitration process to terminate • Breaches of confidentiality by taxpayers or their advisers will terminate the arbitration process • Disputes involving the application of either: – Part IV A of the Income Tax Assessment Act 1936, (including the Diverted Profits Tax (DPT) and the MAAL matters) or – Section 67 of the Fringe Benefits Tax Assessment Act 1986 will be excluded from the scope of arbitration

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