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A: Reconstructing the treaty network
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Summary and conclusions

While Australia has a modest treaty network (44 treaties), its treaties cover a large majority of direct and indirect investment into and out of Australia. Its major trading partners include the US, China and the UK. Australia’s treaty practice is based on the OECD Model with a number of exceptions including importantly:

– a broader definition of permanent establishment (reflecting Australia’s dependence on mineral resources);
– imposition of tax on dividend, interest and royalty at source and subject to higher than usual rates of withholding;
– a reservation relating to the ability to impose tax on permanent establishments without necessarily having regard to the functionally separate enterprise principle;
– modern treaties including a limitation on dividend, interest and royalty articles where one of the main purposes was to access those benefits; and
– explicitly providing in domestic law, which incorporates each treaty into domestic law, that it was subject to being overridden by certain GAARs and SAARs.

Prior to the MLI, Australia had made some domestic and limited bilateral agreements relating to what are now termed the BEPS initiatives. These included:

– limited domestic foreign hybrid provisions applying transparent treatment to certain limited partnerships and LLCs and other entities which would otherwise be taxed as companies for Australian tax purposes;
– only one of Australia’s signed (but then unenacted) treaties included pre-amble wording that specifically addressed the desire to avoid “creating opportunities for non-taxation or reduced taxation”;
– comprehensive and complex statutory anti-hybrid rules that came into effect on 1 January 2019 which, in some actions, go beyond BEPS Action item 2.

Australia has, at the time of writing, 27 outstanding MAP matters relating to transfer pricing and 17 relating to other aspects of treaty practice.

Australia signed the MLI listing 43 of its 44 comprehensives tax treaties (based on counterparty positions, 32 of Australia’s treaties will be amended by the MLI). The only treaty Australia excluded was the 2016 Australia-Germany DTA which was concluded after the publication of the MLI and met the MLI minimum standards. Australia also subsequently excluded the agreement with Chinese Taipei as it is of less than treaty status. Australia’s stated position with regard to the MLI is to adopt the minimum standards and as many of the optional articles as possible and make limited use of the MLI reservation system. The

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2 Barrister and Senior Fellow of the University of Melbourne.
most important treaty not to be modified, from a bilateral trade perspective, is the treaty with the US.

The MLI has entered into force, consistent with Australia’s treaty practice, as a schedule to the International Tax Agreements Act 1953. But for particular GAAR and SAAR provisions, treaties override Australia’s domestic law (including, in at least one case, to impose domestic tax via a deemed source article where no tax would otherwise be imposed). There is nothing in the manner in which the MLI has been incorporated into Australian law indicating that its text will be construed differently to that of other bilateral treaties by reference to the Acts Interpretation Act 1901 and to the Vienna Convention of the Law of Treaties 1969 (VCLT). While Australian law favours the text as written, interpretation of treaty instruments generally gives greater weight to context and purpose (e.g. by reference to article 31 of the VCLT).

Consistent with article 32 of the VCLT, when the meaning resulting from the application of article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse is frequently had to supplementary materials. It is likely a question will arise on how far this recourse to supplementary materials extends in the context of a Covered Tax Agreement. The Base Erosion and Profit Shifting Action Item Reports are likely article 32 material under the Vienna Convention, but they are broad and not necessarily focussed on the text of the MLI and are not directly related at all to any specific Covered Tax Agreement. The formal separation of the MLI from existing bilateral treaties is not overly convincing, and Australian statutory interpretation tends to read an instrument that depends on another for its effect (such as the relationship of the MLI to a Covered Tax Agreement) as a single instrument. As such, the usefulness of the BEPS Reports in determining the meaning of any particular article of a Covered Tax Agreement is uncertain.

Informally, the reaction to the MLI within the Australian tax community has been relatively calm (with the exception of the residency changes in article 4) as Australian tax planning strategies are often not treaty dependent. Australian domestic law provides that an entity incorporated outside Australia can be an Australian resident if (broadly) it has central management and control in Australia. Accordingly, a large number of companies may be prevented from benefiting from Covered Tax Agreements as dual residents (i.e. foreign incorporated and Australian controlled). On the positive side, the confusion caused by article 4 has led to a rapid increase in bilateralism at least between Australia and New Zealand whose revenue authorities released a joint MLI Article 4(1) Administrative Approach providing for self-assessment of a place of effective management where a taxpayer satisfies certain eligibility criteria (e.g. for small to medium enterprises) as such entities may often have elements of control in both countries.

The hybrid provisions in article 3 have been seen as reducing and increasing complexity depending on a taxpayer’s particular position. Australia, somewhat uniquely, treats limited partnerships as companies. Currently, the position is that a foreign limited partnership is assessable separately from the partners and often without treaty benefits and required to pay the tax assessed, although the Commissioner would be barred from enforcing a judgment against a partner that was entitled to treaty benefits. Where the provisions of article 3(1) of the MLI are available, this may provide greater certainty for inbound investors that they are positively entitled to treaty benefits and protected from taxation in the hands of the deemed company for Australian tax purposes.

1.1. Introduction

Australia is a net capital importer. At the end of 2018, foreign economies had a total of $3.5 trillion invested in Australia as compared to around $2.5 trillion of Australian money invested overseas.\(^3\) The United States, the United Kingdom and Japan made up almost 50 percent of direct and portfolio investment flows in and out of Australia in 2018. Almost 40 percent of foreign direct investment in Australia flowed to mining and quarrying with another 30 percent flowing equally to manufacturing, financial services and real estate.

This part describes Australia’s tax treaties and doctrines, provisions and practices prior to the MLI and then proceeds to discuss the direct and indirect impacts of the BEPS Action Plan and the MLI in Australia.

1.2. Background to the MLI

1.2.1. Tax treaties entered into before the MLI

Prior to the MLI, Australia had concluded 44 comprehensive tax treaties.\(^4\) Taking into account any later amendments, Australia’s oldest tax treaty dates back to 1980 (with the Philippines) and its most recent before the MLI was with Germany in 2016. Australia has ten tax treaties which were concluded or updated within the last ten years, 13 between ten and twenty years ago, another 13 between twenty and thirty years ago and eight more than thirty years ago.

