

**OECD/G20 Base Erosion and Profit Shifting
Project**



Making Dispute Resolution More Effective – MAP Peer Review Report, Australia (Stage 1)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

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Foreword

The integration of national economies and markets has increased substantially in recent years, putting a strain on the international tax rules, which were designed more than a century ago. Weaknesses in the current rules create opportunities for base erosion and profit shifting (BEPS), requiring bold moves by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created.

Following the release of the report *Addressing Base Erosion and Profit Shifting* in February 2013, OECD and G20 countries adopted a 15-point Action Plan to address BEPS in September 2013. The Action Plan identified 15 actions along three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty.

After two years of work, measures in response to the 15 actions were delivered to G20 Leaders in Antalya in November 2015. All the different outputs, including those delivered in an interim form in 2014, were consolidated into a comprehensive package. The BEPS package of measures represents the first substantial renovation of the international tax rules in almost a century. Once the new measures become applicable, it is expected that profits will be reported where the economic activities that generate them are carried out and where value is created. BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.

Implementation is now the focus of this work. The BEPS package is designed to be implemented via changes in domestic law and practices, and in tax treaties. With the negotiation of a multilateral instrument (MLI) having been finalised in 2016 to facilitate the implementation of the treaty related BEPS measures, over 80 jurisdictions are covered by the MLI. The entry into force of the MLI on 1 July 2018 paves the way for swift implementation of the treaty related measures. OECD and G20 countries also agreed to continue to work together to ensure a consistent and co-ordinated implementation of the BEPS recommendations and to make the project more inclusive. Globalisation requires that global solutions and a global dialogue be established which go beyond OECD and G20 countries.

A better understanding of how the BEPS recommendations are implemented in practice could reduce misunderstandings and disputes between governments. Greater focus on implementation and tax administration should therefore be mutually beneficial to governments and business. Proposed improvements to data and analysis will help support ongoing evaluation of the quantitative impact of BEPS, as well as evaluating the impact of the countermeasures developed under the BEPS Project.

As a result, the OECD established the Inclusive Framework on BEPS, bringing all interested and committed countries and jurisdictions on an equal footing in the Committee on Fiscal Affairs and all its subsidiary bodies. The Inclusive Framework, which already

has more than 115 members, is monitoring and peer reviewing the implementation of the minimum standards as well as completing the work on standard setting to address BEPS issues. In addition to BEPS members, other international organisations and regional tax bodies are involved in the work of the Inclusive Framework, which also consults business and the civil society on its different work streams.

This report was approved by the Inclusive Framework on BEPS on 14 August 2018 and prepared for publication by the OECD Secretariat.

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Abbreviations and acronyms

APA	Advance Pricing Arrangement
ATO	Australian Taxation Office
BEPS	Base Erosion and Profit Shifting
DPT	Diverted Profits Tax
FTA	Forum on Tax Administration
MAAL	Multinational Anti-Avoidance Law
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development
PGI	Public Groups and International
PMU	APA/MAP Program Management Unit

Executive summary

Australia has a relatively large tax treaty network with around 50 tax treaties. Australia has an established MAP programme and has significant experience with resolving MAP cases. It has a small MAP inventory, with a modest number of new cases submitted each year and less than 45 cases pending on 31 December 2017. Of these cases, approximately 60% concern allocation/attribution cases. Australia meets part of the elements of the Action 14 Minimum Standard. Where it has deficiencies, Australia is considering addressing most of them and already working on some of them.

All of Australia's tax treaties contain a provision relating to MAP. Those treaties generally follow paragraphs 1 through 3 of Article 25 of the *Model Tax Convention on Income and on Capital 2014 (OECD Model Tax Convention, OECD, 2015)*. Its treaty network is partly consistent with the requirements of the Action 14 Minimum Standard. In particular, the main deviations from that standard concern:

- Approximately 70% of its tax treaties do not contain the equivalent of Article 25(3), second sentence of the final report stating that the competent authorities may consult together for the elimination of double taxation for cases not provided for in the tax treaty.
- Around 40 % of its tax treaties neither contain a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law (which is required under Article 25(2), second sentence), nor the alternative provisions for Article 9(1) and Article 7(2) to set a time limit for making transfer pricing adjustments.
- Almost 30% of its tax treaties do not contain the equivalent of Article 25(1) to the OECD Model Tax Convention (OECD, 2015), whereby the majority of these treaties do not contain the equivalent of Article 25(1), first sentence, as it read prior to the adoption of the *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report* (Action 14 final report, OECD, 2015b) since they do not allow taxpayers to submit a MAP request to the state of which it is a national, where its case comes under the non-discrimination provision, and the timeline to file such a request is shorter than three years as from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, Australia needs to amend and update a significant number of its tax treaties. In this respect, Australia signed the Multilateral Instrument, through which a number of its tax treaties will potentially be modified to fulfil the requirements under the Action 14 Minimum Standard. Where treaties will not be modified, upon entry into force of this Multilateral Instrument, Australia reported that it intends to update some of its tax treaties to be compliant with the requirements under the Action 14 Minimum Standard via bilateral negotiations. In this respect, Australia will *inter alia* take into account available resources and the practical impact of differences between the

existing MAP provision and this standard. Furthermore, Australia opted for part VI of the Multilateral Instrument concerning the introduction of a mandatory and binding arbitration provision in tax treaties.

Australia meets the Action 14 Minimum Standard concerning the prevention of disputes. It has in place a bilateral APA programme. This APA programme also enables taxpayers to request rollbacks of bilateral APAs and such rollbacks are granted in practice.

Australia meets some of the requirements regarding the availability and access to MAP under the Action 14 Minimum Standard. While it has provided access to MAP in all eligible cases, Australia's practice enables access to MAP to be limited in cases where taxpayers and the tax administration have entered into an audit settlement that contains a clause not to resort to MAP. Furthermore, due to contradictory public information on whether there is access to MAP in cases concerning the application of domestic anti-abuse provisions, there is a risk that taxpayers in these cases did not submit a MAP request, while in practice MAP would have been available for such cases. In addition, Australia has in place a notification process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified, which has been used in practice. However, this process is not yet documented, while Australia intends to do this in the future.

Furthermore, Australia has issued guidance on the availability of MAP and how it applies this procedure in practice. This guidance, however, is limited to guidance for attribution/allocation cases and is not easily accessible, nor does it contain up-to-date contact details of Australia's competent authority.

Concerning the average time needed to close MAP cases, the MAP statistics for Australia for the period 2016-17 are as follows:

2016-17	Opening inventory 1/1/2016	Cases started	Cases closed	End inventory 31/12/2017	Average time to close cases (in months)*
Attribution/allocation cases	28	20	22	26	20.00
Other cases	12	20	15	17	6.40
Total	40	40	37	43	14.49

* The average time taken for resolving MAP cases for post-2015 cases follows the MAP Statistics Reporting Framework. For computing the average time taken for resolving pre-2016 MAP cases, Australia used as a start date the date the case was allocated to a competent authority in Australia, and as the end date the date the case was closed subsequent to implementation of the MAP outcome.

The number of cases Australia closed in 2016 or 2017 is slightly lower than the number of all new cases started in those years. Its MAP inventory as per 31 December 2017 slightly increased as compared to its inventory as per 1 January 2016. However, Australia's competent authority closed MAP cases on average within a timeframe of 24 months (which is the pursued average for closing MAP cases received on or after 1 January 2016), as the average time necessary was 14.49 months, following which Australia's competent authority is considered adequately resourced.

Furthermore, Australia meets almost all the other requirements under the Action 14 Minimum Standard in relation to the resolution of MAP cases. Australia's competent authority adopts a pragmatic approach to resolve MAP cases in an effective and efficient manner. Its organisation is adequate and the performance indicators used are appropriate to perform the MAP function. However, personnel of the tax administration in Australia

directly involved in the adjustment at issue can participate in face-to-face meetings during which MAP cases which bears the risk that the competent authority function is not performed entirely independent from the approval or direction of the tax administration personnel directly involved in the adjustment at issue concerning the resolution of MAP cases during such meetings.

Lastly, Australia also meets the Action 14 Minimum Standard as regards the implementation of MAP agreements. Australia has a domestic statute of limitation for implementation of MAP agreements, which can be overridden, depending on the case at stake, by law or by statutory authority and for which there is a risk that such agreements cannot be implemented in the latter case. Australia monitors the implementation of MAP agreements and it has implemented all MAP agreements thus far. No issues have surfaced regarding the implementation throughout the peer review process.

Introduction

Available mechanisms in Australia to resolve tax treaty-related disputes

Australia has entered into 53 tax treaties on income (and/or capital), of which 51 are in force.¹ These 53 treaties apply to 53 jurisdictions. All but one of these treaties provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. In addition, three of the 53 treaties provide for an arbitration procedure as a final stage to the mutual agreement procedure.²

In Australia, the competent authority function to conduct MAP is managed by the **APA/ MAP Program Management Unit** (“PMU”) within the **Australian Taxation Office** (“ATO”). The PMU employs 12 full-time staff, three of whom are authorised to exercise the competent authority function. The rest of the PMU staff works on case management, reporting functions and assists with other casework. The PMU manages both the APA and MAP programme in Australia and is located within the Internationals area of the **Public Group and Internationals** (“PGI”) business line, which is separate from the audit function located in the Operations area of PGI.

Australia issued guidance on the governance and administration of the **mutual agreement procedure** (“MAP”) in 2000 which is available at:

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

Recent developments in Australia

Australia is currently conducting tax treaty negotiations with China and Israel. Australia recently signed new tax treaties with the Marshall Islands and Samoa, which have not yet entered into force.

Furthermore, Australia signed on 7 June 2017 the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“**Multilateral Instrument**”), to adopt, where necessary, modifications to the MAP article under its tax treaties with a view to be compliant with the Action 14 Minimum Standard in respect of all the relevant tax treaties. Australia reported its expressed preference to modify Australia’s existing agreements via the Multilateral Instrument and that it will strongly encourage its existing treaty partners to use this instrument to ensure that its tax treaties with Australia comply with the Action 14 Minimum Standard. To facilitate this process, the Australian Government is currently focused on completing Australia’s domestic implementation processes to allow Australia to ratify the Multilateral Instrument as quickly as possible. Where treaties will not be modified by the Multilateral Instrument, Australia reported that the timing and processes for making bilateral amendments to existing tax treaties will be considered having due regard to the Government’s negotiation priorities (including both

tax and non-tax considerations), available resources and, specifically with respect to the Action 14 Minimum Standard, the extent of the practical impact of differences between the existing MAP provision and this standard. Australia also indicated that it would take into account the reasons why a relevant treaty partner has either not signed the Multilateral Instrument or did not include the treaty with Australia as a covered tax agreement before initiating bilateral actions. Australia further reported that it routinely proposes including paragraphs 1 to 3 of Article 25 of the OECD Model Tax Convention (OECD, 2015) in all ongoing tax treaty negotiations and will continue to do so in the future. With the signing of the Multilateral Instrument, Australia also submitted its list of notifications and reservations to that instrument. In relation to the Action 14 Minimum Standard, Australia did not make any reservations to article 16 of the Multilateral Instrument (concerning the mutual agreement procedure). It further opted for part VI of that instrument, which contains a mandatory and binding arbitration procedure as a final stage to the MAP process.

Basis for the peer review process

The peer review process entails an evaluation of Australia’s implementation of the Action 14 Minimum Standard through an analysis of its legal and administrative framework relating to the mutual agreement procedure, as governed by its tax treaties, domestic legislation and regulations, as well as its MAP programme guidance and the practical application of that framework. The review process performed is desk-based and conducted through specific questionnaires completed by the assessed jurisdiction, its peers and taxpayers. The questionnaires for the peer review process were sent to Australia and the peers on 29 December 2017.

The period for evaluating Australia’s implementation of the Action 14 Minimum Standard ranges from 1 January 2016 to 31 December 2017 (“**Review Period**”). While the commitment to the Action 14 Minimum Standard only starts from 1 January 2016, Australia opted to provide information and requested peer input on a period starting as from 1 January 2015. Even though this period is taken into account in the analysis in this report, the basis of conclusions only concerns the period starting on 1 January 2016. In addition to the assessment on its compliance with the Action 14 Minimum Standard Australia also asked for peer input on best practices, which can be accessed on the OECD website.³ Furthermore, this report may depict some recent developments that have occurred after the Review Period, which at this stage will not impact the assessment of Australia’s implementation of this minimum standard. In the update of this report, being stage 2 of the peer review process, these recent developments will be taken into account in the assessment and, if necessary, the conclusions contained in this report will be amended accordingly.

For the purpose of this report and the statistics below, in assessing whether Australia is compliant with the elements of the Action 14 Minimum Standard that relate to a specific treaty provision, the newly negotiated treaties or the treaties as modified by a protocol, as described above, were taken into account, even if it concerned a modification or a replacement of an existing treaty. Reference is made to Annex A for the overview of Australia’s tax treaties regarding the mutual agreement procedure.

In total 18 peers provided input: Belgium, Canada, China, Denmark, Germany, India, Italy, Japan, Korea, New Zealand, Norway, Russia, Singapore, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Out of these 18 peers, nine had MAP cases with Australia that started on or after 1 January 2016. These nine peers represent 76% of post-2015 MAP cases in Australia’s inventory that started in January 2016 or 2017. Input was also

received from taxpayers. Generally, all peers indicated having a positive working relationship with Australia’s competent authority, some of them emphasising good collaboration and the easiness of contact.

Australia provided extensive answers in its questionnaire, which was submitted on time. Australia was very responsive in the course of the drafting of the peer review report by responding timely and comprehensively to requests for additional information, and provided further clarity where necessary. In addition, Australia provided the following information:

- MAP profile⁴
- MAP statistics⁵ according to the MAP Statistics Reporting Framework (see below).

Finally, Australia is an active member of the FTA MAP Forum and has shown good co-operation during the peer review process. Australia provided detailed peer input and made constructive suggestions on how to improve the process with the concerned assessed jurisdictions. Australia also provided peer input on the best practices for a number of jurisdictions that asked for it.

Overview of MAP caseload in Australia

The analysis of Australia’s MAP caseload relates to the period starting on 1 January 2016 and ending on 31 December 2017 (“**Statistics Reporting Period**”). According to the statistics provided by Australia, its MAP caseload during this period was as follows:

2016-17	Opening inventory 1/1/2016	Cases started	Cases closed	End inventory 31/12/2017
Attribution/allocation cases	28	21	22	27
Other cases	12	20	15	17
Total	40	41	37	44

General outline of the peer review report

This report includes an evaluation of Australia’s implementation of the Action 14 Minimum Standard. The report comprises the following four sections:

- Preventing Disputes
- Availability and Access to MAP
- Resolution of MAP cases
- Implementation of MAP agreements.

Each of these sections is divided into elements of the Action 14 Minimum Standard, as described in the terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective (“**Terms of Reference**”).⁶ Apart from analysing Australia’s legal framework and its administrative practice, the report also incorporates peer input and taxpayer input and responses to such input by Australia. Furthermore, the report depicts the changes adopted and plans shared by Australia to implement elements of the Action 14 Minimum Standard where relevant. The conclusion of each element identifies areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed.

The objective of the Action 14 Minimum Standard is to make dispute resolution mechanisms more effective and concerns a continuous effort. Therefore, this peer review report includes recommendations that Australia continues to act in accordance with a given element of the Action 14 Minimum Standard, even if there is no area for improvement for this specific element.

Notes

1. The tax treaties Australia has entered into are available at: <http://192.195.49.161/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties> (accessed on 18 July 2018). The treaties that are signed but have not yet entered into force are with the Marshall Islands and Samoa. Reference is made to Annex A for the overview of Australia's tax treaties.
2. This concerns the treaties with Germany, New Zealand and Switzerland.
3. Available at: <http://oe.cd/bepsaction14>.
4. Available at: www.oecd.org/ctp/dispute/Australia-Dispute-Resolution-Profile.pdf.
5. The MAP statistics of Australia are included in Annexes B and C of this report.
6. Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.

References

- OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review Documents*, www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf (accessed on 18 July 2018).
- OECD (2015), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264239081-en> (accessed on 18 July 2018).

Part A

Preventing disputes

[A.1] **Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties**

Jurisdictions should ensure that their tax treaties contain a provision which requires the competent authority of their jurisdiction to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties.

