

OECD releases Australia peer review report on implementation of Action 14 minimum standard

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Executive summary

On 30 August 2018, the Organisation for Economic Co-operation and Development (OECD) released the fourth batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standard under Action 14 on improving tax dispute resolution mechanisms.¹ Australia was among the assessed jurisdictions in the fourth batch.² Australia requested that the OECD also provide feedback concerning their adoption of the Action 14 best practices, and therefore, in addition to the peer review report, the OECD has released an accompanying best practices report.³

Overall the report concludes that Australia meets most of the elements of the Action 14 minimum standard. In the next stage of the peer review process, Australia's efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored.

Detailed discussion

Background

In October 2016, the OECD released the peer review documents (i.e., the Terms of Reference and Assessment Methodology) on Action 14 on *Making Dispute Resolution Mechanisms More Effective*.⁴ The Terms of Reference translated

the Action 14 minimum standard into 21 elements and the best practices into 12 items. The Assessment Methodology provided procedures for undertaking a peer review and monitoring in two stages. In Stage 1, a review is conducted of how a member of the Inclusive Framework (IF) on BEPS implements the minimum standard based on its legal framework for Mutual Agreement Procedure (MAP) and how it applies the framework in practice. In Stage 2, a review is conducted of the measures the member of the IF on BEPS takes to address any shortcomings identified in Stage 1 of the peer review.

Both of these stages are desk-based and are coordinated by the Secretariat of the Forum on Tax Administration's (FTA) MAP Forum.⁵ In summary, Stage 1 consist of three steps or phases:

- (i) Obtaining inputs for the Stage 1 peer review
- (ii) Drafting and approval of a Stage 1 peer review report
- (iii) Publication of Stage 1 peer review reports

Input is provided through questionnaires completed by the assessed jurisdiction, peers (i.e., other members of the FTA MAP Forum) and taxpayers. Once the input has been gathered, the Secretariat prepares a draft Stage 1 peer review report of the assessed jurisdiction and sends it to the assessed jurisdiction for its written comments on the draft report. When a peer review report is finalized, it is sent for approval of the FTA MAP Forum and later to the OECD Committee on Fiscal Affairs' to adopt the report for publication.

Minimum standard peer review reports

The report is divided into four parts, namely:

- (i) Preventing disputes
- (ii) Availability and access to MAP
- (iii) Resolution of MAP cases
- (iv) Implementation of MAP agreements

Each part addresses a different component of the minimum standard.

The report includes 21 recommendations relating to the minimum standard. In general, the performance of Australia with regard to MAP has proven to be satisfactory in their respective reports. Overall, Australia meets most of the elements of the Action 14 minimum standard.

Preventing disputes

A.1 - Include Article 25(3), first sentence, of the OECD Model Tax Convention in Tax Treaties

Out of Australia's 53 tax treaties, 22 contain a provision equivalent to Article 25(3) first sentence, which requires the competent authority of their jurisdiction to endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties.

Of the 31 treaties identified above as missing an equivalent provision, 22 of these have been listed as covered tax agreements (CTAs) by Australia for the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI), however for none of them did it make a notification that they do not contain the provision equivalent to Article 25(3) first sentence. In this respect, Australia has reported that it is likely to reconsider the notifications made prior to depositing its instrument of ratification, or should request the inclusion of the provision via bilateral negotiations. In addition, Australia should maintain its intention to include the required provision in all future tax treaties.

A.2 - Provide roll-back of bilateral Advance Pricing Agreements (APAs) in appropriate cases

Australia is authorized to enter into bilateral APAs as well as unilateral and multilateral APAs, and has implemented an APA program. Australia has reported that it is possible to obtain a roll-back of APAs in Australia. In general, Australia reported that roll-backs are typically requested for a period of two to three years, with the domestic statute of limitations enabling it to grant roll-backs, in theory, up to seven years after notice of assessment to the taxpayer.

Sections 24A-24G of Australia's APA Guidance outline the roll-back of APAs in Australia and clarifies that Australian Taxation Office (ATO) practice in relation to this depends on taxpayer specific circumstances and on a risk assessment basis. With regards to the practical application of APA roll-backs, Australia reported that it received 13 requests between 1 January 2015 and 31 December 2016, of which 3 have been granted and 10 are still under review.

