

**Inclusive Framework on BEPS: Action 14
Making Dispute Resolution More Effective
MAP Peer Review Report**

BEST PRACTICES

Australia

2021



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Making Dispute Resolution More Effective
MAP Peer Review Report

Australia
Best practices (2021)

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Abbreviations and Acronyms

APA	Advance Pricing Arrangement
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development

Introduction

The final report on BEPS Action 14: “Making Dispute Resolution Mechanisms More Effective” identified a number of best practices related to the three general objectives of the Action 14 Minimum Standard.

Paragraph 9 of the Terms of Reference to monitor and review the implementation of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective¹ stipulates that:

The best practices are not part of the minimum standard and whether or not a jurisdiction has implemented the best practices will not be peer reviewed or monitored, nor will it affect the assessment of the assessed jurisdiction. Jurisdictions are free, however, to identify best practices they have adopted.

Australia has provided information and requested feedback by peers on how it has adopted best practices. In that regard, the FTA MAP Forum agreed on an optional best practices feedback form that peers have used to provide feedback on Australia’s adoption of the best practices.

The peer review process on the implementation of the Action 14 Minimum Standard consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by Australia. This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices during stage 1 (period ranging from 1 January 2015 up to 31 December 2017) and stage 2 (ranging from 1 January 2018 up to 31 August 2019).

¹ Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective ([CTPA/CFA/NOE2\(2016\)45/REV1](#)).

Part A Preventing Disputes

[BP.1] Implement bilateral APA programmes

Jurisdictions should implement bilateral APA programmes.

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Australia reported that since the mid-1990s it has implemented an APA programme, under which it is authorised to enter into unilateral, bilateral and multilateral APAs. Australia reported that the **APA/MAP Program Management Unit** ('**PMU**') is the main contact point for taxpayers seeking an APA. Australia further reported that its APA programme is a three-step process consisting of early engagement (stage 1), APA application (stage 2) and annual monitoring compliance (stage 3). In this respect, Australia's Law Administration Practice Statement PS LA 2015/4² ('**APA guidance**') clarifies that in stage 1 the team in charge of APAs will explain the process to the taxpayer, provide initial feedback on the APA request, evaluate whether the taxpayer should be invited to formally apply for an APA and develop agreed plans with the taxpayers to help him proceed through the early engagement stage and to ultimately conclude the APA itself. Further preliminary discussions are held with the taxpayer and APA workshops are also available. Under stage 2, the Australia Taxation Office ('**ATO**') staff will conduct an analysis and evaluation, and if it determines that the taxpayer has complied with all requirements, an agreement will be reached. Lastly, under the monitoring and compliance phase of stage 3, the Operations area of the Public Group and Internationals ('**PGI**') business line will verify whether any of the critical assumptions listed in the APA have been breached in addition to confirming whether the terms of the APA have been met after the taxpayer submits an Annual Compliance Report.
3. Australia also reported that bilateral APAs typically run for a period between three and five years. Australia clarified that it is possible to renew an APA, for which taxpayers should file a request at least six months before an existing APA expires and that this timeline should also in theory apply to submitting an initial request for a bilateral APA.
4. Australia reported that in mid-2014 the ATO commenced a reinvention of its APA programme. This reinvention emphasised the importance of prevention before correction and this has been a key tenant in enhancing the APA programme since its completion. Australia has expressed its desire to provide early support and certainty to taxpayers with respect to reducing the risk of double taxation. In addition, Australia reported that it also strengthened its APA programme by devoting more resources to the programme to which the competent

² Available at: <http://law.ato.gov.au/atoLaw/view.htm?docid=%22PSR%20154%20FNAT%20FATO%20F00001%22>

authority function is actually delegated. Australia further reported that it also conducts an annual forum with taxpayers to improve the operation of the APA program, as well as to demonstrate that APAs can provide a fair and reasonable solution.