1. Cases may arise concerning the interpretation or the application of tax treaties that do not necessarily relate to individual cases, but are more of a general nature. Inclusion of the first sentence of Article 25(3) of the OECD Model Tax Convention (OECD, 2015) in tax treaties invites and authorises competent authorities to solve these cases, which may avoid submission of MAP requests and/or future disputes from arising, and which may reinforce the consistent bilateral application of tax treaties.

Current situation of Australia’s tax treaties

2. Out of Australia’s 53 tax treaties, 22 contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015) requiring their competent authority to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty. For ten tax treaties, there is no provision based on 25(3), first sentence of the OECD Model Tax Convention (OECD, 2015) at all. For 20 tax treaties, the word “interpretation” is missing. Furthermore, one tax treaty misses the word “application” and is therefore also considered not to have the full equivalent of Article 25(3). For this reason, 31 treaties do not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015).

3. Australia reported that irrespective of whether the applicable treaty contains a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015), there is no obstruction under its domestic law or administrative practice that would prevent its competent authority from entering into discussions to endeavour to resolve an issue under an interpretative MAP agreement. Australia clarified that there is a limit under its domestic law, however, as to what Australia’s competent authority could ultimately agree to in an interpretative MAP agreement as an agreement under Article 25(3) concerning the meaning of a treaty term does not necessarily prevail over the meaning of that term under Australia’s domestic law under ordinary principles of interpretation.

Anticipated modifications

Multilateral Instrument

4. Australia signed the Multilateral Instrument. Article 16(4)(c)(i) of that instrument stipulates that Article 16(3), first sentence – containing the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015). In other words, in the absence of this equivalent, Article 16(4)(c)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. 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 and insofar as both notified, pursuant to Article 16(6)(d)(i), the depositary that this treaty does not include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015).

5. In regard of the 31 tax treaties identified above that are considered not to contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015), Australia listed 22 of them as a covered tax agreement under the Multilateral Instrument and for none of them did it make, pursuant to Article 16(6)(d)(i), a notification they do not contain a provision described in Article 16(4)(c)(i). Therefore, at this stage the Multilateral Instrument will, upon entry into force, not modify any of the 31 tax treaties identified above to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015). In this respect, Australia reported that it is likely to reconsider the notifications it made prior to depositing its instrument of ratification, which is expected to occur between 1 July and 31 August 2018.

Bilateral modifications

6. Australia reported its expressed preference to modify Australia's existing agreements via the Multilateral Instrument and that it will strongly encourage its existing treaty partners to use this instrument to ensure that its tax treaties with Australia comply with the Action 14 Minimum Standard. To facilitate this process, Australia reported that the Australian Government is currently focused on completing Australia's domestic implementation processes to allow Australia to ratify the Multilateral Instrument as quickly as possible. Where treaties will not be modified by the Multilateral Instrument, Australia reported that the timing and processes for making bilateral amendments to existing tax treaties will be considered (including both tax and non-tax considerations), available resources and, specifically with respect to the Action 14 Minimum Standard, the extent of the practical impact of differences between the existing MAP provision and this standard. Australia also indicated that it would take into account the reasons why a relevant treaty partner has either not signed the Multilateral Instrument or did not include the treaty with Australia as a covered tax agreement before initiating bilateral actions. In addition, Australia reported it will seek to include Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015) in all of its future tax treaties.

Peer input

7. Some of the peers that provided input mentioned that their treaty with Australia meets the minimum requirement under element A.1, which is in line with the analysis described previously.

8. For the 31 treaties identified that do not include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015), some of the relevant peers provided input. One of them specified that its own model tax treaty contains the provision of the OECD Model Tax Convention (OECD, 2015) that is not contained in its treaty with Australia. Many of the peers whose tax treaty with Australia does not meet the minimum requirement under this element indicated that their tax treaty with Australia would be modified by the Multilateral Instrument to be in line with element A.1. One peer noted that there was currently a mismatch in notifications with respect to the Multilateral Instrument and that it was currently working with Australia to align such mismatches so that the Multilateral Instrument can modify its tax treaty with Australia. Another peer reported that it contacted Australia to renegotiate their entire tax treaty.

Conclusion

	Areas for improvement	Recommendations
[A.1]	31 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015).	As none of the 31 tax treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations or follow up on its intention to reconsider its notifications in the Multilateral Instrument. In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.

[A.2] Provide roll-back of bilateral APAs in appropriate cases

Jurisdictions with bilateral advance pricing arrangement (“APA”) programmes should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

9. An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustment thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.¹ The methodology to be applied prospectively under a bilateral or multilateral APA may be relevant in determining the treatment of comparable controlled transactions in previous filed years. The “roll-back” of an APA to these previous filed years may be helpful to prevent or resolve potential transfer pricing disputes.

Australia’s APA programme

10. 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.

11. 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 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.

12. 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 submit an initial request for a bilateral APA.

Roll-back of bilateral APAs

13. Australia reported that it is possible to obtain a roll-back of bilateral APAs in Australia. As mentioned above, Australia’s APA guidance² outlines in detail the basis of Australia’s APA programme. In general, Australia reported that roll-backs are typically requested for a period of two to three years. Australia’s domestic statute of limitation enables it to grant rollback in theory up to seven years after the notice of assessment of the taxpayer, as provided in sections 815-150 and 815-240 of the Income Tax Assessment Act 1997 which set the time limit for making a transfer pricing adjustment or for adjusting the profits attributed to a permanent establishment.

14. Sections 24A-24G of Australia’s APA guidance relate to the roll-back of APAs in Australia. Section 24C clarifies that ATO’s practice in relation to roll-backs of bilateral APAs depends on a taxpayer’s specific circumstances and on a risk assessment basis. The criteria set out in Section 24E of Australia’s APA guidance, stipulates that ATO:

- will not seek roll-back where the transfer pricing issues for prior years are rated as low-risk under business line risk assessment procedures
- will be more likely to seek roll-back for a lesser number of years in the case of a voluntary APA request than it would be for a case resulting from ATO compliance activity
- is likely to seek roll-back for issues rated as high risk.

Practical application of roll-back of bilateral APAs

15. According to the statistics available on ATO’s website, Australia completed 22 bilateral APAs between 1 July 2015 and 30 June 2016.³ Concerning roll-backs of bilateral APAs, Australia reported that between 1 January 2015 and 31 December 2016 it received 13 requests, of which three have been granted and the other ten are still under consideration.

16. Several peers mentioned that roll-backs of bilateral APAs with Australia is available in appropriate cases. One peer specified that one APA including a roll-back request was concluded in 2017 and another peer indicated that it has concluded an APA with a roll-back with Australia and that no problems were encountered with the concluding or the

implementation of such an agreement. Several peers indicated that while they have received roll-back requests since 1 January 2015, no cases have been finalised yet and roll-backs have not yet been granted but that roll-backs of bilateral APAs with Australia seems available in appropriate cases. Several other peers indicated not having received any requests for roll-back during the review period and one of these peers also indicated that it is its impression that the Australian competent authority is amenable to granting roll-backs when requested by the taxpayer. One peer further noted that Australia uses APAs positively to avoid tax treaty related disputes and that it has received multiple requests for bilateral APA with Australia since 1 January 2015. One last peer also mentioned that its jurisdiction worked together with Australia and the taxpayer to encourage the latter to submit an APA request further to a MAP case that relates to an issue that is likely to occur again.

Anticipated modifications

17. Australia did not indicate that it anticipates any modifications in relation to element A.2.

Conclusion

	Areas for improvement	Recommendations
[A.2]	-	Australia should continue to provide for roll-back of bilateral APAs in appropriate cases as it has done thus far.

Notes

1. This description of an APA based on the definition of an APA in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.
2. <http://law.ato.gov.au/atolaw/view.htm?docid=%22PSR%2FPS20154%2FNAT%2FATO%2F00001%22> (accessed on 18 July 2018).
3. https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Advance-pricing-arrangements/?anchor=APA_and_MAC_statistics#APA_and_MAC_statistics (accessed on 18 July 2018).

References

- OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/tpg-2017-en> (accessed on 18 July 2018).
- OECD (2015), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264239081-en> (accessed on 18 July 2018).

Part B

Availability and access to MAP

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

Jurisdictions should ensure that their tax treaties contain a MAP provision which provides that when the taxpayer considers that the actions of one or both of the Contracting Parties result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty, the taxpayer, may irrespective of the remedies provided by the domestic law of those Contracting Parties, make a request for MAP assistance, and that the taxpayer can present the request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

18. For resolving cases of taxation not in accordance with the provisions of the tax treaty, it is necessary that tax treaties include a provision allowing taxpayers to request a mutual agreement procedure and that this procedure can be requested irrespective of the remedies provided by the domestic law of the treaty partners. In addition, to provide certainty to taxpayers and competent authorities on the availability of the mutual agreement procedure, a minimum period of three years for submission of a MAP request, beginning on the date of the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty, is the baseline.

Current situation of Australia’s tax treaties

Inclusion of Article 25(1), first sentence of the OECD Model Tax Convention

19. Out of Australia’s 53 tax treaties, 9 contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report (Action 14 final report, OECD, 2015b)*, allowing taxpayers to submit a MAP request to the competent authority of the state in which they are resident when they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty and that can be requested irrespective of the remedies provided by the domestic law of either state. In addition to these 9 treaties, one of Australia’s tax treaties contains a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), as changed by the Action 14 final report (OECD, 2015b) and allowing taxpayers to submit a MAP request to the competent authority of either state.

20. The remaining 43 tax treaties can be categorised as follows:

Provision	Number of tax treaties
No provision allowing the taxpayer to submit a MAP request	1
A variation to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), whereby the taxpayer can submit a MAP request irrespective of domestic available remedies, but whereby pursuant to a protocol provision the taxpayer is also required to initiate these remedies when submitting a MAP request.	1
A variation of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), whereby taxpayers can only submit a MAP request to the competent authorities of the contracting state of which they are a resident and only where there is double taxation contrary to the principles of the agreement.	1
A variation of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), whereby taxpayers can only submit a MAP request for transfer pricing adjustments, whereas the scope of the treaty also covers certain items of income concerning individuals.	8
A variation of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), whereby taxpayers can only submit a MAP request to the competent authorities of the contracting state of which they are resident.	32

21. The treaty in the first row does not contain any provision based on Article 25(1), first sentence of the OECD Model Tax Convention (OECD, 2015a) at all.

22. The treaty mentioned in the second row of the table above allows taxpayers to submit a MAP request irrespective of domestic available remedies. However, the protocol to this treaty limits such submission, as it requires that a domestic remedy should first be initiated before a case can be dealt with in MAP. With respect to the one treaty included in the second row of the table above, the provision incorporated in the protocol to this treaty reads:

The expression “notwithstanding the remedies provided by the national laws” means that the mutual agreement procedure is not alternative to the national contentious proceedings which shall be, in any case, preventively initiated, when the claim is related to an assessment of Italian tax not in accordance with this Convention.

23. For this reason, this one treaty is considered not to have the full equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b).

24. The 32 treaties mentioned in the last row in the table above are considered not to have the full equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), since taxpayers are not allowed to submit a MAP request in the state of which they are a national where the case comes under the non-discrimination article. For the 32 treaties, the following analysis is made:

- The relevant tax treaties do not include a non-discrimination provision and for that reason they are considered to be in line with this part of element B.1 (30 treaties).
- The relevant tax treaties mentioned, contain a non-discrimination provision that is almost identical to Article 24(1) of the OECD Model Tax Convention (OECD, 2015a) and that applies both to nationals that are and are not resident of one of the contracting states. The omission of the full text of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) is therefore not clarified by the absence of or a limited scope of the non-discrimination provision, following which these two treaties are not in line with this part of element B.1. (two treaties)

Inclusion of Article 25(1), second sentence of the OECD Model Tax Convention

25. Out of Australia’s 53 tax treaties, 36 contain a provision equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2015a) allowing taxpayers to submit a MAP request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty.

26. The remaining 17 tax treaties that do not contain such provision can be categorised as follows:

Provision	Number of tax treaties
No MAP provision	1
No filing period for a MAP request	3
Filing period less than three years for a MAP request (two-years)	3
Filing period more than three years for a MAP request (four-years)	2
Treaties that have a limited scope of application, whereby the MAP is restricted to transfer pricing cases and whereby the filing period is three years, however, as of the date of the first notification of a transfer pricing adjustment	8

27. When a treaty does not include a filing period for a MAP request, Australia reported that the taxpayer must present the case within the time frame provided under Australia’s domestic law. Division 3 of Part IVC of the Taxation Administration Act 1953¹ stipulates that the time for lodging an objection is generally two years from the date of the assessment for individuals or small businesses, or four years for other entities starting from the date of self-assessment (corresponding to the filing of a tax return). Australia further reported that in case its statute of limitation has already expired, an Australian resident can present along with its MAP request, a request for extension of the time to lodge an objection under Section 14ZX of the Taxation Administration Act 1953. While this system in theory allows taxpayers to present its MAP request within an indefinite period of time, Australia reported that it will grant access to cases that would be presented after the expiration of such domestic time limits on a case-by-case. Therefore, there is a risk that taxpayers are not allowed to validly present a MAP request within a period of at least three years as from the first notification of the action that results or is likely to result in taxation not in accordance with the provisions of the tax treaty.

Anticipated modifications

Multilateral Instrument

Article 25(1), first sentence of the OECD Model Tax Convention

28. Australia signed the Multilateral Instrument. Article 16(4)(a)(i) of that instrument stipulates that Article 16(1), first sentence – containing the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as amended by the final report on Action 14 (OECD, 2015b) and allowing the submission of MAP requests to the competent authority of either contracting state – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the final report on Action 14 (OECD, 2015b). However, this shall only apply if both contracting parties to the applicable tax treaty have listed this tax treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified the depositary, pursuant to

Article 16(6)(a), that this treaty contains the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the final report on Action 14 (OECD, 2015b). Article 16(4)(a)(i) will for a tax treaty not take effect if one of the treaty partners has, pursuant to Article 16(5)(a), reserved the right not to apply the first sentence of Article 16(1) of that instrument to all of its covered tax agreements.

29. With the signing of the Multilateral Instrument, Australia opted, pursuant to Article 16(4)(a)(i) of that instrument, 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 (OECD, 2015a) as amended by the final report on Action 14 (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either contracting state. In other words, where under Australia's tax treaties taxpayers currently have to submit a MAP request to the competent authority of the contracting state of which it is a resident, Australia opted to modify these treaties allowing taxpayers to submit a MAP request to the competent authority of either contracting state. In this respect, Australia listed 43 of its 53 treaties as a covered tax agreement under the Multilateral Instrument and made, on the basis of Article 16(6)(a), for all of them the notification that they contain a provision that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the final report on Action 14 (OECD, 2015b).

30. In total, eight of 43 relevant treaty partners are not a signatory to the Multilateral Instrument, whereas four have not listed their treaty with Australia as a covered tax agreement under that instrument and 13 reserved, pursuant to Article 16(5)(a), the right not to apply the first sentence of Article 16(1) to its existing tax treaties, with a view to allow taxpayers to submit a MAP request to the competent authority of either contracting state. The remaining 18 treaty partners listed their treaty with Australia as having a provision that is equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the final report on Action 14 (OECD, 2015b). Therefore, at this stage the Multilateral Instrument will, upon entry into force, modify 18 of the 43 treaties to incorporate the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as amended by the final report on Action 14 (OECD, 2015b).

31. In view of the above and in relation to the 13 treaties identified in paragraphs 19 and 20 that are considered not to contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), as it read prior to the adoption of the final report on Action 14 (OECD, 2015b), none are part of the 18 treaties that will be modified via the Multilateral Instrument.

Article 25(1), second sentence of the OECD Model Tax Convention

32. With respect to the period of filing of a MAP request, Article 16(4)(a)(ii) of the Multilateral Instrument stipulates that Article 16(1), second sentence – containing the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2015a) – will apply where such period is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty. 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 and insofar as both notified, pursuant to Article 16(6)(b)(i), the depositary that this treaty does not contain the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2015a).

33. In regard of the 12 tax treaties identified in paragraph 26 above that contain a filing period for MAP requests of less than three years, Australia listed three treaties as a covered tax agreement under the Multilateral Instrument and for all of them did it make, pursuant to Article 16(6)(b)(i), a notification that they do not contain a provision described in Article 16(4)(a)(ii). Of the three relevant treaty partners, one is not a signatory to the Multilateral Instrument. The two remaining tax treaty partners also made such notification. Therefore, at this stage the Multilateral Instrument will, upon entry into force, modify two of the 12 treaties to include the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2015a).