There are currently no areas for improvement required, and Australia will continue to provide for roll-back of bilateral APAs in appropriate cases.

Availability and access to MAP

B.1 - Include Article 25(1) of the OECD Model Tax Convention in tax treaties

Article 25(1) provides that when a taxpayer considers that the actions of one or both of the Contracting Parties results, or will result in taxation not in accordance with the provisions of the tax treaty, the taxpayer may, irrespective of remedies provided within the domestic law of those Contracting Parties, make a request for MAP assistance. The taxpayer may present the request within a period of no less than three years from first notification of the action resulting in the taxation.

Of Australia's 53 tax treaties, 9 contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as it read prior to the adoption of the *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report* (Action 14 final report). In addition to these 9 treaties, 1 treaty contains a provision equivalent to Article 25(1) of the OECD Model Tax Convention as changed by the Action 14 final report.

With regards to Article 25(1) second sentence, regarding time limitations, 36 out of Australia's 53 tax treaties contain an equivalent provision which allows the submission of a MAP request within a period of no less than three years from first notification of the action resulting in taxation not in accordance with the provisions of the particular treaty.

With the signing of the MLI, Australia opted to introduce in all of its tax treaties a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention as amended by the Action 14 final report. In total 8 of the 43 relevant treaty partners are not a signatory to the MLI, 4 have not listed their treaty with Australia as a CTA, and 13 reserved the right not to apply the first sentence of Article 16(1) to its existing tax treaties. Therefore at this stage, the MLI upon entry into force, will modify 18 of the 43 treaties to incorporate Article 25(1) first sentence. It will also modify 2 treaties to include the equivalent of Article 25(1) second sentence. For those treaties that will not be modified by the MLI, Australia should request the inclusion of the provision via bilateral negotiations.

B.2 - Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process

Upon entry into force of the MLI, 18 treaties will be modified to allow taxpayers to submit a MAP request to the competent authority of either treaty partner, with 1 treaty already containing an equivalent provision.

Australia indicated that it is in the process of rewriting its MAP procedures by the end of 2018 and that this document will require a notification for those situations where its competent authority considers an objection raised in a MAP request as being not justified.

Where tax treaties will not be amended via the MLI, Australia declared it will continue to apply its bilateral notification and consultation process when its competent authority considers the objection raised in a MAP request not to be justified.

B.3 - Provide access to MAP in transfer pricing cases

Out of Australia's 53 tax treaties, 40 contain a provision equivalent to Article 9(2) requiring their state to make a correlative adjustment if a transfer pricing adjustment is imposed by the treaty partner. Australia has reported that it has not denied access to MAP on the basis that the case concerned transfer pricing since 1 January 2015, which was the view also expressed by peers and taxpayers.

Australia reported that it was in favor of including Article 9(2) of the OECD Model Tax Convention in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties. At this stage, upon entry into force, the MLI will supersede 1 of the 13 treaties currently not containing an equivalent to Article 9(2).

Australia should continue granting access to MAP in eligible transfer pricing cases.

B.4 - Provide access to MAP in relation to the application of anti-abuse provisions

Australia's domestic anti-abuse provisions are contained in Part IVA of the *Income Tax Assessment Act 1986* (ITAA) which includes the recently enacted Multinational Anti-Avoidance Law (MAAL) and Diverted Profits Tax (DPT).

Australia reported that since 1 January 2015 it has not denied access to MAP in any cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. Its competent authority, however, did not receive any MAP requests of this kind from taxpayers during the review period. Peers and taxpayers also noted not being aware of any limitations in this respect, or any cases that have been denied access to MAP in this circumstance. However, Australia's MAP guidance currently does not include any information on how their domestic anti-abuse provisions affect access to MAP,

and their MAP profile incorrectly states that access to MAP will not be granted when Australia's domestic anti-abuse provisions apply. Australia has indicated that it will correct its MAP profile to reflect this.

Further to the above, however, we note that it is likely the DPT will not be considered a covered tax by most of Australia's tax treaties. Furthermore the current state of Australia's Part IVA provisions is that they override tax treaties where applicable, and it is currently unclear how MAP will be granted in cases concerning Part IVA determinations.

Australia has reported it will provide access to MAP in cases concerning whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty, and should follow its intention to clarify its position regarding this matter.

