

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

BEST PRACTICES

Australia



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Abbreviations and Acronyms

APA	Advance Pricing Arrangement
ATO	Australian Taxation Office
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
MAAL	Multinational Anti Avoidance Law
OECD	Organisation for Economic Co-operation and Development
PGI	Public Group and Internationals
PMU	APA/MAP Program Management Unit

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 implementing 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.

This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices.

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 is authorised to enter into bilateral APAs, as well as unilateral and multilateral APAs, and has implemented an APA programme. Australia reported its APA programme is well-established and has been in place since the mid-1990s. No fees are charged for a bilateral APA request in Australia.
3. Australia reported that in mid-2014 the **Australian Taxation Office** ('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. Australia reported that the **APA/MAP Program Management Unit** ('PMU') is the main contact point for taxpayers seeking an APA. In addition, Australia reported that it also strengthened its APA programme by devoting more resources to the programme to which the competent 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.
4. Australia reported that its APA programme is a three-step process consisting of early engagement (stage 1), APA application (stage 2) and monitoring compliance (stage 3). Australia's **Law Administration Practice Statement PS LA 2015/4** ('APA guidance') clarifies that in stage 1 the team in charge of APAs will explain the APA 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, 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') 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.
5. Australia reported that bilateral APAs typically run for a period between three and five years. Australia further reported that requests to renew an APA should be filed at least

six months before an existing APA expires and that this timeline should also in theory apply to the submission of an initial request for a bilateral APA.

6. Australia also publishes statistics relating to APAs on ATO's website, which essentially relates to the number of APA cases completed.² As of 31 December 2017, Australia reported that it had 106 active APAs and 112 APAs being requested.

7. Of the five peers that provided input on 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 there has been an agreed framework in place since April 2016 to enhance the bilateral APA/MAP process between the two 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. Another peer provided detailed input on its bilateral APA relationship with Australia. This peer noted that the Australian competent authority has a robust bilateral APA programme and also provides a multilateral APA programme as well. 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.

9. This peer 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, the peer reported that these effects seem to be more pronounced in the APA process. The peer expressed concerned 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, the Australian 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.

10. In light of the above paragraph, this peer would appreciate further dialogue with the Australian competent authority on circumstances in which APA applications may be denied or when the APA process may be delayed, and, more generally, when and if taxpayers may be denied access to MAP in light of concerns over the taxpayer's compliance with the MAAL or when the resolution of a MAP case may be delayed or impeded pending such concerns.

² [https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Advance-pricing-arrangements/?anchor=APA and MAC statistics#APA and MAC statistics](https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Advance-pricing-arrangements/?anchor=APA%20and%20MAC%20statistics#APA%20and%20MAC%20statistics).

[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.

11. 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.

12. Australia indicated that it publishes 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.

13. Australia referenced its Practice Statement Law Administration PS LA 2001/8 which 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>

14. 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/>

15. 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.

16. 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.

17. As previously mentioned under BP.1, Australia has implemented bilateral APA programmes. Australia publishes APA guidance in the form of **Law Administration**

Practice Statement PS LA 2015/4 (‘**APA guidance**’), which is separate from Australia’s MAP guidance (Taxation Ruling 2000/16). Section 4.64 of Australia’s current MAP guidance directs taxpayers who are seeking an APA towards an outdated Taxation Ruling 95/23, which has since been withdrawn and is no longer in effect. Australia’s up-to-date APA guidance, however, provides detailed guidance on APAs and contains a holistic overview of the process for entering into an APA in Australia. 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.

18. Australia’s APA guidance is accessible at:

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

19. Specifically, this APA guidance sets out in detail the three step process to obtain an APA described under 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 developing 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.

20. 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.

21. 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.

22. 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.

23. Australia reported that the FTA Global Awareness Training Module has been made available to all staff in its PGI and that this training is mandatory and 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.

24. In addition, Australia noted that its APA/MAP PMU organises regular 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.

25. One peer 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. Other peers did not provide input relating to this particular best practice.

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.