Australia has been an active member of the OECD since 1971 and Australia’s tax treaties generally follow the OECD Model in operation at the time the treaties were negotiated. However, as a capital-importing country with a large natural resources industry, Australia’s tax treaties depart from the OECD Model in certain aspects. In particular, Australia has historically adopted a broader definition of ‘permanent establishment’ and imposed higher withholding tax rate ceilings for dividends, interest and royalties derived from Australia by non-residents.\(^5\)

In 2003, the government accepted a Board of Taxation recommendation that Australia should move towards a more residence-based treaty policy.\(^6\) The recommendation was made on the basis that Australia was moving towards a balance in investment inflows and outflows and also that a move towards residence-based treaty policy would hasten the renegotiation of several


\(^4\) These treaties are with Argentina, Austria, Belgium, Canada, Chile, China, Czech Republic, Denmark, Fiji, Finland, France, Germany, Hungary, India, Indonesia, Ireland, Italy, Japan, Kiribati, Republic of Korea, Malaysia, Malta, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Poland, Romania, Russia, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Chinese Taipei, Thailand, Turkey, United Kingdom, United States and Vietnam. In addition, Australia also has a number of airline profits agreements and tax information exchange agreements.


major tax treaties.\(^7\) Even with the shift to a residence-based treaty policy, Australia continues to maintain a number of reservations with respect to the OECD Model.

1.2.1.1. **Australia’s Reservations to the OECD Model**

1.2.1.1.1. **Article 2 (taxes covered)**

Australia has a reservation to article 2(1) regarding the application of the OECD Model to taxes on capital.\(^8\) This is because Australia does not impose a separate tax on capital.

1.2.1.1.2. **Article 5 (permanent establishment)**

Australia has three reservations in relation to article 5 (permanent establishment) which have the effect of adopting a source-country taxation approach in this regard. First, Australia has a current reservation to article 5(1) as follows:

> Australia reserves the right to treat an enterprise as having a permanent establishment in a State if it carries on activities relating to natural resources or operates substantial equipment in that State with a certain degree of continuity, or a person – acting in that State on behalf of the enterprise – manufactures or processes in that State goods or merchandise belonging to the enterprise.

The reservation is intended to protect Australia’s right to tax income from natural resources and is considered necessary as:

> Australia’s experience is that the permanent establishment provision in the OECD Model may be inadequate to deal with high value activities involved in the development of natural resources, particularly in offshore regions. For example, mobile equipment used in offshore exploration may not have the necessary geographical fixedness to be considered as permanent establishments under Article 5(1) of the Convention. Also, construction of offshore oil drilling platforms can be effected in a relatively short time.\(^9\)

In keeping with this reservation, all but one of Australia’s tax treaties (with Austria) include a provision treating the use or maintenance or operation of substantial equipment in Australia (or some variation thereof) as a permanent establishment. Ten of Australia’s tax treaties include an additional provision stipulating that the carrying on of activities relating to the exploration or exploitation of natural resources constitutes a deemed permanent establishment. Further, almost all of Australia’s tax treaties include as an additional example of a permanent establishment “an agricultural, pastoral or forestry property” or some variation thereof. This example reflects Australia’s policy of retaining taxing rights over the exploitation of Australian land for the purpose of primary production.\(^10\)

\(^7\) Above n. 5, 93-94.

\(^8\) OECD, Model Tax Convention on Income and on Capital (Full Version) (2019), C(2)-4 (hereafter referred to as ‘OECD Model’).

\(^9\) Explanatory Memorandum to the International Tax Agreements Amendment Bill (No. 2), 2002, para. 1.14.

\(^10\) Explanatory Memorandum to the International Tax Agreements Amendment Bill, 1995, p. 18; Explanatory Memorandum to the International Tax Agreements Amendment Bill (No. 1), 2007, paras. 1.45 and 2.48; Explanatory Memorandum to the International Tax Agreements Amendment Bill, 2009, para. 2.107.
Second, Australia also has a current reservation to article 5(3) to vary the 12-month requirement in the OECD Model for a building site or construction or installation project to constitute a permanent establishment. Australia uses a shorter period of six months. Third, Australia has a similar reservation to treat supervisory or consultancy activities in connection with a building site or construction or installation project of more than 183 days in any twelve-month period as constituting a permanent establishment.

1.2.1.1.3. Article 6 (immovable property)
Australia has a current reservation to article 6 (immovable property) to include rights relating to all natural resources under this article. This is consistent with Australia’s position of ensuring that all income arising from Australian natural resources is appropriately taxed in Australia.

1.2.1.1.4. Article 7 (business profits)
Australia has four current reservations in relation to article 7. First, Australia continues to maintain a reservation retaining its right to include a provision that will permit Australia’s domestic law to apply in relation to the taxation of profits from any form of insurance. This is thought to be due to concerns regarding the ability of the insurance industry to undertake large scale operations in a country without giving rise to a permanent establishment in that country and thus avoiding tax in that country on profits arising from business in that country. Under domestic law, Australia taxes non-resident insurers and reinsurers on income arising from insured property located in Australia or insured events which can only happen in Australia.

Second, Australia has a current reservation to article 7 retaining the right to include a provision which clarifies that Australia has the right to tax a share of business profits derived by a resident of another country as beneficiary of a trust estate which derives those profits from the carrying on of a business in Australia through a permanent establishment (unless the trust is treated as a company for tax purposes). This reservation is intended to preserve the applicability of Australia’s domestic transfer pricing provisions.

Third, Australia also has a current reservation to include a provision stipulating that, if the information available to the competent authority is insufficient to determine the profits attributable to the permanent establishment, the competent authority may apply domestic law to that enterprise in accordance with the available information. This reservation is intended to preserve the applicability of Australia’s domestic transfer pricing provisions.

Fourth, Australia has reserved the right to use the previous version of article 7 immediately before the 2010 update (i.e. prior to the introduction of the “functionally separate entity” approach). The Australian approach currently is to allocate the taxpayer’s actual income and expenses to a permanent establishment using functional analysis and by applying the

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11 OECD Model, C(5)-70.
12 OECD Model, C(5)-71.
13 OECD Model, C(6)-3.
14 OECD Model, C(7)-31.
15 Board of Taxation, Review of Tax Arrangements Applying to Permanent Establishments: A Report to the Assistant Treasurer (2013) 60.
17 OECD Model, C(7)-31.
18 OECD Model, C(7)-32.
19 OECD Model, C(7)-33.
The Board of Taxation was asked by the then Assistant Treasurer to investigate the impact of Australia adopting the “functionally separate entity” approach.\(^{21}\) The Board of Taxation provided its report to the then Assistant Treasurer in April 2013 and the report was publicly released by the government on 4 June 2015. The government has yet to provide a formal response to the Board’s observations and recommendations. In sum, the Board made 14 observations on the advantages and disadvantages of Australia adopting the “functionally separate entity” approach, including the more targeted option of only adopting the new approach for financial institutions.