B.5 – Provide access to MAP in cases of audit settlement

Under Australia's domestic law it is possible for taxpayers and the tax administration to enter into an audit settlement. Audit settlements can be requested by either the ATO or the taxpayer and can occur at any stage, including before or after an audit position paper as well as during the course of an objection or litigation. Australia clarified that currently audit settlements can contain clauses denying access to MAP and such clauses are included on a case-by-case basis. Taxpayers expressed concerns, noting that they were asked to forego MAP as part of an audit settlement.

Australia is currently considering its practice with respect to the Action 14 minimum standard, and should ensure that access to MAP is granted in eligible cases, even if there is an audit settlement between the tax authority and a taxpayer.

B.6 – Provide access to MAP if required information is submitted

The information and documentation Australia requires taxpayers to include in a request for MAP assistance are discussed under element B.8.

Australia reported that when a taxpayer does not include the required information and documentation in its MAP request, its competent authority will file a formal request for further information with the taxpayer. Australia has not limited access to MAP in eligible cases where taxpayers have complied with Australia's information and documentation requirements for MAP requests.

Australia did not indicate that it anticipates any modifications in relation to element B.6.

B.7 – Include Article 25(3), second sentence, of the OECD Model Tax Convention in tax treaties

Out of Australia's 53 tax treaties, 15 contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) allowing their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties.

All of the remaining 38 treaties do not contain any provision that is based on Article 25(3), second sentence, of the OECD Model Tax Convention. Of the 38 treaties identified above, Australia listed 29 as a CTA, but only for 28 of these made a notification that they do not contain the provision. Of the relevant 28 treaties, 7 are not signatories to the MLI, 3 did not list their treaty with Australia as a CTA, and 1 did not make the required notification. Therefore upon entering into force, the MLI will modify 17 tax treaties to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention.

For those treaties not being modified by the MLI, Australia should request the inclusion of the provision via bilateral negotiations.

B.8 – Publish clear and comprehensive MAP guidance

Australia's MAP guidance is contained in Taxation Ruling TR 2000/16 and sets out the process and information required by Australia to request a MAP.

In general, Australia's MAP guidance includes information on the availability and the use of MAP and how Australia's competent authority conducts the procedure in practice in transfer pricing cases. However, there is also no published information on access to MAP for individuals regarding non-transfer pricing cases. Information required in a request for MAP assistance include the identity of the taxpayer, basis for the request, facts of the case and analysis of the issues requested to be resolved in the MAP.

Australia indicated that it is currently revising its MAP guidance in order to account for changes to Australian law and to ATO guidance, and that the next version of its MAP guidance will also cover cases other than transfer pricing cases. Australia reported that it intends to complete the rewrite of its MAP guidance by the end of 2018.

B.9 - Make MAP guidance available and easily accessible and publish MAP profile

The [MAP profile of Australia](#) is published on the website of the OECD. This MAP profile is complete and includes external links which provide extra information and guidance where appropriate.

Australia has indicated that it will update its MAP profile and that it is also in the process of rewriting its MAP guidance by the end of 2018.

B.10 - Clarify in MAP guidance that audit settlements do not preclude access to MAP

As previously discussed under element B.5, under Australia's domestic law it is possible for taxpayers and the tax administration to enter into audit settlements and access to MAP is granted for such cases. However, while information on the availability of MAP is included in Australia's MAP profile, its MAP guidance does not clarify that taxpayers have access to MAP in cases of audit settlements.

Australia indicated that it is updating its MAP guidance in relation to element B.10.

Resolution of MAP cases

C.1 - Include Article 25(2), first sentence, of the OECD Model Tax Convention in tax treaties

Out of Australia's 53 tax treaties, 41 contain a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention, which requires that the competent authority who receives a MAP request from the taxpayer, shall endeavor, if the objection from the taxpayer appears to be justified and the competent authority is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

In regards to the 12 tax treaties identified above that are considered not to contain the equivalent of Article 25(2), first sentence of the OECD Model Tax Convention Australia listed 3 as a CTA under the MLI and made a notification that they do not include the provision. Of the relevant 3 treaty partners, 1 is not a signatory to the MLI and only 1 made the required notification. Therefore, at this stage the MLI will, upon entry into force, modify 1 of the 12 tax treaties identified above to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention.