5. Statistics on Australia's bilateral APA programme are available on the website of the ATO.³ The most recent year for which the information is available is the period 1 July 2018 to 30 June 2019.

6. Additionally, Australia reported that it has recently undertaken an end-to-end review of its APA programme, identifying a number of potential improvements with the intention of enhancing efficiency and transparency. Australia clarified that these improvements enable Australia's PMU to more closely scrutinise individual cases, identify cases that are not progressing optimally and proactively initiate action or discussion with all parties involved to ensure timeliness.

7. Of the five peers that provided input on Australia's implementation of best practices, four commented on their APA relationship with Australia. One of these peers reported that it has a co-operative and productive APA relationship with Australia. Another peer commented that Australia has had a long-standing bilateral APA programme. A third peer noted that since April 2016 there has been an agreed framework in place with Australia to enhance the bilateral APA/MAP process between their competent authorities. According to this peer, the framework provides opportunities for both competent authorities to have biannual updates on the cases in inventory and facilitates collaboration between both competent authorities on ways to improve the MAP process.

8. The fourth peer provided detailed input on its bilateral APA relationship with Australia. This peer noted that Australia's competent authority has a robust APA programme that provides for bilateral and multilateral APAs. This peer expressed its belief that both tax administrations and taxpayers benefit significantly from such agreements and therefore, in the spirit of offering constructive feedback about Australia's APA programme, shared substantial feedback outlined in the following paragraph. This peer further noted that, from its perspective, it had some questions and possible concern about the effects that Australia's **Multinational Anti Avoidance Law** ('MAAL') and gatekeeping function may have on the timing and conduct of dispute prevention and resolution processes. In its experience, these effects seem to be more pronounced in the APA process. The peer therefore expressed concern that, in recent years, the administration of Australia's MAAL has resulted in unusually pronounced delays in processing a small number of bilateral APA cases, where they have had to first go through a gatekeeping function before the cases were accepted. It was this peer's understanding that this review was intended to determine compliance with the MAAL. In at least one case, Australia's competent authority has suspended consideration of the bilateral APA request with the peer while the taxpayer restructures its operations to bring itself within compliance of Australian law. In at least two other cases, the peer reported that the Australian government delayed bilateral discussions of the APA pending an audit of the taxpayer. According to the peer, in one of these latter cases, this delayed bilateral discussions for several years.

9. In light of the above, this peer expressed that it would appreciate further dialogue with Australia's competent authority on circumstances in which APA applications may be denied or when the APA process may be delayed. More generally, the peer would appreciate a further dialogue when and if taxpayers may be denied access to MAP in light of concerns

³ Available at: https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Advance-pricing-arrangements/?anchor=APA_and_MAC_statistics

over the taxpayer's compliance with the MAAL or when the resolution of a MAP case may be delayed or impeded pending such concerns.

10. Australia reported that it is open to discussion on the MAAL with its peers and, to this end, has conducted presentations on this topic in the past with such peers. Australia also noted that unlike in the past, the MAAL is now a routine consideration during APA cases in Australia.

11. Australia further reported that its early engagement process or 'gatekeeping' function was introduced to avoid matters entering the APA process which are not suitable for resolution - to avoid both taxpayers and jurisdictions wasting time and resources. Australia noted that the work undertaken at this stage has helped reduce the time take for APAs once the taxpayer is accepted into the APA programme.

[BP.2] Publish mutual agreements of a general nature

Jurisdictions should have appropriate procedures in place to publish agreements reached by competent authorities on difficulties or doubts arising as to the interpretation or application of their tax treaties in appropriate cases.

12. Agreements reached by competent authorities to resolve difficulties or doubts arising as to the interpretation or application of their tax treaties in relation to issues of a general nature which concern, or may concern, a category of taxpayers reflect the competent authorities' mutual understanding of the meaning of the convention and its terms. As such agreements provide information that might be useful to prevent difficulties or doubts in the interpretation or application of tax treaty provisions, publication of these agreements is valuable.