1.2.1.1.5. Article 8 (ships and air transport)

Australia retains the right to tax profits from the carriage of passengers or cargo taken on board at one place in Australia for discharge in Australia.\(^{22}\)

1.2.1.1.6. Article 9 (associated enterprises)

Australia has a current reservation to article 9 (associated enterprises) identical to its reservation in relation to article 7 regarding the application of domestic law when there is inadequate information.\(^{23}\) As mentioned above, this reservation is intended to maintain the applicability of Australia’s domestic transfer pricing provisions.

1.2.1.1.7. Article 10 (dividend)

Australia has two current reservations in relation to article 10 (dividends). The first reservation retains Australia’s right not to include the requirement for the competent authorities to settle by mutual agreement, the mode of application of paragraph 2 of article 10.\(^{24}\) The second reservation retains Australia’s right to expand the definition of dividend to cover amounts which are subject to the same taxation treatment as income from shares under its domestic law.\(^{25}\) This reservation preserves the outcomes under Australia’s debt/equity rules which classify an instrument as debt or equity based on its economic substance rather than on its legal form.

1.2.1.1.8. Article 11 (interest)

Australia has a similar reservation to article 11 (interest) as it does for article 10 (dividends) retaining the right to broaden the definition of interest to include amounts treated the same as income from money lent under Australian domestic law.\(^{26}\)

1.2.1.1.9. Article 12 (royalties)

Consistent with the abovementioned policy regarding taxation of natural resources, Australia has three reservations to article 12 (royalties). First, Australia retains the right to tax royalties at source.\(^{27}\) Second, Australia has a reservation retaining the right to amend the definition

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\(^{20}\) Above n 15, 5.
\(^{22}\) OECD Model, C(8)-9.
\(^{23}\) OECD Model, C(9)-6.
\(^{24}\) OECD Model, C(10)-29.
\(^{25}\) OECD Model, C(10)-30.
\(^{26}\) OECD Model, C(11)-21.
\(^{27}\) OECD Model, C(12)-24.
of royalties to include payments or credits which are treated as royalties under its domestic law. Third, Australia has a reservation retaining the right to include a source rule for royalties similar to the interest source rule in article 11(5) of the OECD Model to address a perceived gap in the OECD Model.

1.2.1.10. Article 21 (other income)
Australia has a reservation to article 21 to maintain its right to tax income arising from sources in Australia.

1.2.1.11. Article 24 (non-discrimination)
Australia has a reservation to article 24 to maintain its right to propose amendments to ensure that Australia can continue to apply certain domestic law provisions relating to withholding tax collection.

1.2.1.12. Article 25 (mutual agreement procedure)
Australia has a reservation to article 25 to maintain its right to exclude a case presented under article 25 from the scope of paragraph 5 to the extent that any unresolved issue involves the application of Australia's general anti-avoidance rules.

1.2.2. Domestic and treaty-based doctrines, provisions and practices before the MLI

1.2.2.1. Purpose of tax treaties as set out in preamble
All but one of Australia’s tax treaties concluded prior to the MLI define the purpose of the treaty as the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. The only exception is the German treaty which was signed on 12 November 2015, prior to the MLI but two months after the publication of the BEPS Final Reports. The preamble to the German treaty defines the purpose of the treaty as “the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty shopping arrangements ...)”.

1.2.2.2. Tax treaty shopping

1.2.2.2.1. Domestic anti-avoidance provisions
Prior to the MLI, Australia had limited specific anti-avoidance provisions in relation to treaty shopping. Since 1 July 1990, Australia has had controlled foreign company (CFC) rules whereby Australian companies with a controlling interest in a foreign company are liable to pay the

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28 Id.
29 OECD Model, C(12)-25.
Australian corporate tax rate on income of the controlled foreign company. Since 2004, Australia has applied (relatively limited) “foreign hybrid” provisions which apply transparent treatment to certain outbound investments in limited partnerships and other entities which are treated as companies for Australian domestic law purposes but flow-through entities in foreign jurisdictions (including specific provisions relevant to US LLCs) to prevent some foreign-domestic entity mismatches. However, Australia’s general anti-avoidance rule contained in Part IVA of the Income Tax Assessment Act 1936 can address treaty shopping. Section 4(2) of the International Tax Agreements Act 1953, the Act which gives Australia’s tax treaties the force of law, stipulates that tax treaties override Australia’s domestic tax law except in the case of the general anti-avoidance rule. The Australian Taxation Office (ATO) adopts the view that the general anti-avoidance rule can apply to treaty shopping. However, as recognised by the ATO, the difficulty in applying Part IVA to treaty shopping is the requirement in the legislation that a sole or dominant purpose of the scheme was to obtain a tax benefit. More recently, Australia introduced the “Multinational Anti-Avoidance Law” (MAAL) which targets schemes for the avoidance of an Australian permanent establishment. The MAAL adopts a lower “principal purpose test”. The MAAL only applies to significant global entities with annual global income in excess of $1 billion. It was introduced in 2015 and applied from 1 January 2016. Several companies, such as Google and Facebook, have publicly stated that they would restructure their operations in response to the MAAL. The ATO has estimated that as a result of the MAAL an additional $7 billion in sales revenue will be reported in Australia in each year.

1.2.2.2. Treaty interpretation and beneficial ownership concept

As Australia is an OECD member, it is generally accepted that the OECD Model Commentary may be relevant in interpreting Australia’s tax treaties. The terms ‘beneficial owner’ or ‘beneficially entitled’ are used in Australia’s tax treaties but neither expression is defined in any Australian tax treaty and the meaning of these terms for treaty purposes has not been considered by the Australian courts. As such, it has been argued that the domestic law or ordinary meanings of these terms do not prevent treaty shopping scenarios.