Bilateral modifications

34. Australia reported its expressed preference to modify Australia's existing agreements via the Multilateral Instrument and that it will strongly encourage its existing treaty partners to use this instrument to ensure that its tax treaties with Australia comply with the Action 14 Minimum Standard. To facilitate this process, Australia reported that the Australian Government is currently focused on completing Australia's domestic implementation processes to allow Australia to ratify the Multilateral Instrument as quickly as possible. Where treaties will not be modified by the Multilateral Instrument, Australia reported that the timing and processes for making bilateral amendments to existing tax treaties will be considered (including both tax and non-tax considerations), available resources and, specifically with respect to the Action 14 Minimum Standard, the extent of the practical impact of differences between the existing MAP provision and this standard. Australia also indicated that it would take into account the reasons why a relevant treaty partner has either not signed the Multilateral Instrument or did not include the treaty with Australia as a covered tax agreement before initiating bilateral actions.

35. With respect to the first sentence of Article 25(1), Australia reported that in future bilateral negotiations of existing tax treaties it will propose to include the equivalent provision as it read after the adoption of the final report on Action 14 (OECD, 2015b). For those treaties which do not include a filing period for MAP requests or a period of less than three years, Australia reported it will also seek to amend these via the Multilateral Instrument. In addition, Australia reported it will seek to include Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) in all of its future tax treaties.

Peer input

36. Some of the peers that provided input mentioned that their treaty with Australia is in line with element B.1, which is also confirmed by the analysis described previously.

37. For the 15 treaties identified that do not include the equivalent of Article 25(1) of the OECD Model Tax Convention (OECD, 2015a), some of the relevant peers provided input. Some of the peers whose tax treaty with Australia does not meet the minimum requirement under this element indicated that their tax treaty with Australia would be modified by the Multilateral Instrument to be in line with element B.1, which is also confirmed by the analysis described previously. One peer reported that it contacted Australia to renegotiate their entire tax treaty.

Conclusion

	Areas for improvement	Recommendations
[B.1]	<p>15 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(1) of the OECD Model Tax Convention (OECD, 2015a). Of those 15 tax treaties:</p> <p>Ten tax treaties do not contain the equivalent to Article 25(1), first sentence and the timeline to file such request is shorter than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.</p> <p>Three tax treaties do not contain the equivalent to Article 25(1), first sentence.</p> <p>Two tax treaties provide that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.</p>	<p>Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) in those treaties that currently do not contain such equivalent. This concerns both:</p> <ul style="list-style-type: none"> • a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention (OECD, 2015a) either: <ul style="list-style-type: none"> a. as amended in the final report of Action 14 (OECD, 2015b); or b. as it read prior to the adoption of final report of Action 14 (OECD, 2015b), thereby including the full sentence of such provision; and • a provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. <p>For the remaining treaties that will not be modified by the Multilateral Instrument following its entry into force to include such equivalent, Australia should request the inclusion of the required provision via bilateral negotiations.</p> <p>In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.</p>
	<p>Where tax treaties do not contain a time limit for submission of a MAP request, there is a risk, under applicable rules under domestic legislation, that taxpayers cannot validly present a MAP request within a period of at least three years as from the first notification of the action that results or will result in taxation not in accordance with the provisions of the tax treaty.</p>	<p>Australia should ensure that where its domestic time limits apply for filing of MAP requests, in the absence of a provision hereon in its tax treaties, such time limits do not prevent taxpayers from access to MAP if a request thereto is made within a period of three years as from the first notification of the action that results or will result in taxation not in accordance with the provisions of the tax treaty.</p>

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

Jurisdictions should ensure that either (i) their tax treaties contain a provision which provides that the taxpayer can make a request for MAP assistance to the competent authority of either Contracting Party, or (ii) where the treaty does not permit a MAP request to be made to either Contracting Party and the competent authority who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the competent authority should implement a bilateral consultation or notification process which allows the other competent authority to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case).

38. In order to ensure that all competent authorities concerned are aware of MAP requests submitted, for a proper consideration of the request by them and to ensure that taxpayers have effective access to MAP in eligible cases, it is essential that all tax treaties contain a provision that either allows taxpayers to submit a MAP request to the competent authority:

- i. of either treaty partner; or, in the absence of such provision

- ii. where it is a resident, or to the competent authority of the state of which they are a national if their cases come under the non-discrimination article. In such cases, jurisdictions should have in place a bilateral consultation or notification process where a competent authority considers the objection raised by the taxpayer in a MAP request as being not justified.

Domestic bilateral consultation or notification process in place

39. As discussed under element B.1, out of Australia’s 53 treaties, one currently contains a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as changed by the Action 14 final report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either treaty partner. However, as was also discussed under element B.1, 18 of these 53 treaties will, upon entry into force, be modified by the Multilateral Instrument to allow taxpayers to submit a MAP request to the competent authority of either treaty partner.

40. Australia reported that it introduced in early 2017 a notification process which allows the other competent authority concerned to provide its views on the case when Australia’s competent authority considers the objection raised in the MAP request not to be justified. Australia also reported that its current practice is to notify treaty partners in writing when a MAP request is received and that it requests their input on whether the case is justified. Australia further reported that it later notifies its treaty partners in writing if it concludes the case is not justified and includes the basis for such a decision. However, Australia’s practice in this respect has not yet been documented.

Practical application

41. Australia reported that in three MAP cases it considered an objection not justified since 1 January 2015.

42. In this respect, Australia reported that one case occurred in 2015 where there is no record of notification of the other competent authority concerned. In the other two cases that occurred in 2017, Australia’s competent authority notified the other competent authority, which was confirmed by both relevant peers. All other peers that provided input indicated not being aware of any cases for which the Australia’s competent authority denied access to MAP. They also reported not having been consulted or notified of a case where Australia’s competent authority considered the objection raised in a MAP request as not justified. One peer also reported that its tax treaty with Australia allows the taxpayer to submit its MAP request to the competent authority of either contracting state. A last peer reported that its competent authority considered the objection raised by the taxpayer as not justified in one case. This peer further reported that it notified Australia’s competent authority hereof and that the latter confirmed receiving this notification.

Anticipated modifications

43. 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.

44. As previously discussed under element B.1, Australia has recently signed the Multilateral Instrument, inter alia with the intention to modify covered tax agreements to allow taxpayers to submit a MAP request to the competent authority of either contracting state. Where tax treaties

will not be amended via the Multilateral Instrument, 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.

Conclusion

	Areas for improvement	Recommendations
[B.2]	52 of the 53 treaties do not contain a provision equivalent to Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as changed by the Action 14 final report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either treaty partners. For these treaties no documented bilateral consultation or notification process is in place, which allows the other competent authority concerned to provide its views on the case when the taxpayer's objection raised in the MAP request is considered not to be justified.	Australia should follow its stated intention to document its notification procedure for cases in which its competent authority considered the objection raised in a MAP request not to be justified and when the tax treaty concerned does not include Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as amended by the final report of Action 14 (OECD, 2015b), and should continue using its notification process in practice.

[B.3] Provide access to MAP in transfer pricing cases

Jurisdictions should provide access to MAP in transfer pricing cases.

45. Where two or more tax administrations take different positions on what constitutes arm's length conditions for specific transactions between associated enterprises, economic double taxation may occur. Not granting access to MAP with respect to a treaty partner's transfer pricing adjustment, with a view to eliminating the economic double taxation that may arise from such adjustment, will likely frustrate the main objective of tax treaties. Jurisdictions should thus provide access to MAP in transfer pricing cases.

Legal and administrative framework

46. Out of Australia's 53 tax treaties, 40 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2015a) 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 (OECD, 2015a). 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 (OECD, 2015a).

47. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) is contained in Australia's tax treaties and irrespective of whether its domestic legislation enables the granting of corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, Australia indicated that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments, where the scope of the treaty also covers such cases. This applies to all 53 of Australia's tax treaties, except one treaty that does not contain a provision on transfer pricing.

48. The first section of Australia's MAP guidance specifies that it applies to taxpayers who "seek relief from international double taxation arising from an increased liability to tax due to a transfer pricing or profit reallocation adjustment by the Australian Taxation

Office (ATO) or by a foreign tax administration”. This guidance further describes the concepts of double taxation, including economic double taxation, and the availability of MAP for such cases.

Application of legal and administrative framework in practice

49. Australia reported that it has not denied access to MAP on the basis that the case concerned a transfer pricing case since 1 January 2015.
50. Peers indicated not being aware of a denial of access to MAP by Australia on the basis that the case concerned was a transfer pricing case.
51. Taxpayers also reported not being aware of such a limitation of access.

Anticipated modifications

52. Australia reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention (OECD, 2015a) in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties.
53. 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 OECD Model Tax Convention (OECD, 2015a) – 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, 2015a). 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 (OECD, 2015a), 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 (OECD, 2015a). 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, 2015a)).
54. 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 (OECD, 2015a). In regard of the 13 treaties identified in paragraph 46 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).

Conclusion

	Areas for improvement	Recommendations
[B.3]	-	As Australia has thus far granted access to MAP in eligible transfer pricing cases, it should continue granting access for these cases.

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

Jurisdictions should provide access to MAP in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment 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 treaty.

55. There is no general rule denying access to MAP in cases of perceived abuse. In order to protect taxpayers from arbitrary application of anti-abuse provisions in tax treaties and in order to ensure that competent authorities have a common understanding on such application, it is important that taxpayers have access to MAP if they consider the interpretation and/or application of a treaty anti-abuse provision as being incorrect. Subsequently, to avoid cases in which the application of domestic anti-abuse legislation is in conflict with the provisions of a tax treaty, it is also important that taxpayers have access to MAP in such cases.

Legal and administrative framework

56. Australia reported that its domestic anti-abuse rules are provided in Part IVA of the Income Tax Assessment Act 1936 or Section 67 of the Fringe Benefits Tax Assessment Act 1986. Australia's recently enacted **Multinational Anti-Avoidance Law** ("MAAL") and **Diverted Profits Tax** ("DPT") legislation falls within Part IVA of the Income Tax Assessment Act 1936. Australia explained that Part IVA of the Income Tax Assessment Act 1936 is a general anti-avoidance provision that gives the ATO Commissioner the power to cancel a tax benefit that has been obtained or would be obtained by a taxpayer. Australia further reported that its domestic anti-abuse rules are not restricted by the application of Australia's tax treaties, as provided under subsections 4(2) and 4AA(2) of its International Tax Agreements Act 1953. Australia further reported that during bilateral treaty negotiations it explains that the application of Australia's general anti-avoidance rules prevails in the event of inconsistency with provisions of the treaty. Australia further reported that a determination to apply its domestic anti-abuse rules is only made after consultation with ATO's chief legal counsel, and review of the case by an independent panel of external private sector professionals. Australia emphasised that a Part IVA determination is not made arbitrarily and is subject to significant internal and external review. Australia also noted that with respect to the newly enacted MAAL and DPT legislation, ATO's emphasis is on proactively avoiding disputes via APAs.

57. Australia stated that taxpayers are entitled to access MAP in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment 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 treaty. Australia specified that the latter covers cases arising under the MAAL and DPT legislation. In respect of the MAAL, Australia clarified that this position is confirmed in Australia’s published Law Companion Ruling LCR 2015/2. However, Australia’s MAP guidance does not include any information on how these domestic anti-abuse provisions affect access to MAP in Australia. In addition, Australia’s MAP profile incorrectly specifies that access to MAP will not be granted when Australia’s domestic anti-abuse provisions apply and does not reference LCR 2015/2. This may have caused taxpayers not to submit MAP requests for cases where Australia’s domestic anti-abuse legislation applies.

Practical application

58. Australia reported that since 1 January 2015 it did not deny 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.

59. Peers indicated not being aware of cases that have been denied access to MAP in Australia since 1 January 2015 in relation to the application of treaty and/or domestic anti-abuse provisions. However, one peer mentioned that its competent authority would appreciate further dialogue with Australia’s competent authority on whether a taxpayer whom the Australian tax authority deems to be in violation of the MAAL will be denied access to MAP, and on when the resolution of a MAP case may be delayed or impeded pending such concerns. Australia responded that it is open to further dialogue on the rationale and administrative workings of the MAAL.

60. Taxpayers reported not being aware of such a limitation of access.

Anticipated modifications

61. Australia indicated that it will correct its MAP profile. It also indicated that it is in the process of rewriting its MAP guidance by the end of 2018, which will provide more clarity about access to MAP in cases involving Australia’s domestic anti-abuse provisions.

Conclusion

	Areas for improvement	Recommendations
[B.4]	There is a lack of clarity in Australia’s position regarding whether MAP is limited for cases involving a disagreement between the taxpayer and the tax authorities as to whether the application of a domestic anti-abuse provision is in conflict with the provisions of a treaty. This lack of clarity may have caused taxpayers to not submit MAP requests during the Review period.	As Australia reported it will give 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, it should follow its stated intention to clarify its position regarding this matter. In addition, Australia is recommended to follow its policy and grant access to MAP in such cases.

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

Jurisdictions should not deny access to MAP in cases where there is an audit settlement between tax authorities and taxpayers. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, jurisdictions may limit access to the MAP with respect to the matters resolved through that process.

62. An audit settlement procedure can be valuable to taxpayers by providing certainty on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing on such settlements, taxpayers should have access to the MAP in such cases, unless they were already resolved via an administrative or statutory disputes settlement/resolution process that functions independently from the audit and examination function and which is only accessible through a request by taxpayers.

Legal and administrative framework

Audit settlements

63. 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 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 indicated that audit settlements would generally not be considered available if the case in question relates to a particularly contentious point of taxation law or where it is considered to be in the public interest to litigate.

64. According to Australia, the factors that ATO takes into consideration during the course of an audit settlement include the relevant strength of the parties' position, the cost versus the benefit of continuing the taxation dispute, as well as the expected impact on future compliance for the taxpayer and the broader taxpaying community. To finalise an audit settlement, Australia reported that the related parties are required to sign a written agreement which sets out the exact terms of the settlement. According to Australia, this is usually in the form of a settlement deed which must be adhered to by the signatories unless it emerges that relevant and material facts were not disclosed.

65. Australia clarified that currently audit settlements can contain clauses denying access to MAP and such clauses are included on a case-by-case basis.

Administrative or statutory dispute settlement/resolution process

66. Australia reported it has an administrative or statutory dispute settlement/resolution process in place, which is independent from the audit and examination functions and which can only be accessed through a request by the taxpayer. Taxpayers are entitled to object to most ATO decisions regarding their income tax affairs, including tax assessments. Such objections are heard by the Review and Disputes Resolution business unit, which Australia noted is separate from the audit and compliance functions of ATO. Australia further reported that the individuals handling such cases will not have had any prior involvement in the original decision making process, other than as the review officer in an independent review. In such cases, Australia reported that access to MAP is granted and there is no impact on the solution that can be found by its competent authority.

Practical application

67. Australia reported that since 1 January 2015 it has not denied access to MAP in any cases where the issue presented by the taxpayer in a MAP request has already been resolved through an audit settlement between the taxpayer and the tax administration.

68. All peers indicated not being aware of a denial of access to MAP in Australia since 1 January 2015 in cases where there was an audit settlement between the taxpayer and the tax administration. One peer, however, expressed concerns about Australia’s decision to deny access to MAP in cases of audit settlements where such settlements relate to such anti-abuse provisions.

69. Taxpayers expressed concerns about Australia’s audit practices. These taxpayers noted that they were asked to forego MAP access as part of an audit settlement. These taxpayers reported that such settlement discussions were not undertaken as part of an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions. Concern was expressed by the taxpayers that ATO is exerting pressure on taxpayers to enter into settlement negotiations with a non-negotiable requirement to forego MAP access. Further concern was expressed by these taxpayers that this perceived pressure will increase if the practice of binding arbitration becomes more widespread, which could end up increasing the double tax risk and burden on taxpayers.

70. Australia responded that there have been instances prior to the Review period where ATO has included a clause in an audit settlement deed to prevent taxpayers from proceeding to MAP and other domestic review rights. However, as from the beginning of the Review period, this has not occurred in practice.

Anticipated modifications

71. Australia indicated that it is currently considering its practice with respect to the Action 14 Minimum Standard.

Conclusion

	Areas for improvement	Recommendations
[B.5]	Access to MAP can be restricted in cases where there is an audit settlement between the tax authority and a taxpayer.	Australia 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

Jurisdictions should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP.