For those treaties not being modified by the MLI, Australia should request the inclusion of the provision via bilateral negotiations.

C.2 - Seek to resolve MAP cases within a 24-month average timeframe

Australia reported it has a system in place to actively monitor its MAP cases to ensure there is adherence to timeframes. Australia further reported that the MAP Project Management Unit (PMU) prepares monthly reports which include MAP case inventory and other data required for the purposes of OECD and internal reporting.

In this respect, Australia further reported that when cases get close to two years old, they are actively monitored by the PMU to ensure a timely resolution of such cases, which also encompasses the implementation of any MAP agreement reached. When MAP cases are open longer than two years, Australia reported that it monitors such cases on a monthly basis until implementation is completed.

Australia's tax treaty policy is to include a mandatory and binding arbitration provision in its bilateral tax treaties, to provide that treaty-related disputes will be resolved within a specified timeframe, which should globally improve the time needed to settle MAP cases. Australia did not indicate that it anticipates any modifications in relation to element C.2.

C.3 - Provide adequate resources to the MAP function

Australia reported that in August 2014 it created its APA/MAP PMU within ATO in order to centralize the management of MAP cases and APAs. Australia reported that the PMU is the entity which manages the competent authority function. Australia further reported that the PMU consists of 12 staff members, 3 of whom are authorized to exercise the competent authority function.

In addition to the 12 staff members mentioned above, Australia reported that it has established a "competent authority network" of 14 staff who have been authorized to act as competent authorities. The staff of Australia's competent authority network meet approximately every six weeks to raise awareness of current issues, provide ad hoc training and to assist each other by sharing knowledge and experience.

Australia did not indicate that it anticipates any modifications in relation to element C.3, and should continue to monitor whether it has adequate resources in place to ensure future MAP cases are resolved in a timely, efficient and effective manner.

C.4 - Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty

Australia reported that the ultimate decision maker in a MAP case is the staff member delegated the competent authority function for the case. Australia further reported that its competent authority is independent in its decision-making but that it does at times rely upon economists, technical specialists, and case teams within the ATO to assist with MAP cases where necessary. Australia further explained that its competent authority may at times need to consult with senior advisors and colleagues as part of the process of reaching a final MAP decision.

Taxpayers reported concern that the ATO personnel who are involved with the adjustments at issue were highly involved with the MAP discussions and were actively involved in the discussion between the competent authorities and had a direct impact on the decision by Australia's competent authority. These taxpayers further reported that Australia's competent authority appears to be less empowered than other authorities to reach a position, and that competent authority personnel always appear to greatly outnumber their counterparty attendance at meetings and the decision making process is slowed as a result.

Australia responded to the taxpayer input in the preceding paragraph by noting that because some cases are particularly complex and due to its desire to ensure consistency, additional resources are sometimes drawn upon to support the competent authority.

Australia did not indicate that it anticipates any modifications in relation to element C.4.

C.5 - Use appropriate performance indicators for the MAP function

Australia reported that staff in charge of MAP processes are assessed through biannual performance reviews and a series of regular check-ins with each staff member's managers. According to Australia, these performance reviews include an assessment of whether a staff member is on track to meet his or her objectives. Furthermore, staff and managers agree to a development plan and on an annual basis all staff are required to complete capability assessments in order to gauge their level of tax technical knowledge

Australia did not indicate that it anticipates any modifications in relation to element C.5

C.6 - Provide transparency with respect to the position on MAP arbitration

Australia reported that it has no domestic law limitations for including MAP arbitration in its tax treaties and that its tax treaty policy is to include a mandatory and binding arbitration provision in its bilateral tax treaties. Australia further reported that it is committed to including a mandatory binding arbitration clause in its bilateral tax treaties. Australia's position on MAP arbitration is included in its MAP profile published on the OECD website.

Australia has incorporated an arbitration clause in 3 of its 53 treaties as a final stage to the MAP. All three of these treaties contain the equivalent of Article 25(5) of the OECD Model Tax Convention.

Australia did not indicate that it anticipates any modifications in relation to element C.6.