1.2.2.2.3. Treaty based anti-avoidance provisions

Some of Australia’s more recently negotiated tax treaties (Finland, Japan, Mexico, New Zealand, Norway, South Africa, United Kingdom) include a “main purpose” provision in the dividend, interest and royalty articles to deny treaty relief where the main purpose or one of the main purposes of the transaction was to obtain the treaty benefit. This type of provision was contemplated in the OECD Model Commentary to article 1 between 2003 and

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Australia’s tax treaty with China includes a specific anti-abuse provision in article 4(5) which states that “if a company has become a resident of a Contracting State for the principal purpose of enjoying benefits under this Agreement, that company shall not be entitled to any of the benefits of Articles 10, 11 and 12.” A specific anti-treaty shopping provision is also contained in article 10(10) of Australia’s tax treaty with Japan. The provision was inserted at Japan’s request to ensure that residents of third countries are not entitled to treaty benefits through the use of preferred shares or similar interests in a back-to-back arrangement. Specific limitation on benefits provisions are also included in some of Australia’s tax treaties such as Chile (article 27), Germany (article 23), Russia (article 23), Japan (article 23) and the United States (article 16).

1.2.2.3. Responses to other tax treaty abuses

Many of Australia’s tax treaties address other tax treaty abuses through measures such as the inclusion of minimum holding periods in relation to non-portfolio intercompany dividends. These measures are discussed further in section 1.3.3. Hybrid mismatch arrangements

Australia passed legislation to introduce rules to target hybrid arrangements on 16 August 2018. The rules came into effect on 1 January 2019. Broadly, the rules target payments made by an entity which result in duplicate deductions for the same expense or a deduction in one jurisdiction, but no corresponding income included in any jurisdiction. The rules also apply to imported hybrid mismatches whereby income is not subject to tax either directly or indirectly due to hybrid outcomes elsewhere in a group of entities or a chain of transactions. The new provisions also include a targeted integrity rule which prevents offshore multinational companies from replicating a hybrid mismatch outcome by routing financing into Australia through an interposed entity in a low or no-tax jurisdiction (≤ 10% tax rate).

1.2.2.4. Mutual Agreement Procedure (MAP)

Many of Australia’s tax treaties include a provision regarding MAP. A review of the ATO’s management of transfer pricing matters has found that, in general, stakeholders are satisfied with the MAP and Advance Pricing Arrangement (APA) processes in Australia. The review highlighted concerns as to the lengthy nature of the process and the onerous documentation requirements. Historically, Australia has had a successful MAP program with only a handful of cases not being resolved. The average resolution time for MAP cases has been two years. The ATO released its revised guidance on MAP in October 2018 and has committed to the
OECD’s two-year time limit to finalise the MAP. The following table summarises Australia’s MAP caseload at the end of 2017:

<table>
<thead>
<tr>
<th></th>
<th>Started pre 1/1/16</th>
<th>Started in 2016</th>
<th>Started in 2017</th>
<th>Closed in 2017</th>
<th>Outstanding at 31/12/17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer pricing cases</td>
<td>21</td>
<td>12</td>
<td>8</td>
<td>14*</td>
<td>27</td>
</tr>
<tr>
<td>Other cases</td>
<td>10</td>
<td>8</td>
<td>10</td>
<td>11*</td>
<td>17</td>
</tr>
</tbody>
</table>

* 9 of the closed cases were cases started before 1/1/16
* 3 of the closed cases were cases started before 1/1/16

1.3. Direct impact of the BEPS Action Plan and the MLI

1.3.1. Signature, ratification, entry into force, and entry into effect

Australia was one of the original 68 signatories to the MLI on 7 June 2017. In its consultation prior to signing the MLI, the Australian Treasury declared that “signing and adopting the MLI to the widest extent possible would be consistent with Australia’s strong track record on tackling multinational tax avoidance”. In its analysis of Australia’s national interest of signing the MLI, the Australian Treasury noted that “the proposed treaty action would reinforce Australia’s commitment to addressing tax avoidance and would help ensure international consistency in the implementation of the relevant BEPS recommendations. The proposed treaty action would also help protect Australia’s corporate tax revenue base from BEPS practices.” The MLI is expected to result in a net revenue gain for Australia but the estimated benefit was considered unquantifiable as the ultimate outcomes would depend on the adoption choices made by other jurisdictions and the behavioural responses by taxpayers.

The MLI was passed into domestic law on 24 August 2018. Australia deposited the instrument of ratification with the OECD Depository on 26 September 2018, in time to clear the three months required for the MLI to enter into force from 1 January 2019 (article 34). As such, the entry into effect for each particular CTA will be 1 January 2019 at the earliest in respect of withholding taxes and 1 July 2019 in respect of all other taxes (article 35), depending on the counter-party ratification.

46 Id. para. 45.
1.3.2. Covered tax agreements (CTA)

At the time of signing the MLI, Australia listed 43 of its 44 comprehensive tax treaties as CTAs for the purpose of article 2 (i.e. 98%). The only treaty which was not included at that time was the recently renegotiated tax treaty with Germany which was concluded after the publication of the final BEPS Reports and includes the MLI minimum standards. However, in its instrument of ratification with the OECD Secretary-General on 26 September 2018, Australia only listed 42 of its 44 tax treaties which were in force at that time. The tax treaty with Chinese Taipei was excluded as it is an agreement between the Australian Commerce and Industry Office and the Taipei Economic and Cultural Office and therefore a document of less than treaty status.

Of Australia’s 42 CTAs, 32 will be amended by the MLI as the other contracting jurisdiction has signed the MLI and listed the agreement as a CTA (i.e. 76% of Australia’s CTAs will be amended by the MLI). The counterparties for 11 of the 32 CTAs have already deposited the instrument of ratification and the date of effect of the MLI’s amendments is known.

Australia recently signed a new tax treaty with Israel on 28 March 2019. This treaty is not yet in force but will not be listed as a CTA as it incorporates the MLI minimum standards. It is expected that future Australian tax treaties will incorporate the MLI minimum standards and will not be listed as a CTA.

1.3.3. Applicable provisions of the MLI

Australia’s stated position with regard to the MLI is to adopt the minimum standards and as many of the optional articles as possible and make limited use of the MLI reservation system. The responses to the specific questions are summarised in the following table.