26. Under Article 25(1) of the OECD Model Tax Convention, 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, 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.

27. Taxpayers in Australia are allowed to request MAP assistance and at the same time seek to resolve the same dispute via domestically available judicial and administrative remedies. According to section 4.43 of Australia's MAP guidance, taxpayers have a right to appeal to the Administrative Appeals Tribunal (AAT) for a review of an objection decision that would not be allowed or appeal to the Federal Court against the decision if he is dissatisfied with it. In addition, no fees are charged to taxpayers for a MAP request.

28. 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 AAT or an order of the Federal Court. Thus, Australia reported that after such a decision is rendered the competent authority's subsequent endeavours will be limited to demonstrating to the competent authority of the tax treaty partner country 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 until the case is resolved via these processes. Australia noted, however, that it has never encountered this situation in practice. As discussed in BP.10, this is addressed in Australia's MAP guidance.

29. Finally, as also discussed in BP.10 section 4.40 of Australia's MAP guidance also stipulates that where an objection decision has been made or will be made to reflect an agreement between competent authorities, the taxpayer has to agree it will not seek review of the decision by the AAT or appeal to the Federal Court against the decision.

30. 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.

31. 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.

32. Australia does not provide guidance for bona fide taxpayer-initiated foreign adjustments, but indicated it would grant access to MAP in practice on a case-by-case basis. There is no mention of bona fide taxpayer-initiated foreign adjustments in Australia's MAP guidance. However, Australia reported that it is considering including this in the revised version of its guidance that it is currently preparing.

33. 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.

34. 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 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.

35. Australia's MAP guidance does not contain information on multilateral MAPs. Australia's MAP profile acknowledges that it does not have specific guidance or policy on multilateral MAPs. However, Australia reported that it is considering including this in the revised version of its guidance that it is currently preparing.

36. 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.

37. 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.

38. Australia does provide for suspension of collection procedures during the period a MAP is pending. Australia's MAP profile makes clear that the ATO may defer recovery action for collection procedures until the MAP process is fully concluded. Australia explained that such deferral is granted in recognition of the fact that the collection of tax during the MAP process will in most instances impose temporary double taxation on the taxpayer.

39. Where such temporary double taxation arises, Australia reported that the legislative basis for it to defer recovery is section 255-5 of the Taxation Administration Act 1953, allows it to defer such recovery until the date at which the MAP process is concluded. Information regarding this procedure is also outlined under section 4.50 of Australia's MAP guidance.

40. 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.

41. 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.

42. Australia has implemented procedures to permit taxpayers to request multi-year resolution of recurring issues through the MAP. Australia did report 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 enter into an APA. Australia's MAP guidance does not address the multi-year resolution of recurring issues through MAP. However, Australia reported that it is considering including this in the revised version of its guidance that it is currently preparing.

43. 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.

44. As mentioned under BP.5, pursuant to Article 25(1) of the OECD Model Tax Convention 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.

45. As discussed in BP.5, Australia has included in sections 4.36-4.49 of its MAP guidance an explanation addressing the relationship between MAP and domestic law administrative and judicial remedies. 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. This ruling is available at:

<https://www.ato.gov.au/law/view/pdf?DocID=TXR%2FTR200016%2FNAT%2FATO%2F00001&filename=law/view/pdf/pbr/tr2000-016c1.pdf&PiT=99991231235958>

46. 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 1953³ in relation to 1992-1993 and subsequent income tax years.

47. Australia publishes 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>

48. 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.

49. 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.

50. Australia does take interest and penalties into consideration in mutual agreement procedures. According to Australia's MAP profile, 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. 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 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.

51. Australia also published information regarding the consideration of interest and penalties in MAP in sections 4.51-4.53 of its MAP guidance. Here it is stated that, similar to what was described under BP.8, where double taxation arises ATO will agree to recovery action under section 255-5 of the Taxation Administration Act 1953, including the recovery of any eligible general interest charges until an agreed future date, which will usually be the date when the MAP process is concluded, unless there is 1) a risk to revenue, 2) the taxpayer has other liabilities unpaid after the due date or 3) the taxpayer has failed to meet other tax obligations when required.