Implementation of MAP agreements

D.1 - Implement all MAP agreements

Australia reported that since 1 January 2015 it has reached the following number of MAP agreements:

- ▶ 2015: 10
- ▶ 2016: 11
- ▶ 2017: 8

In view of these MAP agreements, all required implementation by Australia. In this respect, Australia reported that all but one MAP agreement that were reached on or after 1 January 2015, once accepted by taxpayers, have been implemented. Australia reported that the remaining MAP agreement was reached by the end of 2017 for which implementation is pending. The peer group and taxpayers did not report any difficulties in implementation of MAP agreements.

Australia did not indicate that it anticipates any modifications in relation to element D.1

D.2 - Implement all MAP agreements on a timely basis

As discussed under element D.1, since 1 January 2016, Australia entered into 29 MAP agreements that required implementation by Australia. In this respect, Australia reported that 28 MAP agreements have already been implemented and that no cases of noticeable delays have occurred. For the remaining MAP agreement, which Australia reported having reached by the end of 2017, implementation is pending. Australia did not indicate that it anticipates any modifications in relation to element D.2.

D.3 - Include Article 25(2), second sentence, of the OECD Model Tax Convention in tax treaties or alternative provisions in Article 9(1) and Article 7(2)

Out of Australia's 53 tax treaties, 31 contain a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law or be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an adjustment in order to avoid late adjustments with respect to which MAP relief will not be available.

In regards to the remaining 22 tax treaties identified above that are considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention Australia listed 14 treaties as CTAs under the MLI, but only for 13 treaties did it make the required notification that they do not include the provision. Of the relevant 13 treaty partners, 2 are not a signatory to the MLI, 1 did not list their treaty with Australia as a CTA and 2 made a reservation on the basis of Article 16(5)(c). All remaining 8 treaty partners also made the required notification. Therefore, at this stage the MLI will, upon entry into force, modify 8 of the 22 tax treaties identified above.

For those treaties not being modified by the MLI, Australia should request the inclusion of the provision via bilateral negotiations.

Best practices peer review reports

With regards to APAs, four peers commented on their relationship with Australia. All noted the currently robust APA program, however one expressed concerns about the effects that Australia's MAAL would have on the timing and conduct of dispute resolution procedures. With respect to providing guidance on MAPs, one peer remarked that the Australian competent authority has always been amenable to considering multilateral MAPs on a case-by-case basis.

Peers did not provide comment for many of the best practices outlined in the report for Australia.

Next steps

Australia is already working to address deficiencies identified in its peer review and will now move on to Stage 2 of the process, where its efforts to address any shortcomings identified in its Stage 1 peer review report will be monitored. Under the peer review program methodology, Australia shall submit an update report to the Forum on Tax Administration's MAP Forum within one year of the OECD Committee on Fiscal Affairs' adoption of the Stage 1 peer review report.

Implications

In a post-BEPS world, where multinational enterprises (MNEs) face tremendous pressures and scrutiny from tax authorities, the release of Australia's peer review report represents the continued recognition and importance of the need to achieve tax certainty for cross-border transactions for MNEs. While increased scrutiny is expected to significantly increase the risk of double taxation, the fact that tax authorities may be subject to review by their peers should be seen by MNEs as a positive step to best ensure access to an effective and timely mutual agreement process.

Furthermore, the peer review for Australia provides insights to taxpayers on the availability and efficacy of MAP. With additional countries continuing to be reviewed, the OECD has made it known that taxpayer input continues to be welcomed on an ongoing basis.

With stakeholder feedback in mind, businesses are encouraged to share their views with the OECD on the peer review for Australia and any other jurisdictions, and to perhaps comment on whether the next iteration of the OECD's assessment of tax administration's MAP performance warrants greater feedback from taxpayers as the primary source. Feedback from the international tax community is the logical next step after peer review, which may help to further validate the current favorable result.

Endnotes

1. See EY Global Tax Alert, [OECD releases fourth batch of peer review reports on Action 14](#), dated 4 September 2018.
2. <https://www.oecd-ilibrary.org/docserver/9789264304208-en.pdf?expires=1535638520&id=id&accname=guest&checksum=8462EF6BE70F0577D7B7363DD200D059>.
3. <http://www.oecd.org/tax/beps/beps-action-14-peer-review-best-practices-australia.pdf>.
4. See EY Global Tax Alert, [OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review](#), dated 31 October 2016.
5. <http://www.oecd.org/tax/forum-on-tax-administration/about/>.

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