13. Australia indicated that it publishes MAP agreements of a general nature on a case-by-case basis. According to Australia, the decision to publish such an agreement depends on the perceived need for clarification of the topic of a general nature that is covered.

14. For unilateral interpretative decisions by the ATO that may impact the interpretation or application of tax treaties, Australia referenced its Practice Statement Law Administration PS LA 2001/8. This practice statement explains the policy for ATO interpretative decisions, which are summarised versions of a decision ATO has made on the application of a law to a particular situation. Australia further explained that its interpretative decisions set out a precedential view taken by the ATO and are produced to ensure that Australia provides consistent interpretative decision making. The agreements Australia has decided to publish can be found at:

<https://www.ato.gov.au/law/?anchor=Law/browse/Mode%3Dtype%26ImA%3Dfolder%26Node%3D16%26TOC%3D02%253AOther%2520Precedential%2520ATOview%2520Documents#Law/browse/Mode%3Dtype%26ImA%3Dfolder%26Node%3D16%26TOC%3D02%253AOther%2520Precedential%2520ATOview%2520Documents>

15. ATO also publishes a webpage with further information regarding its view towards precedent. This webpage explains that the ATO's precedential views, in addition to the interpretative decisions mentioned above, include publicly issued rulings and draft rulings, decision impact statements as well as documents listed in the schedule of documents containing precedential ATO views and is available at:

<https://www.ato.gov.au/general/ato-advice-and-guidance/precedential-ato-view/>

16. Peers did not provide input relating to this particular best practice.

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

17. Guidance on a jurisdiction's APA programme facilitates the use of that programme and creates awareness for taxpayers on how the APA process functions. As APAs may also prevent future disputes from arising, including information on APAs in a jurisdiction's MAP guidance is relevant.

18. As previously mentioned under element BP.1, Australia has implemented an APA programme and has published APA guidance in the form of **Law Administration Practice Statement PS LA 2015/4** ('**APA guidance**'), which is separate from Australia's MAP guidance. Australia explained that its APA guidance reflects upon the lessons previously drawn from the implementation of Australia's early engagement approach used for the processing of private ruling applications.

19. Australia's APA guidance is accessible at:

<https://www.ato.gov.au/law/view/document?DocID=PSR/PS20154/NAT/ATO/00001&PiT=99991231235958>

20. Specifically, this APA guidance sets out in detail the three step process to obtain an APA described under element BP.1. This guidance also explains the conditions for which ATO is more or less likely to grant an APA and sets out the roles of the ATO officers involved in processing an APA. Inter alia, the APA guidance also describes:

- the relationship between audits and APAs
- when the ATO might use independent experts in the course of an APA
- the conditions for revising or cancelling an APA
- the process for renewing an APA.

21. Australia's MAP profile also links to the relevant APA guidance. This MAP profile also explains that in Australia transfer pricing issues relating to income years prior to an APA should be treated as collateral issues. What constitutes a collateral issue is defined in paragraph 29 of Australia's APA guidance.

22. Further, Australia has introduced a separate sub-section on APAs in its website within the section "International tax for business", with the aim to give user-friendly guidelines on APAs. This sub-section is accessible at:

<https://www.ato.gov.au/business/international-tax-for-business/in-detail/advance-pricing-arrangements/>

23. This sub-section is based on the APA guidance and provides simple and accessible guidance for the taxpayer on topics such as when an APA is appropriate, the types of APAs that can be obtained, the mutual expectations in the APA process, details on each stage of the application process, the documents required to process a request, how a request will be processed and detailed statistics on APAs.

24. Australia’s MAP guidance, in the section titled ‘Limiting the need for MAP requests’, directs taxpayers who are seeking an APA towards this section of the website as well as to its APA guidance.
25. Further, as discussed under BP.1, Australia has done an end-to-end review of their APA process. Australia reported that these changes will be reflected in its APA guidance.
26. One peer remarked that Australia has implemented this best practice. Other peers did not provide input relating to this particular best practice.