<table>
<thead>
<tr>
<th>MLI Provision</th>
<th>Australian Position</th>
</tr>
</thead>
</table>
| 1. Preamble language in article 6(3) | – Yes, adopted.  
– Reasoning: Australia’s adoption of article 6 to the fullest extent possible will ensure that the intention to address BEPS concerns will be considered when interpreting a CTA.  
– 21 of Australia’s 32 CTAs will be amended. |

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50 Id. 43.
54 TCP, above n 44, para. 22.
55 The affected CTAs have been determined using the OECD’s MLI Matching Database.
<table>
<thead>
<tr>
<th>MLI Provision</th>
<th>Australian Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Treaty abuse (article 7)</td>
<td>– Adopted PPT in article 7(1) – PPT is consistent with Australia’s preferred tax practice.</td>
</tr>
<tr>
<td></td>
<td>– Adopted the discretionary benefits rule in article 7(4). This will amend 10 CTAs.</td>
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<tr>
<td></td>
<td>– Not chosen to apply SLOB and has not indicated that it would agree to allow the SLOB to be applied by another jurisdiction.</td>
</tr>
<tr>
<td></td>
<td>– Pursuant to article 7(17)(a), Australia identified provisions described in article 7(2) in 10 of 32 CTAs that were not subject to a reservation under article 7(15)(b).</td>
</tr>
<tr>
<td>3. Other treaty abuse provisions (arts. 8-10, 12-14)</td>
<td>– Article 8 adopted without reservation. Australia hopes to standardise the holding period rules for non-portfolio intercorporate dividends and noted that many of its tax treaties already include minimum holding periods. Almost 50% (20 of 43) of Australia’s treaties contain provisions described in article 8(1), along with the newly signed German treaty. However, only eight CTAs will be updated. Eight will not be updated due to a reservation under article 8(3)(a) (four did not sign the MLI).</td>
</tr>
<tr>
<td></td>
<td>– Article 9 adopted but Australia will preserve existing bilateral rules that apply to the disposal of comparable interests (non-share interests) in land-rich entities. Australia notified that all CTAs contained a provision described in article 9(1) pursuant to article 9(7). No notifications were made pursuant to article 9(8) so article 9(4) does not apply to any CTAs. As a large number of CTAs already contain a general or detailed reference to comparable interests, Australia reserved the right for article 9(1)(b) not to apply to 19 CTAs. Overall, article 9(1) will update 17 CTAs.</td>
</tr>
<tr>
<td></td>
<td>– Article 10 not adopted because such a rule is not included in any of Australia’s tax treaties and further analysis of the potential impacts in an Australian context is required.</td>
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<tr>
<td></td>
<td>– Article 12 not adopted but Australia will consider adopting these rules bilaterally to enable clarification regarding their application in practice.</td>
</tr>
</tbody>
</table>

57 TCP, above n 44, 15
58 Argentina, France, Mexico, New Zealand, Norway, Romania, Russia and South Africa.
59 Argentina, Belgium, Chile, China, Fiji, France, India, Indonesia, Ireland, Japan, Mexico, Netherlands, New Zealand, Poland, Russian Federation, Slovak Republic, Spain. art. 9(1)(a) will apply in all but two of those treaties (Belgium and China have made a reservation under article 9(6)(b)). art. 9(1)(b) will not apply to nine of those treaties because of the reservation made by Australia or both (Argentina, Chile, France, Ireland, Japan, Mexico, New Zealand, Russian Federation and Slovak Republic).
<table>
<thead>
<tr>
<th>MLI Provision</th>
<th>Australian Position</th>
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<tbody>
<tr>
<td></td>
<td>Article 13 adopted but Australia is preserving existing applicable bilateral rules.</td>
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<td></td>
<td>Article 14 adopted but Australia is preserving existing bilateral rules that deem a PE to exist in relation to offshore natural resource activities.</td>
</tr>
<tr>
<td>4. Hybrid mismatch arrangements (arts. 3 &amp; 4)</td>
<td>Article 3 adopted but Australia is preserving existing corresponding bilateral detailed rules where appropriate. Adoption is consistent with preferred treaty practice.</td>
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<tr>
<td></td>
<td>Article 4 adopted but not the rule that would allow the two tax administrations to grant treaty benefits in the absence of such an agreement. Adoption is consistent with existing treaty practice.</td>
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<tr>
<td>5. Arbitration (arts. 18-26)</td>
<td>Australia has adopted independent and binding arbitration subject to the following conditions:</td>
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<tr>
<td></td>
<td>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;</td>
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<tr>
<td></td>
<td>Breaches of confidentiality by taxpayers or their advisors will terminate the arbitration process; and</td>
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<tr>
<td></td>
<td>Disputes involving the application of general anti-avoidance rules will be excluded from the scope of arbitration. Adoption is consistent with Australia’s general commitment to implement binding MAP arbitration as evidenced by recently concluded treaties. 15 of 32 CTAs will be amended.</td>
</tr>
<tr>
<td>6. Provisions not adopted</td>
<td>Although not quite adopting maximum standards, Australia has adopted far more than the minimum standards. This is not surprising given that Australia was such a key negotiator in the development of the MLI. Provisions not adopted:</td>
</tr>
<tr>
<td></td>
<td>Article 5 was not adopted on the basis that Australian treaties already provide for the “credit method” to deal with double taxation. It seems unlikely that this choice will be reversed.</td>
</tr>
<tr>
<td></td>
<td>Article 10 was not adopted on the basis that Australia should await further analysis to see how the provision would apply in an Australian context. It appears that there is currently no public analysis on the issue.</td>
</tr>
<tr>
<td></td>
<td>Australia did not adopt article 12 on the basis of responses to the public consultation, which took the view that the MAAL sufficiently expanded the PEs concept for incoming investment. The provisions have been included in the recently negotiated German and Israel treaties and so it is reasonable to conclude that Australia will continue to apply the content of article 12 going forward.</td>
</tr>
</tbody>
</table>
7. **Significance of reservations**

Australia's reservations on the content of the MLI are not significant. The key reservations are to article 5, article 10 and article 12.

- As discussed above, the reservation to article 5 was made as Australia’s treaties provided for the credit system.
- The reservation to article 10 was made on the basis that none of Australia’s existing treaties dealt with the issue and so further analysis was required.
- The reservation to article 12 appears to have been made in response to industry consultation but does not appear to have made a durable impression on Australia’s general policy position.

Policy choices underlying the reservations are not included in the 2019 Peer Review Report but have been included in the Treasury Consultation Paper cited at footnote 44.

8. **Proportion of provisions in CTAs modified**

To date, it appears that the MLI will update approximately 230 provisions in 32 treaties. Assuming about 30 articles per treaty, that is approximately 25% of all provisions subject to the MLI or 17% of all provisions to which Australia is a party.

### 1.4. Indirect impact of the BEPS Action Plan and the MLI

Australia signed bilateral tax treaties with Germany on 12 November 2015 and Israel on 28 March 2019. Although signed before the MLI on 7 June 2017, the German treaty was not covered by the MLI on the basis that it already included the G20/OECD updates.62 There is no public indication of any other treaties that are currently being negotiated.