72. To resolve cases where there is taxation not in accordance with the provisions of the tax treaty, it is important that competent authorities do not limit access to MAP when taxpayers have complied with the information and documentation requirements as provided in the jurisdiction’s guidance relating hereto. Access to MAP will be facilitated when such required information and documentation is made publically available.

Legal framework on access to MAP and information to be submitted

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

74. Australia reported that when a taxpayer does not include the required information and documentation in its MAP request, its competent authority will lodge a formal request for further information with the taxpayer. Australia also reported that it normally gives a taxpayer 28 days to respond to this request for further information.

75. In cases where information is not received within this 28-day timeframe, Australia reported that its competent authority will discuss with the taxpayer the reason for the non-response to the request for further information. If a taxpayer still does not provide the requested information and does not provide a satisfactory explanation for why it did not provide such information, then Australia would be able to reject the MAP request. Australia noted that such a rejection would be made on a case-by-case basis and that the Australian competent authority's general aim is to work with the taxpayer to successfully process its MAP request.

Practical application

76. Australia reported that it provides access to MAP in all cases where taxpayers have complied with the information or documentation requirements as set out in its MAP guidance. It further reported that since 1 January 2015 its competent authority has not denied access to MAP for cases where the taxpayer had not provided the required information or documentation.

77. All peers that provided input indicated not being aware of a limitation of access to MAP by Australia since 1 January 2015 in situations where taxpayers complied with information and documentation requirements as set out in its MAP guidance.

78. Taxpayers also reported not being aware of such a limitation of access.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.6]	-	As Australia has thus far not limited access to MAP in eligible cases where taxpayers have complied with Australia's information and documentation requirements for MAP requests, it should continue this practice.

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

Jurisdictions should ensure that their tax treaties contain a provision under which competent authorities may consult together for the elimination of double taxation in cases not provided for in their tax treaties.

80. For ensuring that tax treaties operate effectively and in order for competent authorities to be able to respond quickly to unanticipated situations, it is useful that tax treaties include the second sentence of Article 25(3) of the OECD Model Tax Convention (OECD, 2015a), enabling them to consult together for the elimination of double taxation in cases not provided for by these treaties.

Current situation of Australia's tax treaties

81. 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. One of these treaties contains a deviation that is similar to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a), but this provision refers to the consultation regarding cases not provided for in the convention, whereas the second sentence of Article 25(3) refers to the consultation for the elimination of double taxation in cases not provided for in the convention. As the particular tax treaty provides for a scope of application that is at least as broad as that second sentence of Article 25(3), it is considered to be in line with element B.7.

82. All of the remaining 38 treaties do not contain any provision at all that is based on Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a).

Anticipated modifications

Multilateral Instrument

83. Australia recently signed the Multilateral Instrument. Article 16(4)(c)(ii) of that instrument stipulates that Article 16(3), second sentence – containing the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a). In other words, in the absence of this equivalent, Article 16(4)(c)(ii) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. 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 and insofar as both notified, pursuant to Article 16(6)(d)(ii), the depositary that this treaty does not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a).

84. In regard of the 38 tax treaties identified above that are considered not to contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a), Australia listed 29 treaties as a covered tax agreement under the Multilateral Instrument, but only for 28 did it make, pursuant to Article 16(6)(d)(ii), a notification that they do not include a provision described in Article 16(4)(c)(ii). Of the relevant 28 treaty partners, seven are not a signatory to the Multilateral Instrument and three did not list their treaty with Australia as a covered tax agreement. Of the remaining 18 treaty partners, 17 made such notification. Therefore, at this stage the Multilateral Instrument will, upon entry into force, modify 17 of the 28 tax treaties identified above to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a).

Bilateral modifications

85. Australia reported its expressed preference to modify Australia’s existing agreements via the Multilateral Instrument and that it will strongly encourage its existing treaty partners to use this instrument to ensure that its tax treaties with Australia comply with the Action 14 Minimum Standard. To facilitate this process, Australia reported that the Australian Government is currently focused on completing Australia’s domestic implementation processes to allow Australia to ratify the Multilateral Instrument as quickly as possible. Where treaties will not be modified by the Multilateral Instrument, Australia reported that the timing and processes for making bilateral amendments to existing tax treaties will be considered (including both tax and non-tax considerations), available resources and, specifically with respect to the Action 14 Minimum Standard, the extent of the practical impact of differences between the existing MAP provision and this standard. Australia also indicated that it would take into account the reasons why a relevant treaty partner has either not signed the Multilateral Instrument or did not include the treaty with Australia as a covered tax agreement before initiating bilateral actions. In addition, Australia reported it will seek to include Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) in all of its future tax treaties.

Peer input

86. Some of the peers that provided input mentioned that their treaty with Australia meets the minimum requirement under element B.7, which is confirmed by the analysis made previously.

87. For the 38 treaties identified that do not include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015a), some of the relevant peers provided input. Many of the peers whose tax treaty with Australia does not meet the minimum requirement under this element indicated that its tax treaty with Australia would be modified by the Multilateral Instrument to be in line with element B.7 which is also confirmed by the analysis made previously. One peer reported that it contacted Australia to renegotiate their entire tax treaty.

Conclusion

	Areas for improvement	Recommendations
[B.7]	38 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a).	<p>Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) in those 17 treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force.</p> <p>For the remaining 21 treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations.</p> <p>In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.</p>

[B.8] Publish clear and comprehensive MAP guidance

Jurisdictions should publish clear rules, guidelines and procedures on access to and use of the MAP and include the specific information and documentation that should be submitted in a taxpayer's request for MAP assistance.

88. Information on a jurisdiction's MAP regime facilitates the timely initiation and resolution of MAP cases. Clear rules, guidelines and procedures on access to and use of the MAP are essential for making taxpayers and other stakeholders aware of how a jurisdiction's MAP regime functions. In addition, to ensure that a MAP request is received and will be reviewed by the competent authority in a timely manner, it is important that a jurisdiction's MAP guidance clearly and comprehensively explains how a taxpayer can make a MAP request and what information and documentation should be included in such request.

Australia's MAP guidance

89. 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>

90. This ruling sets out when access to MAP is available for both economic and juridical double taxation. Australia reported that many sections of its guidance are out of date due to changes in its domestic legislation or measures that were enacted to help increase the availability of MAP. This includes for instance paragraph 4.7 which contains the prior address of Australia's competent authority and is no longer valid.

91. Australia's MAP guidance contains information that is still valid with respect to:

- a. access to MAP
- b. relationship with domestic available remedies
- c. implementation of MAP agreements
- d. rights and role of taxpayers in the process
- e. consideration of interest and penalties in the MAP.

92. 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.

93. This guidance further includes the information that the FTA MAP Forum agreed should be included in a jurisdiction's MAP guidance, which concerns: (i) contact information of the competent authority or the office in charge of MAP cases (which is currently outdated) and (ii) the manner and form in which the taxpayer should submit its MAP request.²

94. While the information available is detailed and comprehensive, various subjects are not specifically discussed in Australia's MAP guidance. This concerns information on:

- whether MAP is available in cases of: (i) the application of anti-abuse provisions, (ii) multilateral disputes and (iii) bona fide foreign-initiated self-adjustments

- the timing of the steps of the process for the implementation of MAP agreements, including any actions to be taken by taxpayers.

95. The members of the association of taxpayers that provided input reported that Australia's MAP guidance is clear.

Information and documentation to be included in a MAP request

96. To facilitate the review of a MAP request by competent authorities and to have more consistency in the required content of MAP requests, the FTA MAP Forum agreed on guidance that jurisdictions could use in their domestic guidance on what information and documentation taxpayers need to include in a request for MAP assistance.³ This agreed guidance is shown below. Australia's MAP guidance enumerating which items must be included in a request for MAP assistance (if available) are checked in the following list:

- Identity of the taxpayer(s) covered in the MAP request
- The basis for the request
- Facts of the case
- Analysis of the issue(s) requested to be resolved via MAP
- Whether the MAP request was also submitted to the competent authority of the other treaty partner
- Whether the MAP request was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes
- Whether the issue(s) involved were dealt with previously
- A statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the competent authority in its resolution of the issue(s) presented in the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner.

Anticipated modifications

97. 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 other cases than transfer pricing cases.

98. Australia reported that it intends to complete the rewrite of its MAP guidance by the end of 2018 and that information on the following items are envisaged to be included:

- up-to-date competent authority details and the addition of an email address
- whether MAP is available or not in cases of the application of an anti-abuse provision
- whether MAP is available or not in cases of multilateral disputes
- whether MAP is available or not in cases of bona fide foreign initiated self-adjustments
- whether taxpayers can request for the multi-year resolution of issues through MAP
- whether MAP is available in cases of audit settlements.

Conclusion

	Areas for improvement	Recommendations
[B.8]	Contact details of Australia's competent authority and other sections are not up to date in the MAP guidance. Furthermore, Australia's MAP guidance only addresses attribution/allocation cases.	Australia should follow its stated intention to update its MAP guidance to include up-to-date contact information of its competent authority as soon as possible, and include information concerning cases other than attribution/allocation cases. Additionally, although not required by the Action 14 Minimum Standard, Australia could follow its stated intention to update its guidance with the information listed above, and could consider including information on the timing of the steps of the process for the implementation of MAP agreements, including any actions to be taken by taxpayers.

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

Jurisdictions should take appropriate measures to make rules, guidelines and procedures on access to and use of the MAP available and easily accessible to the public and should publish their jurisdiction MAP profiles on a shared public platform pursuant to the agreed template.

99. The public availability and accessibility of a jurisdiction's MAP guidance increases public awareness on access to and the use of the MAP in that jurisdiction. Publishing MAP profiles on a shared public platform further promotes the transparency and dissemination of the MAP programme.⁴

Rules, guidelines and procedures on access to and use of the MAP

100. The MAP guidance of Australia is published as Taxation Ruling TR 2000/16 and can be found at:

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

101. As regards its accessibility, Australia's MAP guidance is difficult to find, as searches for "double taxation" or "mutual agreement procedure" on ATO's website do not easily lead to Australia's MAP guidance.

MAP profile

102. The MAP profile of Australia is published on the website of the OECD.⁵ This MAP profile is complete and includes external links which provide extra information and guidance where appropriate. However, as discussed under element B.4, Australia's MAP profile incorrectly specifies that access to MAP will not be granted when Australia's domestic anti-abuse provisions apply.

103. As discussed under element C.3, one peer mentioned Australia's published MAP profile only contains the mailing address of Australia's competent authority (and not the e-mail address).

Anticipated modifications

104. As stated under element B.4, Australia indicated that it will correct its MAP profile and that it is also in the process of rewriting its MAP guidance by the end of 2018.

Conclusion

	Areas for improvement	Recommendations
[B.9]	The MAP guidance is not easily accessible. The MAP profile contains inconsistencies with Australia's reported policy.	Australia should make its existing MAP guidance more easily accessible. Australia should also ensure that the update of its MAP guidance is made publically available and easily accessible. In addition, Australia should follow its stated intention to amend its MAP profile.

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

Jurisdictions should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, and jurisdictions limit access to the MAP with respect to the matters resolved through that process, jurisdictions should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.

105. As explained under element B.5, an audit settlement can be valuable to taxpayers by providing certainty to them on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing with such settlements, it is important that a jurisdiction's MAP guidance clarifies that in case of audit settlement taxpayers have access to the MAP. In addition, for providing clarity on the relationship between administrative or statutory dispute settlement or resolution processes and the MAP (if any), it is critical that both the public guidance on such processes and the public MAP programme guidance address the effects of those processes, if any. Finally, as the MAP represents a collaborative approach between treaty partners, it is helpful that treaty partners are notified of each other's MAP programme and limitations thereto, particularly in relation to the previously mentioned processes.

MAP and audit settlements in the MAP guidance

106. 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.

107. Peers raised no issues with respect to the availability of audit settlements and the inclusion of information in Australia's MAP guidance.

MAP and other administrative or statutory dispute settlement/resolution processes in available guidance

108. As previously mentioned under element B.5, Australia has an administrative or statutory dispute settlement/resolution process in place that is independent from the audit and examination functions and that can only be accessed through a request by the taxpayer. However, access to MAP is not limited to taxpayers resorting to such a process.

109. All peers that provided input indicated not being aware of the existence of an administrative or statutory dispute settlement/resolution process that limits access to MAP in Australia, which can be clarified by the fact that such process is not in place in Australia.

Notification of treaty partners of existing administrative or statutory dispute settlement/resolution processes

110. As Australia does not have an internal administrative or statutory dispute settlement/resolution process in place that limits access to MAP, there is no need for notifying treaty partners of such process.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[B.10]	The MAP guidance does not contain information on the relationship between MAP and audit settlements.	Australia's MAP guidance should clarify that taxpayers have access to MAP in case of audit settlements.

Notes

1. <https://www.legislation.gov.au/Details/C2017C00213> (accessed on 18 July 2018).
2. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
3. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
4. The shared public platform can be found at: www.oecd.org/ctp/dispute/country-map-profiles.htm.
5. Available at www.oecd.org/ctp/dispute/Australia-Dispute-Resolution-Profile.pdf.

References

- OECD (2016), *BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review Documents*, www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf (accessed on 18 July 2018).
- OECD (2015a), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264239081-en> (accessed on 18 July 2018).
- OECD (2015b), *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241633-en> (accessed on 18 July 2018).

Part C

Resolution of MAP cases

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

Jurisdictions should ensure that their tax treaties contain a provision which requires that the competent authority who receives a MAP request from the taxpayer, shall endeavour, 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.

112. It is of critical importance that in addition to allowing taxpayers to request for a MAP, tax treaties also include the equivalent of the first sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2015a), which obliges competent authorities, in situations where the objection raised by taxpayers are considered justified and where cases cannot be unilaterally resolved, to enter into discussions with each other to resolve cases of taxation not in accordance with the provisions of a tax treaty.

Current situation of Australia’s tax treaties

113. Out of Australia’s 53 tax treaties, 41 contain a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) requiring its competent authority to endeavour – when the objection raised is considered justified and no unilateral solution is possible – to resolve by mutual agreement with the competent authority of the other treaty partner the MAP case with a view to the avoidance of taxation which is not in accordance with the tax treaty.

114. Of the 12 treaties that do not contain a provision that is equivalent to Article 25(2), first sentence of the OECD Model Tax Convention (OECD, 2015a), one does not contain a MAP article at all. The remaining 11 tax treaties are not considered to have the equivalent of Article 25(2), first sentence of the OECD Model Tax Convention (OECD, 2015a) for the following reasons:

- Eight treaties contain a variation of Article 25(2), first sentence, that is limited to transfer pricing adjustments not in accordance with the arm’s length principle while the scope of the treaty is in fact wider than only transfer pricing issues.
- The text of the relevant provision differs substantially and does not contain the wording “if it is not itself able to arrive at a satisfactory solution” (one treaty).

- The text of the relevant provision includes additional language that imposes a time limit of notification of a received MAP request, which could lead to the prevention of some cases being effectively dealt with in MAP (one treaty).
- The objective of the MAP is to come to an agreement to avoid “double taxation” instead of “taxation not in accordance with the convention” (one treaty).

Anticipated modifications

Multilateral Instrument

115. Australia recently signed the Multilateral Instrument. Article 16(4)(b)(i) of that instrument stipulates that Article 16(2), first sentence – containing the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a). In other words, in the absence of this equivalent, Article 16(4)(b)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. 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 and insofar as both notified, pursuant to Article 16(6)(c)(i), the depositary that this treaty does not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a).

116. In regard of the 12 tax treaties identified above that are considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015a), Australia listed three as a covered tax agreement under the Multilateral Instrument and for all of them did it make, pursuant to Article 16(6)(c)(i), a notification that they do not include a provision described in Article 16(4)(b)(i). Of the relevant three treaty partners, one is not a signatory to the Multilateral Instrument. Of the remaining two treaty partners, only one made such a notification. Therefore, at this stage the Multilateral Instrument will, upon entry into force, modify one of the 12 tax treaties identified above to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a).