[BP.4] Develop “global awareness” of the audit/examination functions

Jurisdictions should develop the “global awareness” of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration’s “Global Awareness Training Module” to appropriate personnel.

27. Making audit/examination function of tax administrations that are involved in international matters aware of: (i) the potential for creating double taxation, (ii) the impact of a proposed adjustment on the tax base of one or more jurisdictions and (iii) the process and principles by which competing juridical claims are reconciled by competent authorities, may be useful to prevent disputes from arising. Using the Global Awareness Training Module developed by the Forum on Tax Administration (FTA) can be helpful in this respect.
28. Australia reported that the Global Awareness Training Module has been made available to all staff in its PGI and that this training is mandatory. Managers follow up with staff members who have not yet completed the training. Australia further reported that online and in-class learning materials on international tax treaties are available internally in Australia but are not publically available.
29. In addition, Australia noted that its PMU organises internal competent authority meetings approximately every six weeks. These meetings are intended to be a forum to raise awareness of current issues amongst staff members involved with MAP and APAs and is also an opportunity to for such staff to share knowledge and experiences to help facilitate the resolution of cases. Ad hoc training is also provided to staff at these conferences.
30. One peer provided input relating to this particular best practice. It noted that Australia is a committed partner within the FTA MAP Forum and FTA Large Business Programme regarding joint efforts to raise awareness of the principles of the Global Awareness Training Module within the examination and competent authority functions. This peer further noted that it would welcome discussing with Australia’s competent authority issues of shared concern to both competent authorities and to their respective examination and competent authority functions.

Part B

Availability and access to MAP

[BP.5] Implement appropriate administrative measures to facilitate recourse to MAP

Jurisdictions should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognising the general principle that the choice of remedies should remain with the taxpayer.

31. Under Article 25(1) of the OECD Model Tax Convention (OECD, 2017), the mutual agreement procedure is a dispute settlement procedure in annex to domestic available remedies and not a substitute for such remedies. Reference is made to inter alia paragraph 7 of the Commentary to Article 25 of the OECD Model Tax Convention (OECD, 2017), which specifies that the right to submit a MAP request is available to taxpayers *without depriving them of the ordinary legal remedies available*. Facilitating recourse to the MAP through appropriate administrative measures, under the general principle that the choice of remedies remains with taxpayers, enables them to effectively resort to such dispute settlement procedure.

32. Australia reported that taxpayers are allowed to request MAP assistance and at the same time seek to resolve the same dispute via domestically available judicial and administrative remedies. Australia also reported that MAP requests can be submitted regardless of whether the issue under dispute has already been decided via these judicial and administrative remedies. However, Australia explained that its competent authority cannot deviate from a decision of its Administrative Appeals Tribunal or an order of the Federal Court. In that situation, Australia's competent authority's endeavours will be limited to demonstrating to the competent authority of the tax treaty partner that the ATO transfer pricing or profit reallocation adjustment is in accordance with the tax treaty, both in principle and amount, and that relief should be provided by that country. In addition, Australia explained that where a case is under appeal the competent authority may decide on a case-by-case basis that it is appropriate to cease their endeavours in MAP until the case is resolved via these appeals processes. Australia noted, however, that it has never encountered this situation in practice.

33. Further, if a taxpayer wants to pursue domestic remedies in either jurisdiction, but is concerned about exceeding the time limits for filing a MAP request, Australia clarified that a protective MAP request may be filed. If such request is considered eligible, Australia's competent authority will accept the request, notify the other jurisdiction's competent authority of the request and defer MAP negotiations until the taxpayer requests for progress on the MAP case. These aspects are also addressed in Australia's MAP guidance the section titled 'Impact of domestic dispute resolution processes on the MAP process'.

34. Peers did not provide input relating to this particular best practice.

[BP.6] Provide access to MAP for bona fide taxpayer-initiated foreign adjustments

Jurisdictions' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments.