Australia has generally embraced the MLI updates in its subsequent negotiations, having included some provisions which were reserved from its instrument of deposit (specifically article 12). It continues to embrace binding arbitration except in respect of matters to the extent that they are subject to its GAAR (including the newly enacted MAAL and DPT).63 Although it is generally embracing the new approach to PEs, it retains a reservation to ensure that multinational mining enterprises will have a taxable presence in Australia (where they are carrying on activities relating to natural resources or operating substantial equipment with a certain degree of continuity).64

It is expected that the MLI will remain a third layer of international tax law. The ATO is

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63 Refer to the new OECD Model Tax Convention Commentaries on art. 25, para 103.

64 Refer to the new OECD Model Tax Convention Commentaries on art. 5, para 188.
working to produce consolidated tax treaties but there has not been any indication that affected treaties will be renegotiated outside the usual treaty negotiation process.

Australia's policy with regard to the MLI appears to be broadly consistent with its policy regarding the 2017 version of the OECD Model. The only inconsistency may be in the non-adoption of article 12 of the MLI but even then, the non-adoption was only because Australia wished to clarify the practical application of the provision bilaterally.

2. Part Two: Practical Implementation of Provisions of the MLI

2.1. Entry into force and legal value of the MLI

2.1.1. Procedure implemented in order to implement the MLI

Australia actively participated in the development of the MLI. After its release on 24 November 2016, Treasury held a public consultation from 19 December 2016 to 6 February 2017 in which it released a consultation paper setting out Australia's proposed approach and its initial adoption choices, and it invited all interested parties to make submissions on the potential impacts of Australia becoming a party to the agreement. The consultation received eight submissions. As discussed above, Australia adopted the MLI to the widest possible extent. The main impact of the consultation appears to be a change in Australia's position on article 12 (to not adopt it).

Tax treaties are incorporated into, and given primacy over, domestic laws by section 4(1) of the International Tax Agreements Act 1953 (ITAA53). Pursuant to section 4(2) ITAA53, they are subject to the operation of Australia's general anti-avoidance rule (GAAR). On and after the date of entry into force, a provision of an agreement mentioned in section 5(1) ITAA53 has the force of law according to its tenor.

The MLI was incorporated into Australian domestic law by the Treasury Laws Amendment (OECD Multilateral Instrument) Act 2018 (passed 24 August 2018), which had the effect of adding the MLI to the list of agreements mentioned in section 5(1) ITAA53. The instrument of ratification was deposited with the OECD Depositary on 26 September 2018, in time to clear the three-month window to come into force on 1 January 2019.

According to the TCP, consistent with the current practice, the Australian government would not produce consolidated versions of each modified treaty. However, this approach was deeply criticised in the consultation process. Consequently, the tax authority (ATO) is preparing synthesised texts for the majority of Australia's tax treaties which have been

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67 TCP above n 44, para 26.
68 TCP, above n 44, see submissions from Chartered Accountants of Australia and New Zealand, Corporate Tax Association and KPMG.
modified by the MLI.\footnote{ATO, Multilateral Instrument, available at: https://www.ato.gov.au/General/International-tax-agreements/In-detail/Multilateral-Instrument/ (last accessed 4 July 2019).} A synthesised text is for educational purposes only and does not constitute a source of law. However, when a taxpayer makes a mistake as a result of following information from the ATO that turns out to be incorrect or misleading, the ATO will take that into account when determining what action it should take. Six synthesised texts have been published to date. It appears that Australia will, where possible, prepare the text in consultation with the competent authority of the other jurisdiction in order to produce a text that represents their shared understanding of the modifications made by the MLI.\footnote{Refer to the general disclaimers of the synthesised texts for Japan, New Zealand, Poland, the Slovak Republic and the United Kingdom.} The synthesised text for the Singapore agreement appears to have been made unilaterally. The OECD’s “MLI Matching Database” does not have any legal value in Australia.

### 2.1.2. Legal value of the MLI

As discussed above, the MLI is given the force of law by enacting domestic legislation. The MLI is given primacy over existing domestic legislation through the operation of section 4(1) ITAA53. However, it is subject to Australia’s general anti-avoidance rule (GAAR) including, the multinational anti-avoidance law (MAAL). As it is part of domestic law, the MLI can be overridden by subsequent domestic legislation. Australia is a dualist country.

### 2.2. Interpretation Issues

#### 2.2.1. Interpretation of the MLI

There is nothing that has been publicly identified in the manner in which the MLI was implemented into domestic law that indicates that the meaning of the text it incorporates alongside (or, arguably, into) existing treaties should be interpreted, from a methodological perspective, differently to any other treaty instruments entered into by Australia.

#### 2.2.2. Interpretation of tax treaties generally

As noted above, the MLI has been incorporated into Australian domestic law as a schedule to the International Tax Agreements Act 1953. Australia’s approach to statutory interpretation tends to favour the ordinary meaning of the statutory text\footnote{Commissioner of Taxation v Consolidated Media Holdings (2012) 250 CLR 503; Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 at 47.} within the specific framework given for interpreting the relevant instrument. The context (including the relevant legislative history) is considered at the first stage\footnote{SZTAL v Minister for Immigration and Border Protection [2017] HCA 34 [14].} of interpreting the ordinary meaning of the text, as well when ensuring that in considering the context and purpose of the provisions external to the text itself.
words (other than in cases of manifest error) have not impermissibly\textsuperscript{73} replaced the actual statutory text.

In respect of treaties, it is generally accepted that interpretation starts from the text\textsuperscript{74} of the relevant treaty instrument read in light of the rules prescribed by the Acts Interpretation Act 1901, the Vienna Convention of the Law of Treaties 1969 (VCLT)\textsuperscript{75} and the rule in section 4(2) of the International Tax Agreements Act 1953 that to the extent domestic law is inconsistent with the terms of a treaty, the rule in the treaty shall prevail (unless the General Anti-Avoidance Rules in Part IVA of the Income Tax Assessment Act 1936 have been applied).