Bilateral modifications

117. Australia reported its expressed preference to modify Australia’s existing agreements via the Multilateral Instrument and that it will strongly encourage its existing treaty partners to use this instrument to ensure that its tax treaties with Australia comply with the Action 14 Minimum Standard. To facilitate this process, Australia reported that the Australian Government is currently focused on completing Australia’s domestic implementation processes to allow Australia to ratify the Multilateral Instrument as quickly as possible. Where treaties will not be modified by the Multilateral Instrument, Australia reported that the timing and processes for making bilateral amendments to existing tax treaties will be considered (including both tax and non-tax considerations), available resources and, specifically with respect to the Action 14 Minimum Standard, the extent of the practical impact of differences between the existing MAP provision and this standard. Australia also indicated that it would take into account the reasons why a relevant treaty partner has either not signed the Multilateral Instrument or did not include the treaty with Australia as a covered tax agreement before initiating bilateral actions. In addition, Australia reported it will seek to include Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) in all of its future tax treaties.

Peer input

118. Almost all peers that provided input reported their treaty with Australia meets the requirements under element C.1, which is confirmed by the analysis made previously.

119. For the 12 treaties identified that do not include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a), one of the relevant peers noted that there was currently a mismatch in notifications with respect to the Multilateral Instrument and that it was currently working with Australia to align such mismatches so that the Multilateral Instrument can modify its tax treaty with Australia. Another peer specified that its own model tax treaty contains the provision of the OECD Model Tax Convention (OECD, 2015a) that is not contained in its treaty with Australia.

Conclusion

	Areas for improvement	Recommendations
[C.1]	12 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a).	<p>Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) in the one treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force.</p> <p>For the remaining 11 treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations.</p> <p>In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.</p>

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

Jurisdictions should seek to resolve MAP cases within an average time frame of 24 months. This time frame applies to both jurisdictions (i.e. the jurisdiction which receives the MAP request from the taxpayer and its treaty partner).

120. As double taxation creates uncertainties and leads to costs for both taxpayers and jurisdictions, and as the resolution of MAP cases may also avoid (potential) similar issues for future years concerning the same taxpayers, it is important that MAP cases are resolved swiftly. A period of 24 months is considered as an appropriate time period to resolve MAP cases on average.

Reporting of MAP statistics

121. Statistics regarding all tax treaty related disputes concerning Australia are published on the website of the OECD as of 2007.¹ Australia also publishes statistics relating to MAP on ATO's website, which essentially relates to the number of MAP cases completed.²

122. The FTA MAP Forum has agreed on rules for reporting of MAP statistics (“**MAP Statistics Reporting Framework**”) for MAP requests submitted on or after January 1, 2016 (“**post-2015 cases**”). Also, for MAP requests submitted prior to that date (“**pre-2016 cases**”),

the FTA MAP Forum agreed to report MAP statistics on the basis of an agreed template. Australia provided its MAP statistics pursuant to the MAP Statistics Reporting Framework within the given deadline, including all cases involving Australia and of which its competent authority was aware.³ The statistics discussed below include both pre-2016 and post-2015 cases and the full statistics are attached to this report as Annexes B and C respectively⁴ and should be considered jointly for an understanding of the MAP caseload of Australia. With respect to post-2015 cases, Australia reported having reached out to all its MAP partners with a view to have their MAP statistics matching. In that regard, Australia reported that it could match its statistics with all of its MAP partners.

Monitoring of MAP statistics

123. 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 PMU prepares monthly reports which include MAP case inventory and other data required for the purposes of OECD and internal reporting.

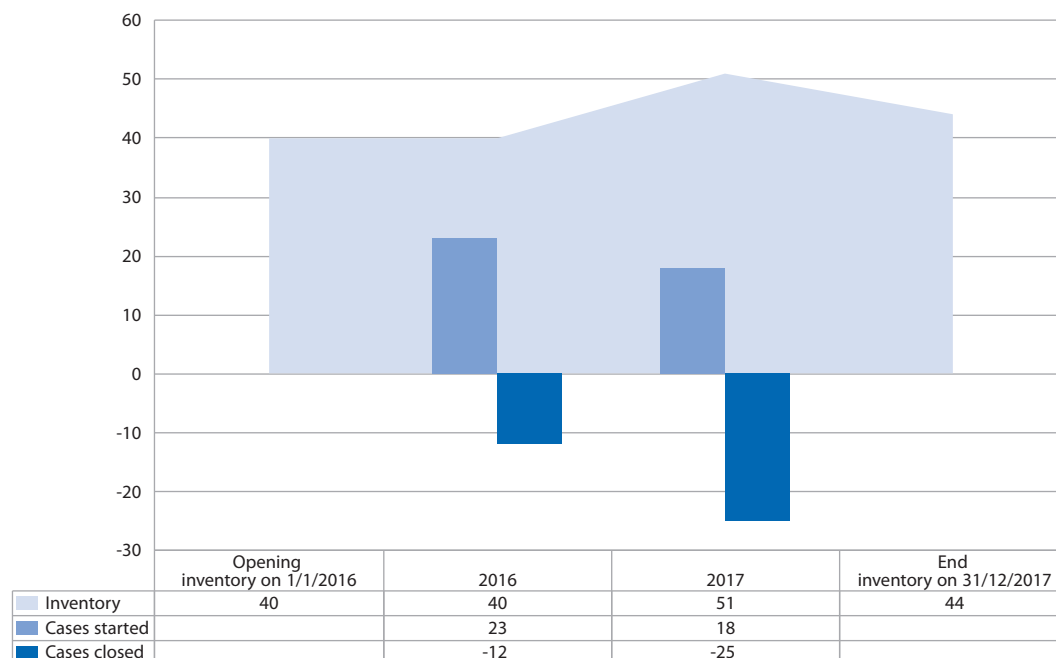
124. In this respect, Australia further reported that when cases get close to two years old, they are actively monitored by the PMU to ensure a timely resolution of such cases, which also encompasses the implementation of any MAP agreement reached. When MAP cases are open longer than two years, Australia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

Analysis of Australia's MAP caseload

Global overview

125. Figure C.1 shows the evolution of Australia's MAP caseload over the Statistics Reporting Period.

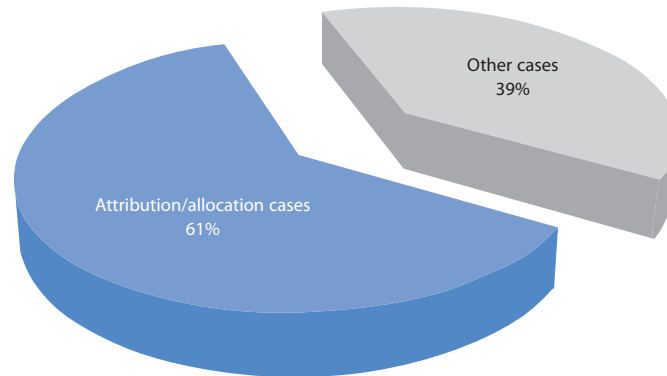
Figure C.1. Evolution of Australia's MAP caseload



126. At the beginning of the Statistics Reporting Period, Australia had 40 pending MAP cases, of which 28 were attribution/allocation cases and 12 other MAP cases.⁵ At the end of the Statistics Reporting Period, Australia had 44 MAP cases in its inventory, of which 27 are attribution/allocation cases and 17 are other MAP cases. Australia’s MAP caseload has increased by 10% during the Statistics Reporting Period.

127. The breakdown of the end inventory can be shown as in Figure C.2.

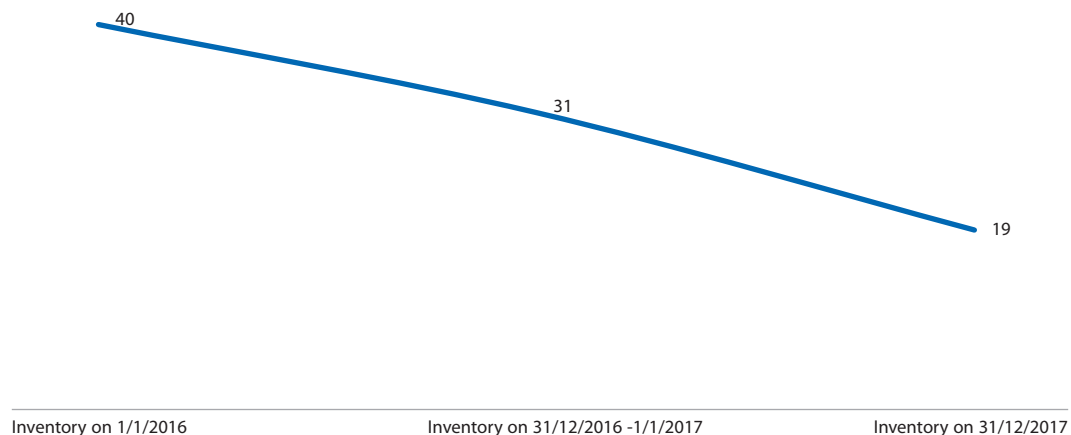
Figure C.2. End inventory on 31 December 2017 (44 cases)



Pre-2016 cases

128. Figure C.3 shows the evolution of Australia’s pre-2016 MAP cases over the Statistics Reporting Period.

Figure C.3. Evolution of Australia’s MAP inventory Pre-2016 cases



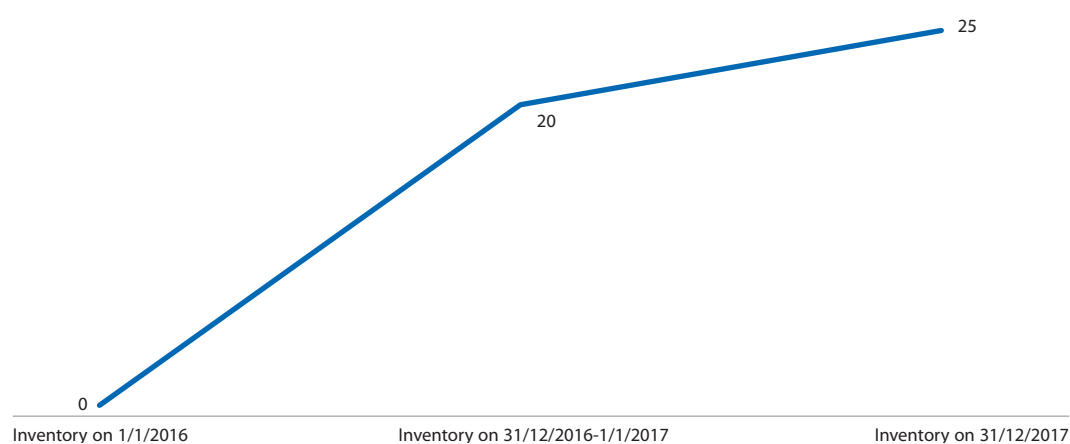
129. At the beginning of the Statistics Reporting Period, Australia’s MAP inventory of pre-2016 MAP cases consisted of 40 cases, of which were 28 attribution/allocation cases and 12 other cases. At the end of the Statistics Reporting Period the total inventory of pre-2016 cases had decreased to 19 cases, consisting of 12 attribution/allocation cases and 7 other cases. The decrease in the number of pre-2016 MAP cases is shown in the table below.

Pre-2016 cases only	Evolution of total MAP caseload in 2016	Evolution of total MAP caseload in 2017	Cumulative evolution of total MAP caseload over the two years (2016+2017)
Attribution/allocation cases	-25%	-43%	-57%
Other cases	-17%	-30%	-42%

Post-2015 cases

130. Figure C.4 shows the evolution of Australia's post-2015 MAP cases over the Statistics Reporting Period.

Figure C.4. Evolution of Australia's MAP inventory Post-2015 cases



131. In total, 41 MAP cases started during the Statistics Reporting Period, 21 of which concerned attribution/allocation cases and 20 other cases. At the end of this period the total number of post-2015 cases in the inventory was 25 cases, consisting of 15 attribution/allocation cases and 10 other cases. Conclusively, Australia closed 16 post-2015 cases during the Statistics Reporting Period, six of them being attribution/allocation cases and 10 of them of them being other cases. The total number of closed cases represents 37% of the total number of post-2015 cases that started during the Statistics Reporting Period.

132. The number of post-2015 cases closed as compared to the number of post-2015 cases started during the Statistics Reporting Period is shown in the table below.

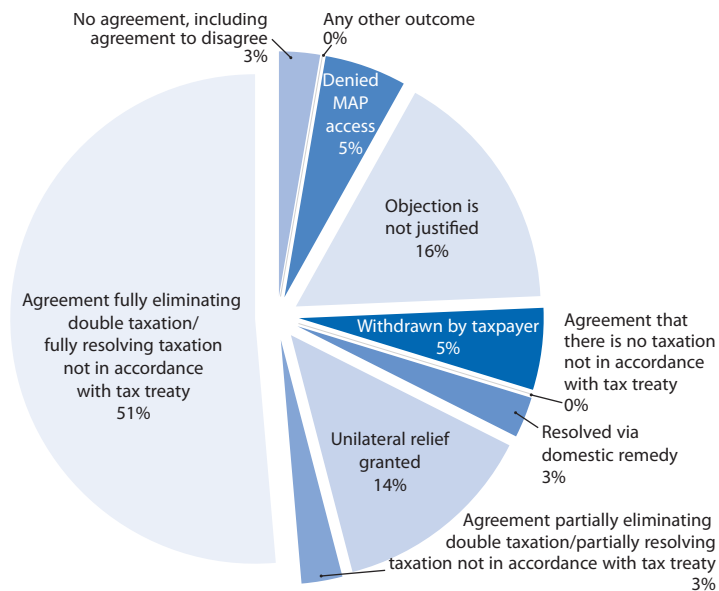
Post-2015 cases only	% of cases closed in 2016 compared to cases started in 2016	% of cases closed in 2017 compared to cases started in 2017	Cumulative % of cases closed compared to cases started over the two years (2016+2017)
Attribution/allocation cases	8%	63%	29%
Other cases	20%	80%	50%

Overview of cases closed during the Statistics Reporting Period

Reported outcomes

133. During the Statistics Reporting Period Australia in total closed 37 MAP cases for which the following outcomes were reported:

Figure C.5. Cases closed during the Statistics Reporting Period (37 cases)



This chart shows that during the Statistics Reporting Period, 19 out of 37 cases were closed through an agreement that fully eliminated double taxation or fully resolved taxation not in accordance with the tax treaty.

Reported outcomes for attribution/allocation cases

134. In total, 22 attribution/allocation cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- 68% agreement fully eliminating double taxation or fully resolving double taxation not in accordance with a tax treaty
- 18% unilateral relief granted.

Reported outcomes for other cases

135. In total, 15 other cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- 33% objection not justified
- 27% agreement fully eliminating double taxation or fully resolving taxation not in accordance with a tax treaty.

Average timeframe needed to resolve MAP cases

All cases closed during the Statistics Reporting Period

136. The average time needed to close MAP cases during the Statistics Reporting Period was 14.49 months. This average can be broken down as follows:

	Number of cases	Start date to End date (in months)
Attribution/Allocation cases	22	20.00
Other cases	15	6.40
All cases	37	14.49

Pre-2016 cases

137. For pre-2016 cases Australia reported that on average it needed 24.74 months to close attribution/allocation cases and 12.34 months to close other cases. This resulted in an average time needed of 21.79 months to close 21 pre-2016 cases. For the purpose of computing the average time needed to resolve pre-2016 cases, Australia reported that it uses the following:

- *Start date*: the date the case was allocated to a competent authority in Australia. Australia reported that a competent authority is allocated to a case soon after the request is received.
- *End date*: the date the case was closed subsequent to implementation of the MAP outcome.

Post-2015 cases

138. As a preliminary remark, it should be noted that the period for assessing post-2015 MAP statistics only comprises 24 months.

139. For post-2015 cases Australia reported that on average it needed 7.36 months to close attribution/allocation cases and 3.44 months to close other cases. This resulted in an average time needed of 4.91 months to close 16 post-2015 cases.

Peer input

140. As will be discussed in more detail under element C.3, most peers that provided input generally reported having a good working relationship with Australia's competent authority and noted that no impediments have occurred. Several peers reported that Australia's competent authority endeavours to resolve MAP cases in a reasonable timeframe in a co-operative way. One peer reported that Australia's competent authority is very responsive and that it reacted on a position paper in a very short timeframe (2.5 months), which permitted the resolution of the underlying case in a very short timeframe as well. Another peer noted that the resolution of MAP cases with Australia took less than 24 months. Another peer noted that one of its unresolved cases with Australia was due to the taxpayer's delay in providing the required information to ATO to actively consider the MAP request.

141. Another peer also expressed concern by stating that in one of its MAP cases with Australia, Australia's competent authority was constrained by its domestic law on making a downward adjustment and this resulted in double taxation that could not be relieved. This peer remarked that due to this domestic law constraint, along with other unspecified complications, the resolution of the underlying MAP case was delayed.