35. A taxpayer-initiated foreign adjustment is considered bona fide where it reflects the good faith effort of the taxpayer to report correctly, timely and properly the adjusted taxable income from a controlled transaction or the profits attributable to a permanent establishment with a view to reflect an arm's length result, and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the laws of the treaty partners. As such taxpayer-initiated foreign adjustments may lead to cases of double taxation, it is relevant that there is access to MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance also provides additional clarity.

36. Australia reported that it will grant access to MAP in cases of bona fide taxpayer-initiated foreign adjustments. Australia's MAP guidance, in the section titled 'When you can request a MAP', clarifies that access to MAP will be granted in such cases.

37. Peers did not provide input relating to this particular best practice.

[BP.7] Provide guidance on multilateral MAPs

Jurisdictions' published MAP guidance should provide guidance on multilateral MAPs.

38. In recent years, globalisation has created unique challenges for existing tax treaty dispute resolution mechanisms. Whilst the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention (OECD, 2017) has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global value chains as well as the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes. In that regard, it is for clarity purposes relevant that jurisdiction's MAP guidance includes information on availability of and access to multilateral MAPs.

39. Australia reported that it is willing to enter into multilateral MAP negotiations. Australia's MAP guidance, in the sub-section titled 'MAP requests involving multiple jurisdictions' within the main section 'When you can request a MAP', clarifies that the competent authorities of multiple jurisdictions can be part of such negotiations when: every jurisdiction involved has a tax treaty containing the necessary MAP and exchange of information articles with each of the other jurisdictions. Australia reported that it typically does not enter into single multilateral agreements, but rather resolves these multilateral cases by way of a series of bilateral agreements. In some of Australia's tax treaties, the MAP Article does not contain the express provision to consult together on cases not provided for in the convention. In these cases, while effective exchange of Information may still be possible with

the third jurisdiction, the ability to consult or mutually agree on a multilateral basis may be limited.

40. One peer remarked that the Australian competent authority has always been amenable to considering multilateral MAPs on a case-by-case basis. Other peers did not provide input relating to this particular best practice.

[BP.8] Provide for suspension of collection procedures for pending MAP cases

Jurisdictions should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

41. If, following an adjustment taxpayers immediately have to pay the tax due, whereas the same amount was already paid to the tax administration of the other jurisdiction involved, double taxation will in fact occur. As taxpayers may then face significant cash-flow issues, at least for the period the MAP case is pending, it is relevant that jurisdictions provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

42. Australia reported that it does provide for a general suspension of collection procedures during the period a MAP is pending. Australia's MAP guidance, in the section titled 'Paying tax during the MAP process' clarifies that where requesting the taxpayer to pay taxes that are subject to MAP may result in double taxation, ATO may defer recovery action for collection procedures until the MAP process is fully concluded. However, such deferral would not be possible where there is a risk to revenue, where the taxpayer has other liabilities unpaid after the due date or where the taxpayer has failed to meet other tax obligations when required. Australia's MAP guidance links to Law Administration Practice Statement PS LA 2011/4 and Law Administration Practice Statement PS LA 2011/14 for more details in this regard.

43. Peers did not provide input relating to this particular best practice.

Part C

Resolution of MAP Cases

[BP.9] Permit taxpayers to request multi-year resolution of recurring issues through the MAP

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

44. In certain cases, a MAP request with respect to a specific adjustment to income may present recurring issues that may be relevant in previous or subsequent tax years. Allowing taxpayers to submit requests for the multi-year resolution through MAP with respect to such recurring issues, where the relevant facts and circumstances are the same, may help avoid duplicative MAP requests and facilitate a more efficient use of competent authority resources.