52. Section 4.51 of Australia's MAP guidance further states that under 204 of the Tax Administration Act 1953 any general interest charge or other relevant penalty, if applicable for any unpaid, amount of the liability, begins to accrue when the liability becomes due and payable under the relevant taxation law. Section 4.52 of Australia's MAP guidance also states

³ <https://www.legislation.gov.au/Details/C2017C00290>

that under section 8AAG of the Tax Administration Act 1953, the interest that has accrued during the course of a MAP will be remitted in respect of the tax that was actually paid on the profits that both countries claimed to tax, provided that this policy does not result in a windfall gain⁴ to a global multinational enterprise group. Australia noted that such a windfall gain can occur when the other tax administration pays interest on overpayments of tax in cases where correlative relief is granted.

53. Australia's MAP guidance also explains that a general interest charge will be remitted in recognition of any unreasonable delay caused by either itself or the other taxing authority in the resolution of the MAP case. In that regard, Australia reported that two years is reported as the internal benchmark for ATO to resolve transfer pricing cases.

54. Sections 4.54-4.63 of Australia's MAP guidance further clarify when payment of interest on correlative adjustments would be due. It should also be noted that Australia's Taxation (Interest on Overpayments and Early Payments Act) 1983 governs these circumstances where correlative adjustments would give rise to overpayment of tax upon which interest is payable.⁵

55. 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.

56. Article 9(2) of the OECD Model Tax Convention 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.

57. Out of Australia's 53 tax treaties, 40 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the treaty partner. Furthermore, 13 do not contain Article 9(2) of the OECD Model Tax Convention. One of these 13 tax treaties includes a provision in 9(2) that stipulates that corresponding adjustments can only be made as a result of a mutual agreement procedure in accordance with the MAP article and is therefore not considered to have the equivalent of Article 9(2) of the OECD Model Tax Convention.

58. Australia reported that it is in favour 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.

59. In that regard, Australia signed the Multilateral Instrument. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the

⁴ A "windfall gain" is generally defined in section 4.62 of Australia's MAP guidance as payments of "interest on overpayments arising from the provision of correlative relief where the country making the transfer pricing or profit reallocation adjustment does not impose interest 'would result in a windfall gain for a taxpayer or MNE (multinational enterprise) [group] where the taxpayer or MNE [group] viewed as an economic unit has not overpaid its global tax obligations. This would place taxpayers or MNEs who engage in international profit shifting through transfer pricing in a better position than those who do not.'"

⁵ <https://www.legislation.gov.au/Details/C2017C00236>

OECD Model Tax Convention – 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. 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(2) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention, or not to apply Article 17(2) 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. 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).

60. Australia has, pursuant to Article 17(3), reserved the right not to apply Article 17(2) of the Multilateral Instrument for those tax treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention. In regard of the 13 treaties identified in paragraph 50 above that are considered not to contain an equivalent provision, Australia listed four as a covered tax agreement under the Multilateral Instrument and included three in the list of treaties for which Australia has, pursuant to Article 17(3), reserved the right not to apply Article 17(2) of the Multilateral Instrument. For the remaining treaty Australia did not make, pursuant to Article 17(4), a notification that this treaty does contain such equivalent. The relevant treaty partner, being a signatory to the Multilateral Instrument, has not, on the basis of Article 17(3), reserved the right not to apply Article 17(2). Therefore, at this stage, the Multilateral Instrument will, upon entry into force, supersede one of the 13 treaties only to the extent that the provision included in that tax treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1).

61. One peer noted that its tax treaty with Australia contains Article 9(2) of the OECD Model Tax Convention. Other peers did not provide input relating to this particular best practice.

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)



BETTER POLICIES FOR BETTER LIVES

For more information:

 ctp.beps@oecd.org

 <http://oe.cd/bepsaction14>

 [@OECDtax](https://twitter.com/OECDtax)