Anticipated modifications

142. As will be further discussed under element C.6, 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.

Conclusion

	Areas for improvement	Recommendations
[C.2]	Australia submitted comprehensive MAP statistics on time on the basis of the MAP Statistics Reporting Framework for the years 2016 and 2017. Based on the information provided by Australia’s MAP partners, its post-2015 MAP statistics actually match those of its treaty partners as reported by the latter.	Australia’s MAP statistics show that during the Statistics Reporting Period it closed 39% (16 out of 41 cases) of its post-2015 cases in 4.91 months on average. In that regard, Australia is recommended to seek to resolve the remaining 61% of the post-2015 cases pending on 31 December 2017 (25 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.

[C.3] Provide adequate resources to the MAP function

Jurisdictions should ensure that adequate resources are provided to the MAP function.

143. Adequate resources, including personnel, funding and training, are necessary to properly perform the competent authority function and to ensure that MAP cases are resolved in a timely, efficient and effective manner.

Description of Australia’s competent authority

144. Australia reported that in August 2014 it created its APA/MAP PMU within ATO in order to centralise 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, three of whom are authorised to exercise the competent authority function. According to Australia, the rest of the PMU staff assists with case work, case management and reporting functions. Australia reported that it considers its current funding level is adequate to support the MAP function in the competent authority.

145. 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 authorised 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.

146. Australia reported that the PMU conducts training and awareness sessions for all staff in the PGI who are involved with the work of the PMU. The timing of these trainings is flexible and typically conducted when new staff commences their work. Australia further reported that conferences are occasionally organised with advisory firms and academics to solicit input regarding the work of the PMU and to consider where improvements could be made. These conferences commenced in 2015 and are ongoing.

Monitoring mechanism

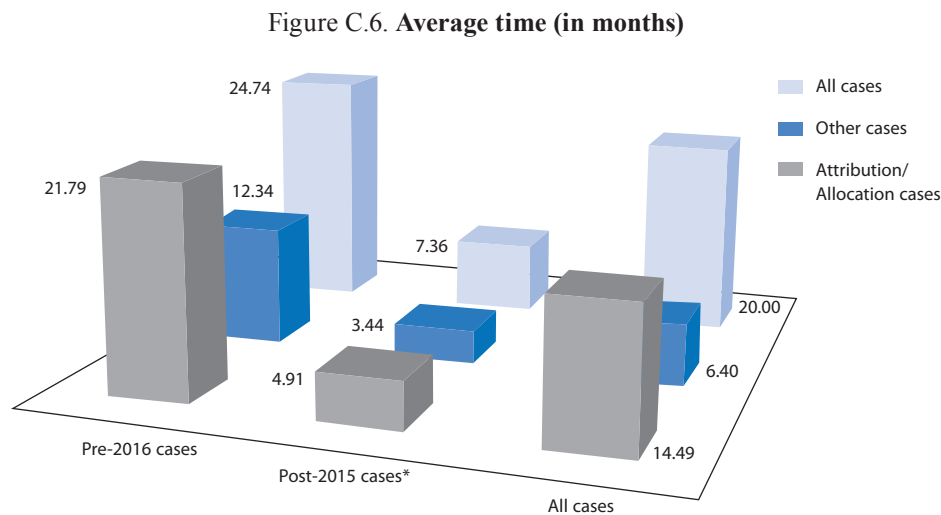
147. Australia reported that it monitors MAP statistics on a monthly basis. This reporting provides Australia with an indication regarding whether or not target timeframes are being effectively managed and whether existing resources are sufficient or need to be increased.

148. If the need for additional resources such as an increase in staff members or face-to-face meetings arises, Australia reported that a business case for the additional resources is made by the PMU. Australia noted that in the past it had already increased the number of its competent authority staff to assist in relation to its newly implemented MAAL and DPT legislation. It was Australia's conclusion that its resourcing was sufficient to resolve MAP cases during the Review period.

Practical application

MAP statistics

149. As discussed under element C.2, Australia closed its MAP cases during the Statistics Reporting Period within the pursued 24-month average. This can be illustrated by Figure C.6.



* Note that these post-2015 cases only concern cases started and closed during 2016 or 2017.

150. Based on these figures, it follows that on average it took Australia 14.49 months to close MAP cases during the Statistics Reporting Period, by which Australia is considered to be adequately resourced.

Peer input

General

151. Of the 18 peers that provided input on Australia's implementation of the Action 14 Minimum Standard, almost all provided general input on their contacts with Australia's competent authority as well as input regarding the resolution of MAP cases. Generally, all peers indicated having a positive working relationship with Australia's competent authority, some of them emphasising good collaboration and the easiness of contact.

Contacts and relationship with Australia’s competent authority

152. Several peers commented on the ease of communication with Australia’s competent authority. Most peers mentioned that their communication with Australia’s competent authority mainly took place via written communication, with email being used most frequently followed by regular mail and fax, which is considered efficient by the peers that provided input. One peer mentioned that although the contacts with Australia have mainly taken place via email, its published MAP profile only contains the mailing address of Australia’s competent authority. Two peers with challenging time differences with Australia noted that they were able to overcome such a challenge due to their strong and active relationship and by scheduling regular calls.

Scheduling face-to-face meetings

153. Several peers noted that Australia’s competent authority is available to scheduling face-to-face meetings. One of these peers described its system with Australia’s competent authority to hold face-to-face meetings for five consecutive days two times per year in order to resolve their existing MAP cases. The other one of these peers noted that it had an in-person meeting for discussing the MAP cases between them. A third peer with only a few MAP cases with Australia explained that there was no need for an in-person meeting thus far.

Handling and resolving MAP cases

154. Several peers offered specific, positive comments on how Australia’s competent authority handles and resolves MAP cases, some of them emphasising the positive and constructive experience they had. Several peers remarked that when dealing with Australia’s competent authority they found its staff to be competent, productive, flexible, efficient and co-operative. One peer remarked that Australia’s competent authority reacts quickly to its position papers and another noted that Australia took a constructive approach to resolving MAP cases. A third peer remarked that Australia’s competent authority makes time devoted specifically to handling MAP cases with it and a fourth peer commented that agreements were reached with Australia’s competent authority through open and regular dialogue and that Australia’s competent authority was transparent and professional.

Suggestions for improvement

155. A few peers offered suggestions for improvement for Australia’s competent authority. Two peers expressed a desire for more frequent communication. One of these peers stated that due time difference, both jurisdictions should make every effort to increase the frequency of teleconferences to further improve upon the timeliness of MAP requests. The other peer noted that more face-to-face meetings would help expedite the MAP process but acknowledged that such meetings due to the high costs and time requirements involved with especially long-distance travel pose a challenge to such efforts.

Anticipated modifications

156. Australia did not indicate that it anticipates any modifications in relation to element C.3.

Conclusion

	Areas for improvement	Recommendations
[C.3]	-	Australia should continue to monitor whether it has adequate resources in place to ensure that 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

Jurisdictions should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the jurisdictions would like to see reflected in future amendments to the treaty.

157. Ensuring that staff in charge of MAP can and will resolve cases, absent any approval/direction by the tax administration personnel directly involved in the adjustment and absent any policy considerations, contributes to a principled and consistent approach to MAP cases.

Functioning of staff in charge of MAP

158. With respect to handling and resolving MAP cases, 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.

159. With respect to how Australia's competent authority is organised, Australia reported that the PMU is located within the PGI business line and reports directly to a Deputy Commissioner in the ATO. Australia further explained that audits are undertaken by the Operations area of PGI, which is separate from the Internationals area and reports directly to a different Deputy Commissioner in ATO.

160. Australia further reported that treaty negotiations and policy considerations are undertaken by its Treasury department, with input from ATO. According to Australia, this input is provided by the tax counsel network, Policy, Analysis and Legislation Area, and a newly established treaty consultation unit which sits within the PGI. The treaty consultation unit was set up by Australia to handle the implementation of the Multilateral Instrument. Australia explained that the outside consultations occur on an ad hoc basis and are undertaken to ensure consistency.

161. In regard of the above, Australia reported that staff in charge of MAP operates independently in practice and have the authority to resolve MAP cases without being dependent on the approval/direction of the tax administration personnel directly involved in the adjustment and the process for negotiating MAP agreements is not influenced by policy considerations.

Practical application

162. All peers reported no impediments in Australia to perform its MAP function in the absence of approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy. One peer specifically mentioned it was not aware that staff in charge of the MAP in Australia are dependent on the approval of MAP agreements by the personnel within the tax administration that made the adjustment under review.

163. 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.

164. 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.

165. Australia reported that it is standard practice for audit personnel to not be present at competent authority meetings. Australia further reported that personnel associated with an audit may be consulted as part of competent authority meetings with the prior consent of the other jurisdiction and only for the purpose of providing a full factual understanding of the case but a question confirming this practice was not posed to peers. Therefore, this was not assessed during the Review Period. Australia emphasised that the support of the audit personnel does not affect the independence of the competent authority. Australia further responded by stating that it fully recognises the importance of and need to have independence between the competent authority and the audit functions.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.4]	<p>Personnel of tax administrations of Australia directly involved in the adjustment at issue can participate in competent authority meetings during which MAP cases are resolved. This bears the risk that the competent authority function is not performed entirely independent from the approval or direction of the tax administration personnel directly involved in the adjustment at issue concerning the resolution of MAP cases during such meetings. However, it was not possible to assess whether this risk was appropriately addressed in practice during the Review period.</p> <p>Australia should ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being dependent of approval or direction from the personnel of the tax administrations of Australia directly involved in the adjustments at issue when they attend competent authority meetings.</p>	
	-	As it has done thus far, Australia should continue to ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being influenced by considerations of the policy that Australia would like to see reflected in future amendments to the tax treaty.

[C.5] Use appropriate performance indicators for the MAP function

Jurisdictions should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.

167. For ensuring that each case is considered on its individual merits and will be resolved in a principled and consistent manner, it is essential that any performance indicators for the competent authority function and for the staff in charge of MAP processes are appropriate and not based on the amount of sustained audit adjustments or aim at maintaining a certain amount of tax revenue.

Performance indicators used by Australia

168. 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.

169. Reviews are based upon staff behaviours and outcomes and use a wide variety of performance indicators relating to the following three criteria: (i) outcomes of job description, duty statements, capabilities and knowledge; (ii) outcomes of team plan; and (iii) behaviour. The specific criteria for all three objectives include assessments on, *inter alia*, technical knowledge, communication, teamwork, professionalism and client management.

170. The Final Report on Action 14 (OECD, 2015b) includes examples of performance indicators that are considered appropriate. These indicators are shown below and presented in the form of a checklist for Australia:

- Number of MAP cases resolved
- Consistency (i.e. a treaty should be applied in a principled and consistent manner to MAP cases involving the same facts and similarly-situated taxpayers)
- Time taken to resolve a MAP case (recognising that the time taken to resolve a MAP case may vary according to its complexity and that matters not under the control of a competent authority may have a significant impact on the time needed to resolve a case).

171. Further to the above, Australia also reported that it does not use any performance indicators for staff in charge of MAP that are related to the outcome of MAP discussions in terms of the amount of sustained audit adjustments or maintained tax revenue. In other words, staff in charge of MAP are not evaluated on the basis of the material outcome of MAP discussions.

Practical application

172. Peers generally provided no specific input relating to this element of the Action 14 Minimum Standard. One peer particularly noted that they are not aware of the use of performance indicators by Australia that are based on the amount of sustained audit adjustments or maintaining a certain amount of tax revenue.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.5]	-	As it has done thus far, Australia should continue to use appropriate performance indicators.

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

Jurisdictions should provide transparency with respect to their positions on MAP arbitration.

174. The inclusion of an arbitration provision in tax treaties may help ensure that MAP cases are resolved within a certain timeframe, which provides certainty to both taxpayers and competent authorities. In order to have full clarity on whether arbitration as a final stage in the MAP process can and will be available in jurisdictions it is important that jurisdictions are transparent on their position on MAP arbitration.

Position on MAP arbitration

175. 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.⁶

176. Australia was a participant in the sub-group on arbitration as part of the group which negotiated the Multilateral Instrument. In that regard, Australia reported that it opted for part VI of the Multilateral Instrument, which includes a mandatory and binding arbitration provision.⁷

177. In relation to Australia's anti-avoidance legislation discussed under element B.4, it should also be noted that Australia made a reservation on Article 25 of the OECD Model Tax Convention (OECD, 2015a) to reflect the fact that:

Australia reserves the right to exclude a case presented under the mutual agreement procedure article from the scope of paragraph 5 to the extent that any unresolved issue involves the application of Australia's general anti-avoidance rules contained in Part IVA of the Income Tax Assessment Act 1936 and section 67 of the Fringe Benefits Tax Assessment Act 1986.

178. As mentioned under element B.4, Australia's MAAL and DPT legislation falls under Part IVA of the Income Tax Assessment Act of 1936 and therefore MAP cases related to either law would also be excluded from the scope of arbitration.

Practical application

179. Australia has incorporated an arbitration clause in three 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 (OECD, 2015a).

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
[C.6]	-	-

Notes

1. Available at: www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm. These statistics are up to and include fiscal year 2016.
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 (accessed on 18 July 2018).
3. Australia’s 2016 MAP statistics were corrected in the course of its peer review and deviate from the published MAP statistics for 2016. See further explanations in Annex B.
4. For post-2015 cases, if the number of MAP cases in Australia’s inventory at the beginning of the Statistics Reporting Period plus the number of MAP cases started during the Statistics Reporting Period was more than five, Australia reports its MAP caseload on a jurisdiction-by-jurisdiction basis. This rule applies for each type of cases (attribution/allocation cases and other cases).
5. For pre-2016 cases and for post-2015, Australia follows the MAP Statistics Reporting Framework for determining whether a case is considered an attribution/allocation MAP case. Annex D of MAP Statistics Reporting Framework provides that “an attribution/allocation MAP case is a MAP case where the taxpayer’s MAP request relates to (i) the attribution of profits to a permanent establishment (see e.g. Article 7 of the OECD Model Tax Convention (OECD, 2015)); or (ii) the determination of profits between associated enterprises (see e.g. Article 9 of the OECD Model Tax Convention (OECD, 2015)), which is also known as a transfer pricing MAP case”.
6. www.oecd.org/ctp/dispute/Australia-Dispute-Resolution-Profile.pdf.
7. An overview of Australia’s position on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mlt-position-australia.pdf.

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- OECD (2015b), *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241633-en> (accessed on 18 July 2018).

Part D

Implementation of MAP agreements

[D.1] Implement all MAP agreements

Jurisdictions should implement any agreement reached in MAP discussions, including by making appropriate adjustments to the tax assessed in transfer pricing cases.

182. In order to provide full certainty to taxpayers and the jurisdictions, it is essential that all MAP agreements are implemented by the competent authorities concerned.

Legal framework to implement MAP agreements

183. Australia reported that when Article 25(2), second sentence of the OECD Model Tax Convention (OECD, 2015) or its equivalent is not included in a tax treaty, domestic time limits apply for the implementation of MAP agreements. Australia reported that different situations apply depending on where the MAP request was initially presented.

184. If the MAP request is initially received by Australia’s competent authority, Australia reported that it is possible that domestic time limits do not apply if both of the following conditions are met:

- First, the MAP request must be presented to Australia’s competent authority within the applicable filing period. In case no filing period is provided in the treaty, the taxpayer may submit its MAP request within two to four years from the date of assessment or later if it also files a request for an extension of such time limit, as provided under section 14ZX of the Taxation Administration Act 1953, as also discussed under element B.1.
- Second, the taxpayer must lodge a formal objection that fulfils the conditions stipulated under Part IVC of the Taxation Administration Act 1953 and these conditions must be fulfilled within the applicable time limits, unless the taxpayer also requested an extension of time to lodge an objection, as provided under section 14ZX of the Taxation Administration Act 1953.

185. If the MAP request is initially received by Australia’s treaty partner’s competent authority then the application of domestic time limits depend on the type of case submitted to MAP. For attribution/allocation cases, there are no domestic time limits for downward adjustments associated with correlative relief (which can result from the implementation of a MAP agreement), as provided under item 6 of section 170(1) of the Income Tax Assessment Act 1936. For other cases, Australia applies the ordinary domestic time limits of two to four years from the date of self-assessment of the taxpayer to implement MAP agreements. However, in the latter case, Australia reported that the taxpayer could also

request an extension of time to lodge an objection to have the MAP agreement implemented irrespective of domestic time limits.