45. Australia reported that it has implemented procedures to permit taxpayers to request multi-year resolution of recurring issues through the MAP and that this is its long-standing practice. However, Australia reported that this may be limited where the implementation of the MAP outcome is prevented due to domestic time-limits either in Australia or in the other jurisdiction. Australia reported that where a taxpayer has a recurring issue, the ATO would typically consider entering into MAP for the entirety of the relevant periods. Australia noted that if the issue is expected to arise in the future, the ATO would typically recommend the taxpayer to request for an APA. Australia's MAP guidance does not address the multi-year resolution of recurring issues through MAP.

46. Peers did not provide input relating to this particular best practice.

[BP.10] Publish explanation of the relationship between the MAP and domestic remedies

Jurisdictions should publish an explanation of the relationship between the MAP and domestic law administrative and judicial remedies.

47. As mentioned under BP.5, pursuant to Article 25(1) of the OECD Model Tax Convention (OECD, 2017) taxpayers are allowed to submit a MAP request irrespective of available domestic remedies. This, however, does not further specify how to proceed if both

available remedies are initiated and the case is dealt with in the bilateral phase of the MAP. Publicly available guidance on the relationship between the MAP and domestic remedies provides clarity to taxpayers as well as treaty partners.

48. As discussed in BP.5, Australia has included an explanation addressing the relationship between MAP and domestic law administrative and judicial remedies in its MAP guidance in the section titled ‘Impact of domestic dispute resolution processes on the MAP process’. Australia’s MAP guidance is available at:

<https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Mutual-agreement-procedure/>

49. Australia’s MAP guidance, in the section titled ‘Impact of domestic dispute resolution processes on the MAP process’, states that MAP is a remedy available to taxpayers in addition to domestic remedies and that MAP can be requested regardless of such remedies. It is also stated that Australia’s competent authority will try to progress a MAP case as much as possible where a taxpayer is also pursuing domestic remedies simultaneously. In addition, no fees are charged to taxpayers for a MAP request. Finally, this section also provides that where the competent authorities have not agreed on an appropriate solution by the time a decision is taken on an objection in domestic law, the taxpayer have the right to appeal against the objection decision.

50. Australia also reported that the domestic provisions governing objections, review or appeals are publically available and published in Part IVC of the Taxation Administration Act 1953⁴ in relation to 1992-1993 and subsequent income tax years.

51. Furthermore, Australia has published detailed guidance on domestic disputes policy, which also make a reference to the availability of the MAP at:

<https://www.ato.gov.au/misc/downloads/pdf/qc26517.pdf>

52. Peers did not provide input relating to this particular best practice.

[BP.11] Provide guidance on consideration of interest and penalties in MAP

Jurisdictions’ published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure.

53. As interests and penalties may concern substantial amounts, providing clarity in a jurisdiction’s MAP guidance on whether interest and penalties are in the scope of the MAP is relevant to ensure that a taxpayer is well-informed on this issue.

54. According to section ‘Penalties and interest under MAP’ in Australia’s MAP guidance, its tax treaties specifically exclude penalties or interest relating to tax from the definition of “tax”, which prevents such amounts from being eligible for double tax reliefs under a tax treaty and thus, it does take interest and penalties into consideration in MAP. In this respect, Australia stated that any applicable interest and penalties begin to accrue when a liability becomes due and payable under the relevant Australian taxation law. However, it

⁴ <https://www.legislation.gov.au/Details/C2017C00290>

is ATO's policy that where recovery of a liability has been deferred until the completion of the MAP, interest on that liability will be remitted.

55. Further, Australia's MAP guidance states that where taxation not in line with the tax treaty is relieved resulting in an overpayment of taxes, interest may be paid on such amount. The interest payable would be the lesser amount among the interest payable under the Taxation (Interest on Overpayments and Early Payments) Act 1983, the interest charged by the other jurisdiction making the transfer pricing or profit reallocation adjustment or relief provided under the MAP agreement. However, no interest would be payable where the other jurisdiction does not require payment of interest on its primary adjustment or where interest on that primary adjustment has not been paid.

56. Peers did not provide input relating to this particular best practice.

[BP.12] Include Article 9(2) of the OECD Model Tax Convention in tax treaties

Jurisdictions should include paragraph 2 of Article 9 of the OECD Model Tax Convention in their tax treaties.