Australian case law gives great weight to the rules of interpretation in article 31 of the VCLT. While Australian law does favour the text as written, it is commonly acknowledged that the nature of treaty instruments requires greater weight to be given to context and purpose when applying the words of a treaty. Consistent with article 32 of the VCLT, when the meaning resulting from the application of article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse is frequently had to supplementary materials.\textsuperscript{76} It is likely a question will arise on how far this recourse to supplementary materials extends in the context of a CTA. For example, the Base Erosion and Profit Shifting Action Item Reports are likely article 32 material under the Vienna Convention but are broad and not necessarily focussed on the text of the MLI and are not directly related at all to any specific CTA.\textsuperscript{77} As such, their usefulness in determining the meaning of any particular article of a CTA is uncertain.

From a methodological perspective, the application of Australia’s usual rules as to the interpretation of treaties gives rise to a specific (and relatively localised) concern. There has been a recent decision of the Full Federal Court in \textit{Satyam Computer Services Limited v Commissioner of Taxation} [2018] FCAFC 172 (\textit{Satyam}), and from which Australia’s High Court (the ultimate appellate Court) refused to hear an appeal as there was “no reason to doubt the correctness of the Full Court’s decision”,\textsuperscript{78} that Australia’s treaties can operate to modify the domestic law to impose primary tax as well as to protect a resident of a contracting state from taxation. The converse proposition, that treaties act as a shield and not as a sword, was rejected as not being compatible with the wording of a particular treaty provision (which deemed items of income to have an Australian source notwithstanding they are not so sourced under domestic law) and the manner in which the treaty was incorporated into domestic law as a schedule to the International Tax Agreements Act 1953. The extent to which this affects treaty provisions more broadly than deemed source provisions, including the MLI, is uncertain.

A narrow interpretation of the principles in \textit{Satyam} would be that it only applies to specific rules providing for a deemed source of a particular income type (usually, relevantly, royalties) which does not arise under the text of the MLI. One broad interpretation of the principles in \textit{Satyam} would be that where a deemed PE arises (including under an aggregation of time

\begin{itemize}
\item \textsuperscript{73} \textit{Taylor v Owens Strata Plan – Strata Plan No 11564} (2014) 253 CLR 531, 548 – 549.
\item \textsuperscript{74} \textit{Commissioner of Taxation v Resource Capital Fund IV LP} [2019] FCAFC 51 [68] – [70].
\item \textsuperscript{75} Australian Treaty Series [1974 No 2].
\item \textsuperscript{76} \textit{Thiel v Federal Commissioner of Taxation} (1990) 171 CLR 338, 344, 349-350, 356-7; \textit{Federal Commissioner of Taxation v SNF (Australia) Pty Ltd} (2011) 193 FCR 149, [113]-[120].
\item \textsuperscript{77} Given some are explicitly referred to in the Explanatory Statement and the preamble to the MLI states that the parties to the Convention, “Welcoming the package of measures developed under the OECD/G20 BEPS project... have agreed as follows”.
\item \textsuperscript{78} [2019] HCASL 87.
\end{itemize}
periods resulting from article 14(1) of the MLI in a Covered Tax Agreement), Australian domestic taxation can be imposed even though the usual domestic laws, which require gains of a non-resident to have an Australian source at domestic law before tax can be imposed, is satisfied. Against such a construction, Australia has historically interpreted deeming rules narrowly\(^{79}\) and applies each deeming provision only for the specific purpose intended and has interpreted article 7 generally as only providing a permissive\(^ {80}\) power to tax.

2.2.3. Interpretation of earlier tax treaties (pre-MLI)

Regarding the interpretation of treaties entered into before and after the MLI, it is likely there will be a difference between the relevance of the MLI to interpreting pre-existing treaties and subsequent treaties. In respect of treaties arising before the MLI was signed, where both contracting states party to a pre-existing treaty are signatories to the MLI that the MLI, including its preamble text, would be an article 31(3) material as a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. Given Australia’s approach to statutory interpretation, this is significant as article 31(3) mandates that such subsequent agreements be taken into account (as opposed to article 32 materials to which recourse may be had).

2.2.4. Interpretation of later tax treaties (post-MLI)

By contrast, there is no binding rule in Australian domestic law or under the VCLT that seemingly requires a decision maker to consider the terms of the MLI when interpreting a treaty entered into after it has been signed. Quite probably, at its highest, it could be said that the MLI forms part of the statutory context\(^ {81}\) within which subsequent treaties should be interpreted. Australia has excluded recently negotiated treaties (e.g. Germany and Israel) from the application of the MLI on the basis that they contain provisions equivalent to those that may be incorporated into MLI-affected treaties. This would, potentially, support a contextual inference that the MLI was an agreement made between the parties in connection with the conclusion of the treaty.\(^ {82}\) For the same reasons, it is doubtful that the MLI should be taken as a supplementary means of interpretation under article 32 unless it could be said its existence was relevant to the circumstances of the latter treaty’s conclusion.

One potential manner in which the provisions of article 6 of the MLI (Purpose of a Covered Tax Agreement) may be effectively included in subsequent treaties – if not done so explicitly by the contracting states – would be by reference to historical context. Recent scholarship indicates that the League of Nations model tax treaties, the forerunner of the OECD Model treaties which are most commonly implemented by Australia, arose as a response to and in

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82 Art. 31(2)(a) of the VCLT.
order to prevent both double non-taxation and double taxation. Accordingly, it is possible that the combination of the historical context of the purpose of double tax treaties broadly, coupled with the recent context of article 6 of the MLI, may be relevant to the interpretation of any tax treaties entered into after the MLI was signed. However, any particular case would turn on the terms of the relevant future treaty.

2.3. Tax planning and tax administration after the BEPS Action Plan and the MLI

Informally, the reaction to the MLI within the Australian tax community has been relatively calm (with the exception of the residency changes in article 4). Australia has a relatively small (44 pre-MLI comprehensive tax treaties) network of income tax treaties. Australian tax planning strategies are usually less reliant on entitlement to treaty benefits than comparable European tax planning strategies and focus on domestic law (e.g. has the non-resident derived income with an Australian source?) including historically generous safe harbours for thin capitalisation (i.e. 3:1 debt to equity, subsequent reduced to 1.5:1) and debt-equity classifications which are more likely to be adversely impacted by the recently enacted anti-hybrid rules in Division 832 of the ITAA 1997.