186. With respect to the possibility of obtaining an extension of time to lodge an objection, Australia reported that there is no set period of time in which a taxpayer may request an extension to lodge an objection. Subsections 14ZW(2) to (3) allow a taxpayer to lodge an objection outside of the period in which filing is required so long as it is accompanied by a written extension request. However, Australia further indicated that the decision to allow an extension is at the discretion of ATO's Commissioner. The breadth of such discretion by ATO's commissioner is stipulated in PS LA 2003/7. Therefore, there is a risk that such extension is not granted in practice and that not all MAP agreements are implemented.

187. It is Australia's reported practice to seek consent from a taxpayer before proceeding with implementation of the mutual agreement procedure. Australia further reported that there is no timeline for obtaining such consent from the taxpayer. Australia's MAP guidance explains that a taxpayer is required to record the terms of the agreement in writing and withdraw any objection which is still ongoing. Furthermore, if an objection decision has been made or will be made to reflect the agreement between the competent authorities, the taxpayer has to agree not to seek review of the decision by the Administrative Appeals Tribunal or appeal to the Federal Court against the decision.

188. Once the taxpayer gives its consent to the implementation of the MAP agreement, Australia reported that it lodges an amendment request with its amendment support team, which is located within the Private Groups and High Wealth Individuals unit. Furthermore, Australia reported that implementation of MAP agreements is monitored by the PMU.

Practical application

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

Year	MAP agreements
2015	10
2016	11
2017	8

190. In view of these MAP agreements, all required an 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.

191. All peers that provided input reported that they were not aware of any MAP agreement reached on or after 1 January 2015 that was not implemented by Australia. Furthermore, two peers noted that Australia implements MAP agreements in a timely manner and correctly.

192. Taxpayers reported no difficulties in relation to implementation of MAP agreements.

Anticipated modifications

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

Conclusion

	Areas for improvement	Recommendations
	-	As it has done thus far, Australia should continue to implement all MAP agreements reached if the conditions for such implementation are fulfilled.
[D.1]	As will be discussed under element D.3 not all of Australia's tax treaties contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015). Therefore, there is a risk that for those tax treaties that do not contain that provision, not all MAP agreements will be implemented due to time limits of two to four years in its domestic law that can only be overridden by discretionary authority in certain circumstances.	Additionally, Australia should closely monitor whether its domestic statute of limitation results in obstructions in practice concerning the implementation of MAP agreements. Where this is the case, Australia should consider amending the process in place with a view to enable the implementation of all MAP agreements.

[D.2] Implement all MAP agreements on a timely basis

Agreements reached by competent authorities through the MAP process should be implemented on a timely basis.

194. Delay of implementation of MAP agreements may lead to adverse financial consequences for both taxpayers and competent authorities. To avoid this and to increase certainty for all parties involved, it is important that the implementation of any MAP agreement is not obstructed by procedural and/or statutory delays in the jurisdictions concerned.

Theoretical timeframe for implementing mutual agreements

195. As discussed under element D.1, Australia reported that to implement a MAP agreement it first issues a communication to the taxpayer notifying them of the agreement and offers to discuss the nature and terms of the agreement. However, the taxpayer is not given a certain timeframe within which they should declare whether or not they give consent to the MAP agreement. If the taxpayer gives consent to the MAP agreement, Australia reported that it lodges an amendment request with its amendment support team, as also discussed under element D.1. According to Australia, this amendment support team generally processes the request within ten business days, with delays occurring occasionally due to interest calculations or other complexities. The time taken to implement MAP agreements is monitored as part of the general monitoring of MAP case times.

196. Furthermore, as part of its general monitoring system described under element C.3, Australia reported that it monitors the time needed for the resolution of MAP cases which also encompasses the implementation stage in Australia.

197. Australia's MAP guidance does not include any information in relation to the time of the steps for implementation of MAP agreements. This is further discussed under element B.8.

Practical application

198. 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.

199. All peers that provided input have not indicated experiencing any problems with Australia regarding the implementation of MAP agreements reached on a timely basis. One peer noted that implementation of MAP agreement by Australia has been efficient. Another peer also noted that the taxpayer is informed very soon by Australia's competent authority after the MAP agreement is concluded.

Anticipated modifications

200. Australia did not indicate that it anticipates any modifications in relation to element D.2.

Conclusion

	Areas for improvement	Recommendations
[D.2]	-	As it has done thus far, Australia should continue to implement all MAP agreements reached on a timely basis if the conditions for such implementation are fulfilled, in particular for the MAP agreement whose implementation is pending.

[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)

Jurisdictions should either (i) provide in their tax treaties that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law, or (ii) be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

201. In order to provide full certainty to taxpayers it is essential that implementation of MAP agreements is not obstructed by any time limits in the domestic law of the jurisdictions concerned. Such certainty can be provided by either including the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) in tax treaties, or alternatively, setting a time limit in Article 9(1) and Article 7(2) for making adjustments to avoid that late adjustments obstruct granting of MAP relief.

Legal framework and current situation of Australia's tax treaties

202. As discussed under element D.1, Australia's domestic legislation includes a statute of limitations of two to four years for implementing MAP agreements. Australia reported that when Article 25(2), second sentence of the OECD Model Tax Convention (OECD, 2015) or its equivalent is not included in a tax treaty, it considers that these domestic time limits apply.

203. Out of Australia's 53 tax treaties, 31 contain a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law.

204. Of the remaining 22 treaties that do not contain the equivalent the following analysis is made:

- In 18 tax treaties no equivalent provision to Article 25(2), second sentence of the OECD Model Tax Convention (OECD, 2015) is included. Furthermore, none of these 18 treaties include the equivalent to Article 9(1) and Article 7(2).
- One tax treaty stipulates that a MAP agreement may be implemented within a period of seven years from the presentation of the case. While this time period does not constitute a limitation of the implementation of MAP agreements, the wording used in the provision could nevertheless in practice obstruct such implementation and therefore this provision is not considered to be the equivalent of Article 25(2), second sentence of the OECD Model Tax Convention (OECD, 2015).
- One tax treaty stipulated that a MAP agreement may be implemented notwithstanding domestic time limits only if the claim is made within six years of the end of the year of assessment or the year of tax. For similar reasons discussed in the previous bullet point, this extra wording could also in practice obstruct the implementation of a MAP agreement.
- One tax treaty allows for a MAP agreement to be implemented only when a MAP request has been notified in due time to the competent authority of the other contracting state and where it concerns the other contracting jurisdiction, within ten years as from the due date of the filing of a tax return or, if later, the time period under the other contracting jurisdiction's domestic law. Therefore, as this tax treaty does not follow the wording of Article 25(2), second sentence of the OECD Model Tax Convention (OECD, 2015) and as there may be a domestic statute of limitation in the other contracting state, this tax treaty is considered not having the equivalent of Article 25(2) second sentence of the OECD Model Tax Convention (OECD, 2015).
- One tax treaty stipulates that MAP agreements will be implemented notwithstanding any time limits in the domestic laws only if, in the case of the other contracting jurisdiction, a case is presented within three years from the determination of the other jurisdiction's tax liability to which the case relates. Therefore, this additional text imposes a possible limitation on the implementation of MAP agreements given that such determination of the other jurisdiction's tax liability could result in a timeframe that is more constrictive than the three year time period required for a taxpayer to simply present his case to a competent authority. This treaty, however, contains a time limit to make primary adjustments in the MAP article, which applies to both the equivalents in Article 7 and Article 9. Therefore, this treaty is considered in line with the Action 14 Minimum Standard.

Anticipated modifications

Multilateral Instrument

205. Australia recently signed the Multilateral Instrument. Article 16(4)(b)(ii) of that instrument stipulates that Article 16(2), second sentence – containing the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015). In other words, in the absence of this equivalent, Article 16(4)(b)(ii) of the Multilateral Instrument will

modify the applicable tax treaty to include such equivalent. 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 and insofar as both, pursuant to Article 16(6)(c)(ii), notified the depositary that this treaty does not include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015). Article 16(4)(b)(ii) of the Multilateral Instrument will for a tax treaty not take effect if one or both of the treaty partners has, pursuant to Article 16(5)(c), reserved the right not to apply the second sentence of Article 16(2) of that instrument for all of its covered tax agreements under the condition that: (i) any MAP agreement shall be implemented notwithstanding any time limits in the domestic laws of the contracting states, or (ii) the jurisdiction intends to meet the Action 14 Minimum Standard by accepting in its tax treaties the alternative provisions to Article 9(1) and 7(2) concerning the introduction of a time limit for making transfer pricing profit adjustments.

206. In regard of the 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 (OECD, 2015), Australia listed 14 treaties as covered tax agreements under the Multilateral Instrument, but only for 13 treaties did it make, pursuant to Article 16(6)(c)(ii), a notification that they do not include a provision described in Article 16(4)(b)(ii). Of the relevant 13 treaty partners, two are not a signatory to the Multilateral Instrument, whereas one did not list their treaty with Australia as a covered tax agreement and two made a reservation on the basis of Article 16(5)(c). All remaining eight treaty partners also made a notification on the basis of Article 16(6)(c)(ii). Therefore, at this stage the Multilateral Instrument will, upon entry into force, modify eight of the 22 tax treaties identified above to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015).

Bilateral modifications

207. Australia reported its expressed preference to modify Australia's existing agreements via the Multilateral Instrument and that it will strongly encourage its existing treaty partners to use this instrument to ensure that its tax treaties with Australia comply with the Action 14 Minimum Standard. To facilitate this process, Australia reported that the Australian Government is currently focused on completing Australia's domestic implementation processes to allow Australia to ratify the Multilateral Instrument as quickly as possible. Where treaties will not be modified by the Multilateral Instrument, Australia reported that the timing and processes for making bilateral amendments to existing tax treaties will be considered (including both tax and non-tax considerations), available resources and, specifically with respect to the Action 14 Minimum Standard, the extent of the practical impact of differences between the existing MAP provision and this standard. Australia also indicated that it would take into account the reasons why a relevant treaty partner has either not signed the Multilateral Instrument or did not include the treaty with Australia as a covered tax agreement before initiating bilateral actions. In addition, Australia reported it will seek to include Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) in all of its future tax treaties.

Peer input

208. Most peers that provided input reported that their treaty with Australia meets the requirement under element D.3, which is confirmed by the analysis made previously.

209. For the 22 tax treaties identified that do not include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015), or both alternatives, one peer acknowledged that its treaty did not meet the requirement under element D.3 but did not mention having contacted Australia in this respect. Some of the other relevant peers noted that their treaty would be modified by the Multilateral Instrument to meet the requirement under element D.3, which is confirmed by the analysis.

Conclusion

	Areas for improvement	Recommendations
[D.3]	22 out of 53 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) nor any of the alternative provisions provided for in Article 9(1) and Article 7(2).	<p>Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) in those eight treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force.</p> <p>For the remaining 15 treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations or be willing to accept the inclusion of both alternative provisions.</p> <p>In addition, Australia should maintain its stated intention to include the required provision, or be willing to accept the inclusion of both alternative provisions, in all future tax treaties.</p>

References

OECD (2015), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264239081-en> (accessed on 18 July 2018).

Summary

	Areas for improvement	Recommendations
Part A: Preventing disputes		
[A.1]	31 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015).	<p>As none of the 31 tax treaties will be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2015) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations or follow up on its intention to reconsider its notifications in the Multilateral Instrument.</p> <p>In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.</p>
[A.2]	-	Australia should continue to provide for roll-back of bilateral APAs in appropriate cases as it has done thus far.
Part B: Availability and access to MAP		
[B.1]	<p>15 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(1) of the OECD Model Tax Convention (OECD, 2015a). Of those 15 tax treaties:</p> <ul style="list-style-type: none"> • Ten tax treaties do not contain the equivalent to Article 25(1), first sentence and the timeline to file such request is shorter than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. • Three tax treaties do not contain the equivalent to Article 25(1), first sentence. • Two tax treaties provide that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. 	<p>Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) in those treaties that currently do not contain such equivalent. This concerns both:</p> <ul style="list-style-type: none"> • a provision that is equivalent to Article 25(1), first sentence of the OECD Model Tax Convention (OECD, 2015a) either: <ul style="list-style-type: none"> a. As amended in the final report of Action 14 (OECD, 2015b); or b. As it read prior to the adoption of final report of Action 14 (OECD, 2015b), thereby including the full sentence of such provision; and • a provision that allows taxpayers to submit a MAP request within a period of no less than three years as from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty. <p>For the remaining treaties that will not be modified by the Multilateral Instrument following its entry into force to include such equivalent, Australia should request the inclusion of the required provision via bilateral negotiations.</p> <p>In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.</p>

	Areas for improvement	Recommendations
	Where tax treaties do not contain a time limit for submission of a MAP request, there is a risk, under applicable rules under domestic legislation, that taxpayers cannot validly present a MAP request within a period of at least three years as from the first notification of the action that results or will result in taxation not in accordance with the provisions of the tax treaty.	Australia should ensure that where its domestic time limits apply for filing of MAP requests, in the absence of a provision hereon in its tax treaties, such time limits do not prevent taxpayers from access to MAP if a request thereto is made within a period of three years as from the first notification of the action that results or will result in taxation not in accordance with the provisions of the tax treaty.
[B.2]	52 of the 53 treaties do not contain a provision equivalent to Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as changed by the Action 14 final report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either treaty partners. For these treaties no documented bilateral consultation or notification process is in place, which allows the other competent authority concerned to provide its views on the case when the taxpayer's objection raised in the MAP request is considered not to be justified.	Australia should follow its stated intention to document its notification procedure for cases in which its competent authority considered the objection raised in a MAP request not to be justified and when the tax treaty concerned does not include Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as amended by the final report of Action 14 (OECD, 2015b), and should continue using its notification process in practice.
[B.3]	-	As Australia has thus far granted access to MAP in eligible transfer pricing cases, it should continue granting access for these cases.
[B.4]	There is a lack of clarity in Australia's position regarding whether MAP is limited for cases involving a disagreement between the taxpayer and the tax authorities as to whether the application of a domestic anti-abuse provision is in conflict with the provisions of a treaty. This lack of clarity may have caused taxpayers to not submit MAP requests during the Review period.	As Australia reported it will give 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, it should follow its stated intention to clarify its position regarding this matter. In addition, Australia is recommended to follow its policy and grant access to MAP in such cases.
[B.5]	Access to MAP can be restricted in cases where there is an audit settlement between the tax authority and a taxpayer.	Australia 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]	-	As Australia has thus far not limited access to MAP in eligible cases where taxpayers have complied with Australia's information and documentation requirements for MAP requests, it should continue this practice.
[B.7]	38 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a).	<p>Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) in those 17 treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force.</p> <p>For the remaining 21 treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2015a) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations.</p> <p>In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.</p>

	Areas for improvement	Recommendations
[B.8]	Contact details of Australia's competent authority and other sections are not up to date in the MAP guidance. Furthermore, Australia's MAP guidance only addresses attribution/allocation cases.	Australia should follow its stated intention to update its MAP guidance to include the valid contact information of its competent authority as soon as possible, and include information concerning cases other than attribution/allocation cases. Additionally, although not required by the Action 14 Minimum Standard, Australia could follow its stated intention to update its guidance with the information listed above, and could consider including information on the timing of the steps of the process for the implementation of MAP agreements, including any actions to be taken by taxpayers.
[B.9]	The MAP guidance is not easily accessible. The MAP profile contains inconsistencies with Australia's reported policy.	Australia should make its existing MAP guidance more easily accessible. Australia should also ensure that the update of its MAP guidance is made publically available and easily accessible. In addition, Australia should follow its stated intention to amend its MAP profile.
[B.10]	The MAP guidance does not contain information on the relationship between MAP and audit settlements.	Australia's MAP guidance should clarify that taxpayers have access to MAP in case of audit settlements.
Part C: Resolution of MAP cases		
[C.1]	12 out of 53 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a).	Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) in the one treaty that currently does not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force. For the remaining 11 treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2015a) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations. In addition, Australia should maintain its stated intention to include the required provision in all future tax treaties.
[C.2]	Australia submitted comprehensive MAP statistics on time on the basis of the MAP Statistics Reporting Framework for the years 2016 and 2017. Based on the information provided by Australia's MAP partners, its post-2015 MAP statistics actually match those of its treaty partners as reported by the latter. Australia's MAP statistics show that during the Statistics Reporting Period it closed 39% (16 out of 41 cases) of its post-2015 cases in 4.91 months on average. In that regard, Australia is recommended to seek to resolve the remaining 61% of the post-2015 cases pending on 31 December 2017 (25 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.	
[C.3]	-	Australia should continue to monitor whether it has adequate resources in place to ensure that future MAP cases are resolved in a timely, efficient and effective manner.