57. Article 9(2) of the OECD Model Tax Convention (OECD, 2017) allows competent authorities to make a corresponding adjustment to unilaterally eliminate double taxation arising from primary adjustments. Including this provision in tax treaties provides taxpayers the possibility to obtain the elimination of such double taxation via a unilateral corresponding adjustment.

58. Australia reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties.

Overview of tax treaties

59. Out of Australia's 52 tax treaties, 41 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017) requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the treaty partner. Furthermore, 10 treaties do not contain a provision that is based on or equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). Out of these 10 treaties, seven are treaties with a limited scope that do not contain a provision that is based on or equivalent to Article 9 of the OECD Model Tax Convention (OECD, 2017), but that allow the MAP to be initiated for transfer pricing cases. The remaining treaty contains a provision that is based on Article 9(2), but as it stipulates that corresponding adjustments can only be made as a result of a mutual agreement procedure in accordance with the MAP article, it is therefore considered not being equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017).

Recent developments

Bilateral modifications

60. Australia signed a new tax treaty with one treaty partner, which is a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty contains a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD,

2017). This treaty has already entered into force. The effect of this newly signed treaty has been reflected in the analysis above where it has relevance.

Multilateral Instrument

61. Australia signed the Multilateral Instrument and has deposited its instrument of ratification on 26 September 2018. The Multilateral Instrument has entered into force for Australia on 1 January 2019.

62. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017) – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Article 17(2) of the Multilateral Instrument does for a tax treaty not take effect if one or both of the treaty partners to the tax treaty have, pursuant to Article 17(3), reserved the right to not apply Article 17(1) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), or not to apply Article 17(1) in the absence of such equivalent under the condition that: (i) it shall make appropriate corresponding adjustments or (ii) its competent authority shall endeavour to resolve the case under mutual agreement procedure of the applicable tax treaty. Where neither treaty partner has made such a reservation, Article 17(4) of the Multilateral Instrument stipulates that both have to make a notification whether the applicable treaty already contains a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). Where such a notification is made by both of them, the Multilateral Instrument will modify this treaty to replace that provision. If neither or only one treaty partner made this notification, Article 17(1) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1) (containing the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017)).

63. Australia has, pursuant to Article 17(3), reserved the right not to apply Article 17(1) of the Multilateral Instrument for those tax treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). With regard to the four treaties identified in paragraph 59 above that are considered not to contain an equivalent provision (disregarding the seven treaties that do not contain Article 9 at all), Australia listed all of them as a covered tax agreement under the Multilateral Instrument and included two in the list of treaties for which Australia has, pursuant to Article 17(3), reserved the right not to apply Article 17(1) of the Multilateral Instrument. For the remaining two treaties Australia did not make, pursuant to Article 17(4), a notification that this treaty contains such equivalent.

64. Both relevant treaty partners are signatories to the Multilateral Instrument, listed their treaty with Australia as a covered tax agreement under that instrument and have not, on the basis of Article 17(3), reserved the right not to apply Article 17(1) to the treaty with Australia. One of these two treaty partners has already deposited its instrument of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaty between Australia and this treaty partner, and therefore has superseded the relevant treaty provision to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provision contained in this treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1). The

provision in the other treaty will, upon the entry into force of the Multilateral Instrument for this treaty, be superseded by the Multilateral Instrument to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provision contained in this treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1).

65. One peer provided input on this particular best practice and noted that its tax treaty with Australia contains Article 9(2) of the OECD Model Tax Convention (OECD, 2017).

Part D

Implementation of MAP agreements

There are no best practices for Part D.

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Settlement Mechanisms More Effective
APA Guidance	Law Administration Practice Statement PS LA 2015/4
MAP Guidance	Taxation Ruling TR 2000/16
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (CTPA/CFA/NOE2(2016)45/REV1)



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