The most obvious change to Australian tax planning as a result of the MLI would be, for Covered Tax Agreements, the PPT which is likely to be the final nail in the coffin of simply interposing a treaty jurisdiction entity with little economic substance between Australia and a non-treaty country to benefit from reduced dividend and royalty withholding tax rates (i.e. a dog-leg structure). For taxpayers with tax risk governance procedures, such structures are relatively uncommon due to the risk of the domestic GAAR or transfer pricing disputes and the fact that most Australian tax deduction generating tax planning utilised interest (whose treaty rate is generally equally to the domestic rate of 10% and may often be deferred until paid), entity mismatches, preferential taxation of capital gains and returns of capital and other domestic measures.

The most significant non-signatory, from Australia's perspective, is the United States which is one of Australia's largest trading partners. However, the absence of MLI compliant articles in the Australia-United States DTC is likely an insignificant contributor to tax planning changes between US-Australian enterprises when compared to the US domestic Tax Cuts and Jobs Act 2017.

Quite high levels of optimism have been expressed by taxpayers in respect of fiscally transparent entities (article 3) and the potential for mandatory binding arbitration under Part VI. The areas of most concern are the dual resident provisions in article 4 and the PPT.

Taxpayer perspectives

In the context of Australia’s approach to both legislative drafting and statutory interpretation, the Principal Purposes Test is often viewed reflexively as creating legal uncertainty. The most common substantive legal uncertainty arises from the need to interpret the phrase “a principal purpose”. That uncertainty is in part in contradistinction to the domestic GAAR with has been judicially interpreted and accepted as requiring a “sole or dominant” purpose

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84 Division 974 of the ITAA 1997.
of obtaining a tax benefit. However, as the PPT has a more limited scope than the domestic GAAR in terms of tax benefits it targets, and the domestic GAAR overrides treaty benefits in any event, the PPT is probably no less uncertain in practice than the relevant tests in the Australian GAAR.

More substantively, concerns have been raised by the new treaty dual residence rules in article 4 of the MLI. This is partly in the context of how a recent Australian case (Bywater Investments Limited v Commissioner of Taxation [2016] HCA 45) related to abusive offshore arrangements controlled by a natural person from Australia which the Australian Taxation Office has taken as providing broad principles of general application to all companies (including substantive trading businesses). Broadly, this interpretation sees Australia’s residency tests – which requires that an entity carries on business in Australia and is centrally managed and controlled from Australia – more easily satisfied as an entity will carry on business where it is centrally managed and controlled. As where an entity is centrally managed and controlled can only be answered based on the facts of a particular case by reference to “high level decisions that set the company's general policies”, this increases the scope of dual resident foreign companies with Australian central management and control to arise. As under article 4 dual residents will not be entitled to any treaty benefits absent an agreement between the competent authorities, this could have very significant impact on Australian outbound and inbound investment.

Further, there is a concept of a prescribed dual resident in Australian domestic law. This definition includes a resident of Australia and another country that is allocated to the treaty partner under a tiebreaker provision and a company that is resident of Australia and another country and has its central management and control in another country. In particular, if an entity is a prescribed dual resident, it cannot broadly be a member of an Australian tax consolidated group. Trying to determine, absent a determination by the competent authorities, whether a dual resident of Australia and a state with a Covered Tax Agreement is a prescribed dual resident, is an interpretative challenge (albeit one that could be addressed through amending the relevant domestic law definition). On the positive side, the confusion caused by article 4 has led to a rapid increase in bilateralism at least between Australia and New Zealand whose revenue authorities released a joint MLI Article 4(1) Administrative Approach providing for self-assessment of a place of effective management where a taxpayer satisfies certain eligibility criteria (e.g. for small to medium enterprises) as such entities may often have elements of control in both countries.

The hybrid provisions in article 3 have been seen as reducing and increasing complexity depending on a taxpayer’s particular position. Australia, somewhat uniquely, treats limited partnerships as companies. A series of (still ongoing) cases and administrative rulings have debated whether taxing that deemed company is permissible in the context of particular treaties where the income is beneficially owned by residents of a treaty jurisdiction.

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85 Taxation Ruling TR 2018/5.
86 Taxation Ruling TR 2018/5, [7].
88 S. 6(1) of the ITAA 1936.
90 Division 5A of the ITAA 1997.
Currently, in a matter subject to an appeal to the High Court, the analysis is that the limited partnership is assessable separately from the partners and often without treaty benefits and required to pay the tax assessed, although the Commissioner would be barred from enforcing a judgment against a partner that was entitled to treaty benefits. Where the provisions of article 3(1) of the MLI are available, this may provide greater certainty for inbound investors that they are positively entitled to treaty benefits and protected from taxation in the hands of the deemed company for Australian tax purposes.

Article 3 of the MLI also must be considered alongside Australia’s implementation of BEPS Action Item 2 compliant (and beyond) anti-hybrid rules in Division 832 of the ITAA 1997 effective from 1 January 2019. Division 832 is mechanically complex, and the extent to which article 3 deems income derived through an entity an MLI treaty partner considers transparent to be income of another entity, may potentially alter the Division 832 anti-hybrid analysis for a taxpayer’s structure and may require detailed consideration.

The most optimism expressed by taxpayers in respect of the MLI is the potential for mandatory binding arbitration for Mutual Agreement Procedure matters which cannot be resolved by agreement between the competent authorities. A number of inbound and outbound investors have expressed interest in such arbitration as a path to resolving instances of double tax which are currently unavoidable costs of doing business. It is also hoped that the existence of the referral mechanism itself will encourage competent authorities to proactively resolve such disputes before the time period for referral expires. Where Covered Tax Agreements are shown to provide a realistic path to resolution of double tax imposed between two contracting states via arbitration, it is not unlikely that Australian inbound and outbound investors in some spaces may actively seek to structure into a Covered Tax Agreement for access to the arbitration procedure.

Administrative perspectives
The Australian Taxation Office has an internal treaties consultation unit who has taken the lead in issues relating to the MLI (i.e. the bilateral approach to article 4 issues with New Zealand). The unit was asked to provide input for this report but did not participate.

Textual uncertainty
As previously noted, some initial legal uncertainty stems in part from the matching process required to be undertaken to determine if a treaty has been affected by the MLI. The Australian Treasury has historically maintained a detailed and publicly accessible online compendiums of treaties. However, given the scope of the task involved, the actual process of providing consolidated texts of Australia’s affected treaties initially fell entirely to private publishers. As at the date of this draft, it has not resulted in any published consolidated treaty texts. The Australian Taxation Office has since begun publishing consolidated texts as described above.

92 Commissioner of Taxation v Resource Capital Fund IV LP [2019] FCAFC 51 (an application for special leave to the High Court was refused).