	Areas for improvement	Recommendations
[C.4]	<p>Personnel of tax administrations of Australia directly involved in the adjustment at issue can participate in competent authority meetings during which MAP cases are resolved. This bears the risk that the competent authority function is not performed entirely independent from the approval or direction of the tax administration personnel directly involved in the adjustment at issue concerning the resolution of MAP cases during such meetings. However, it was not possible to assess whether this risk was appropriately addressed in practice during the Review period.</p> <p>Australia should ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being dependent of approval or direction from the personnel of the tax administrations of Australia directly involved in the adjustments at issue when they attend competent authority meetings.</p>	<p>As it has done thus far, Australia should continue to ensure that its competent authority has the authority, and uses that authority in practice, to resolve MAP cases without being influenced by considerations of the policy that Australia would like to see reflected in future amendments to the tax treaty.</p>
[C.5]	-	As it has done thus far, Australia should continue to use appropriate performance indicators.
[C.6]	-	-
Part D: Implementation of MAP agreements		
	-	As it has done thus far, Australia should continue to implement all MAP agreements reached if the conditions for such implementation are fulfilled.
[D.1]	As will be discussed under element D.3 not all of Australia's tax treaties contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015). Therefore, there is a risk that for those tax treaties that do not contain that provision, not all MAP agreements will be implemented due to time limits of two to four years in its domestic law that can only be overridden by discretionary authority in certain circumstances.	Additionally, Australia should closely monitor whether its domestic statute of limitation results in obstructions in practice concerning the implementation of MAP agreements. Where this is the case, Australia should consider amending the process in place with a view to enable the implementation of all MAP agreements.
[D.2]	-	As it has done thus far, Australia should continue to implement all MAP agreements reached on a timely basis if the conditions for such implementation are fulfilled, in particular for the MAP agreement whose implementation is pending.
[D.3]	22 out of 53 tax treaties contain neither a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) nor any of the alternative provisions provided for in Article 9(1) and Article 7(2).	<p>Australia should as quickly as possible ratify the Multilateral Instrument to incorporate the equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) in those eight treaties that currently do not contain such equivalent and that will be modified by the Multilateral Instrument upon its entry into force.</p> <p>For the remaining 15 treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2015) following its entry into force, Australia should request the inclusion of the required provision via bilateral negotiations or be willing to accept the inclusion of both alternative provisions.</p> <p>In addition, Australia should maintain its stated intention to include the required provision, or be willing to accept the inclusion of both alternatives provisions, in all future tax treaties.</p>

Annex A

Tax treaty network of Australia

		Action 25(1) of the OECD Model Tax Convention (“MTC”)		Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1	B.1	B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Treaty partner	DTC in force?	Inclusion Art.25(1)?	Inclusion Art. 25(1) second sentence?		Inclusion Art.9(2)? If no, will your CA provide access to MAP in TP cases?	Existence of a provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?	Inclusion Art.25(2) first sentence?	Inclusion Art.25(2) second sentence?	Inclusion Art.25(3) first sentence?	Inclusion Art.25(3) second sentence?	Inclusion arbitration provision?
		If yes, submission to either competent authority	If no, please state reasons			If no, will your CA accept a taxpayer’s request for MAP in relation to such cases?		If no, alternative provision in Art. 7 & 9 OECD MTC?			
	Y = yes N = signed pending ratification	E = yes, either CAs O = yes, only one CA N = No	Y = yes i = no, no such provision ii = no, different period iii = no, starting point for computing the 3 year period is different iv = no, others reasons	if ii, specify period	Y = yes i = no, but access will be given to TP cases ii = no and access will not be given to TP cases	Y = yes i = no and such cases will be accepted for MAP ii = no but such cases will not be accepted for MAP	Y = yes N = no	Y = yes i = no, but have Art 7 equivalent ii = no, but have Art 9 equivalent iii = no, but have both Art. 7 & 9 equivalent N = no and no equivalent of Art 7 and 9	Y = yes N = no	Y = yes N = no	Y = yes N = no if yes i-Art.25(5) ii-mandatory other iii – voluntary
Argentina	Y	O*	Y	N/A	Y	ii	Y	Y	Y	Y	N N/A
Aruba	Y	N	iv	N/A	i	ii	N	N	N	N	N N/A
Austria	Y	O	Y	N/A	Y	ii	Y	Y	N	N	N N/A
Belgium	Y	O*	Y	N/A	Y	ii	Y	N*	N	N*	N N/A
British Virgin Islands	Y	N	iv	N/A	N/A	ii	N	N	N	N	N N/A

		Action 25(1) of the OECD Model Tax Convention (“MTC”)			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1	B.1		B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
Treaty partner	DTC in force?	Inclusion Art. 25(1)?	Inclusion Art. 25(1) second sentence?		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Existence of a provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
		If yes, submission to either competent authority	If no, please state reasons			If no, will your CA accept a taxpayer’s request for MAP in relation to such cases?		If no, alternative provision in Art. 7 & 9 OECD MTC?				
Canada	Y	O	i	N/A	Y	ii	Y	N	N	Y	N	N/A
Chile	Y	O	Y	N/A	Y	ii	Y	N*	Y	N*	N	N/A
China (People’s Republic of)	Y	O	Y	N/A	Y	ii	Y	Y	N	N*	N	N/A
Cook Islands	Y	N	iv	N/A	i	ii	N	N	N	N	N	N/A
Czech Republic	Y	O*	ii	4-years	Y	ii	Y	Y	Y	N*	N	N/A
Denmark	Y	O*	Y	N/A	Y	ii	Y	Y	N	N*	N	N/A
Fiji	Y	O*	Y	N/A	Y	ii	Y	N*	N	N*	N	N/A
Finland	Y	O*	Y	N/A	Y	ii	Y	Y	Y	Y	N	N/A
France	Y	O*	Y	N/A	i	ii	Y	Y	Y	Y	N	N/A
Germany	Y	E	Y	N/A	Y	ii	Y	Y	Y	Y	Y	i
Guernsey	Y	N	iv	N/A	i	ii	N	N	N	N	N	N/A
Hungary	Y	O	Y	N/A	Y	ii	Y	Y	N	N	N	N/A
India	Y	N	Y	N/A	Y	ii	Y	Y	N	N*	N	N/A
Indonesia	Y	O	Y	N/A	Y	ii	Y	Y	N	N	N	N/A
Ireland	Y	O*	Y	N/A	Y	ii	Y	N*	N	N*	N	N/A
Isle of Man	Y	N	iv	N/A	i	ii	N	N	N	N	N	N/A
Italy	Y	N	ii*	2-years	i*	ii	Y	N*	N	N*	N	N/A
Japan	Y	O*	Y	N/A	i	ii	Y	Y	Y	Y	N	N/A
Jersey	Y	N	iv	N/A	i	ii	N	N	N	N	N	N/A
Kiribati	Y	O	Y	N/A	Y	ii	Y	Y	N	N	N	N/A
Korea	Y	O	Y	N/A	Y	ii	Y	Y	Y	N	N	N/A
Malaysia	Y	O*	ii*	2-years	Y	ii	Y	N*	Y	N*	N	N/A
Malta	Y	O*	Y	N/A	Y	ii	Y	Y	Y	N*	N	N/A

		Action 25(1) of the OECD Model Tax Convention (“MTC”)			Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration	
		B.1	B.1		B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
Treaty partner	DTC in force?	Inclusion Art. 25(1)?	Inclusion Art. 25(1) second sentence?		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Existence of a provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
		If yes, submission to either competent authority	If no, please state reasons			If no, will your CA accept a taxpayer’s request for MAP in relation to such cases?		If no, alternative provision in Art. 7 & 9 OECD MTC?				
Marshall Islands	N	N	iv	N/A	i	ii	N	N	N	N	N	N/A
Mauritius	Y	N	iv	N/A	i	ii	N	N	N	N	N	N/A
Mexico	Y	O*	Y	N/A	i	ii	N*	N	Y	Y	N	N/A
Netherlands	Y	O*	Y	N/A	Y	ii	Y	Y	Y	N*	N	N/A
New Zealand	Y	O*	Y	N/A	Y	ii	Y	Y	Y	Y	Y	i
Norway	Y	O*	Y	N/A	Y	ii	Y	Y	Y	Y	N	N/A
Papua New Guinea	Y	O	Y	N/A	Y	ii	Y	Y	N	N	N	N/A
Philippines	Y	O	ii	2-years	Y	ii	Y	N	N	N	N	N/A
Poland	Y	O	Y	N/A	Y	ii	Y	Y	N	N*	N	N/A
Romania	Y	O	Y	N/A	Y	ii	Y	Y	N	N*	N	N/A
Russia	Y	O*	Y	N/A	Y	ii	Y	Y	Y	Y	N	N/A
Samoa	N	N	iv	N/A	i	ii	N	N	N	N	N	N/A
Singapore	Y	N	i	N/A	Y	ii	N	N*	N	N*	N	N/A
Slovak Republic	Y	O	ii	4-years	Y	ii	Y	Y	N	N*	N	N/A
South Africa	Y	N	Y	N/A	Y	ii	Y	Y	Y	Y	N	N/A
Spain	Y	O	Y	N/A	Y	ii	Y	Y	N	N*	N	N/A
Sri Lanka	Y	O	Y	Y	Y	ii	Y	Y	N	N	N	N/A
Sweden	Y	O	Y	N/A	Y	ii	Y	Y	N	N	N	N/A
Switzerland	Y	O	Y	N/A	Y	ii	Y	N	Y	Y	Y	i
Chinese Taipei	Y	O	Y	N/A	Y	ii	Y	Y	Y	Y	N	N/A
Thailand	Y	O	Y	N/A	Y	ii	Y	N	Y	N	N	N/A
Turkey	Y	O*	Y	N/A	Y	ii	Y	N	Y	Y	N	N/A

		Action 25(1) of the OECD Model Tax Convention (“MTC”)		Article 9(2) of the OECD MTC	Anti-abuse	Article 25(2) of the OECD MTC		Article 25(3) of the OECD MTC		Arbitration		
		B.1	B.1		B.3	B.4	C.1	D.3	A.1	B.7	C.6	
Column 1	Column 2	Column 3	Column 4		Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	
Treaty partner	DTC in force?	Inclusion Art. 25(1)?	Inclusion Art. 25(1) second sentence?		Inclusion Art. 9(2)? If no, will your CA provide access to MAP in TP cases?	Existence of a provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law?	Inclusion Art. 25(2) first sentence?	Inclusion Art. 25(2) second sentence?	Inclusion Art. 25(3) first sentence?	Inclusion Art. 25(3) second sentence?	Inclusion arbitration provision?	
		If yes, submission to either competent authority	If no, please state reasons			If no, will your CA accept a taxpayer’s request for MAP in relation to such cases?		If no, alternative provision in Art. 7 & 9 OECD MTC?				
United Kingdom	Y	O*	i	N/A	Y	ii	Y	N*	Y	Y	N	N/A
United States	Y	O	Y	N/A	Y	ii	N	Y	Y	N	N	N/A
Viet Nam	Y	O	Y	N/A	Y	ii	Y	Y	N	N	N	N/A

* Treaties that will be modified upon entry into force of the Multilateral Instrument.

** Treaties will be modified upon entry into force of the Multilateral Instrument only to the extent that existing treaty provisions are incompatible with the relevant provision of Article 17 of the Multilateral Instrument.

Annex B

MAP statistics reporting for the 2016 and 2017 Reporting Periods (1 January 2016 to 31 December 2017) for pre-2016 cases

2016 MAP Statistics													
Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2016	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in on MAP inventory on 31 December 2016	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/Allocation	28	0	0	0	0	0	7	0	0	0	0	21	28.00
Others	12	0	0	0	0	0	2	0	0	0	0	10	9.00
Total	40	0	0	0	0	0	9	0	0	0	0	31	23.78

Notes: The number of pre-2016 cases in the inventory on 1 January 2016 in the table above is different from the number of pre-2016 cases in Australia’s published 2016 MAP statistics. This results from the fact that:

- four cases (one attribution/allocation case and three other cases) for which MAP request was submitted before 1 January 2016 and was only notified to Australia in 2017 and
- four attribution/allocation cases had started before July 2014 but by mistake were not included in Australia’s 2016 MAP statistics.

2017 MAP Statistics													
Category of cases	No. of pre-2016 cases in MAP inventory on 1 January 2017	Number of pre-2016 cases closed during the reporting period by outcome										No. of pre-2016 cases remaining in on MAP inventory on 31 December 2017	Average time taken (in months) for closing pre-2016 cases during the reporting period
		Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14
Attribution/Allocation	21	0	1	0	3	0	4	1	0	0	0	12	22.21
Others	10	0	0	0	1	0	1	0	0	1	0	7	14.56
Total	31	0	1	0	4	0	5	1	0	1	0	19	20.30

Annex C

MAP statistics reporting for the 2016 and 2017 Reporting Periods (1 January 2016 to 31 December 2017) for post-2015 cases

2016 MAP Statistics														
Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2016	No. of post-2015 cases started during the reporting period	Number of post-2015 cases closed during the reporting period by outcome										No. of post-2015 cases remaining in on map inventory on 31 december 2016	Average time taken (in months) for closing post-2015 cases during the reporting period
			Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/ Allocation	0	13	0	0	0	0	0	1	0	0	0	0	12	7.50
Others	0	10	0	1	0	0	0	1	0	0	0	0	8	5.75
Total	0	33	0	1	0	0	0	2	0	0	0	0	20	6.33

Note: The number of post-2015 cases started in 2016 in the table above is different from the number of post-2015 cases in Australia’s published 2016 MAP statistics. This results from the fact that Australia was notified in 2018 by one of its treaty partners of a case that started in 2016 and that was closed with unilateral relief granted by this treaty partner in 2017.

2017 MAP Statistics														
Category of cases	No. of post-2015 cases in MAP inventory on 1 January 2017	No. of post-2015 cases started during the reporting period	Number of post-2015 cases closed during the reporting period by outcome										No. of post-2015 cases remaining in on MAP inventory on 31 December 2017	Average time taken (in months) for closing post-2015 cases during the reporting period
			Denied MAP access	Objection is not justified	Withdrawn by taxpayer	Unilateral relief granted	Resolved via domestic remedy	Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty	Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty	Agreement that there is no taxation not in accordance with tax treaty	No agreement, including agreement to disagree	Any other outcome		
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15
Attribution/ Allocation	12	8	0	0	1	1	0	3	0	0	0	0	15	7.33
Others	8	10	2	4	1	0	1	0	0	0	0	0	10	2.86
Total	20	18	2	4	2	1	1	3	0	0	0	0	25	4.58

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
APA Guidance	Law Administration Practice Statement 2015/4
MAP Guidance	Taxation Ruling TR 2000/16
MAP Statistics Reporting Framework	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
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
OECD Transfer Pricing Guidelines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
Pre-2016 cases	MAP cases in a competent authority’s inventory were pending resolution on 31 December 2015
Post-2015 cases	MAP cases received by a competent authority from the taxpayer on or after 1 January 2016
Review Period	Period for the peer review process that started on 1 January 2015 and ended on 31 December 2017
Statistics Reporting Period	Period for reporting MAP statistics that started on 1 January 2016 and ended on 31 December 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

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OECD/G20 Base Erosion and Profit Shifting Project

Making Dispute Resolution More Effective – MAP Peer Review Report, Australia (Stage 1)

INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

Under Action 14, countries have committed to implement a minimum standard to strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP). The MAP is included in Article 25 of the OECD Model Tax Convention and commits countries to endeavour to resolve disputes related to the interpretation and application of tax treaties. The Action 14 Minimum Standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process. The minimum standard is complemented by a set of best practices.

The peer review process is conducted in two stages. Stage 1 assesses countries against the terms of reference of the minimum standard according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. This report reflects the outcome of the stage 1 peer review of the implementation of the Action 14 Minimum Standard by Australia, which is accompanied by a document addressing the implementation of best practices which can be accessed on the OECD website: <http://oe.cd/bepsaction14>.

Consult this publication on line at <https://doi.org/10.1787/9789264304208-en>.

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