



13 February 2017

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### **Submission – Australia’s adoption of the BEPS Convention (Multilateral Instrument)**

The Minerals Council of Australia (MCA) offers comments on Treasury’s consultation paper on the adoption of the BEPS multilateral instrument (MLI).

The MCA acknowledges that Treasury’s consultation paper outlines, overall, a sensible approach to Australia’s adoption of the MLI. The MCA supports Australia’s adoption of the MLI and broadly supports the proposed approach set out in the paper. The MCA offers some comments on the proposed approach on the Permanent Establishment (PE) articles, exclusion of the DPT and potential complexity issues given the overlay of the MLI to DTAs.

The MCA supports strong, balanced tax laws to preserve the integrity of the tax system and Australia remaining in step with international efforts on BEPS reform. While a multilateral and co-ordinated approach through the OECD BEPS project is the best way to address aggressive tax practices, Australia must have regard to its economic interests in considering implementation of new tax integrity rules. The MCA offers some suggestions in relation to Australia’s proposed adoption of the Permanent Establishment (PE) articles to ensure Australia’s interests are taken clearly into account.

#### **Article 12 – Permanent Establishment**

Australia’s approach to the adoption of the PE articles should be consistent with that of our major trading partners. While the MCA agrees with Treasury’s principles informing the proposed approach to adopting the MLI, as set out in paragraphs 21 and 22 (to essentially adopt the MLI to the greatest extent possible), but suggests an additional and important principle to achieve consistency with major trading partners in the adoption of the PE articles.

Australia should as a general principle take a consistent approach to our adoption of the PE rules in the MLI with our major trading partners. The UK, for example, has indicated that it will not accept all of the revisions to the PE rules. A close examination of the UK’s economic interests might suggest that they are not well served with the adoption of the PE articles. Australia should seriously consider its own interests in a similar fashion.

In addition, it is not yet clear whether some of Australia’s major trading partners, such as China, will adopt the PE articles or even what their interpretation of BEPS Action 7 is. Until it is clear which parts of the MLI have been accepted by other trading partners, and what their interpretation is of the relevant BEPS Action items, Australia should take a cautious approach in adopting the PE components of the MLI given the potential for other countries to have a different interpretation of the PE BEPS Actions. This is particularly important in relation to the measures that would expand the definition of PEs given the potential impact for the Australian revenue if activities common to the sales and marketing function of the Australian minerals industry selling product to Asian countries gives rise to a PE courtesy of the application of revised Article 5(5).

## Articles 18-26

The MCA strongly supports Treasury's proposed approach to adopt Part VI of the MLI across its covered tax agreements, including the option requiring taxpayers (and their advisers) to maintain the confidentiality of information obtained during the course of arbitration proceedings. The MCA sees independent and binding arbitration as a way to ensure no double taxation arises.

In addition, the ability to take an unresolved matter to binding arbitration has a significant impact on relevant competent authority attitudes in trying to resolve disputes to help ensure they are resolved within a two year time frame rather than taking significantly longer or not being resolved at all.

The MCA has concerns with the approach of potentially excluding the Diverted Profits Tax (DPT), as part of Australia's general anti-avoidance rules, from the scope of arbitration and enter the reservations permitted by Article 19(12). In relation to Australia's existing anti-avoidance legislation, the MCA can understand Treasury's position and does not raise any major concerns. However, the MCA has significant concerns in relation to the proposed DPT which should be included in the mandatory arbitration clause to limit the potential for double taxation.

The proposed DPT legislation will apply to taxpayers 'who transfer profits to offshore associates using arrangements entered into or carried out with a principle purpose of avoiding Australia tax'. The wording of the legislation is broad and may capture many cross border transactions where there is a differing opinion between the taxpayer and the Australian tax authority, and between tax authorities. Removing the ability to have these transactions reviewed by MAP and potentially going to independent binding arbitration removes the ability for a taxpayer to get an appropriate corresponding adjustment and the removal of double taxation.

For example, take the position where the DPT has been applied to a cross border transaction. In any discussion with the non-Australian tax authority there is little incentive for them to engage in genuine discussions around making a corresponding adjustment in their tax jurisdiction. However if MAP or independent binding arbitration is still available they are likely to strongly engage and make adjustments if considered appropriate. If agreement between the taxpayer and the non-Australian tax authority cannot be reached in line with the Australian adjustment, the ability to obtain a corresponding adjustment through MAP or independent binding arbitration is still possible. Should the Australian tax authority view prevail in arbitration double taxation should be removed. Should the Australian tax authority view not prevail in arbitration, there would not appear to be the need for Australia to change its DPT position but this would give a signal that perhaps the Australian tax authorities DPT position is not in line with international thinking on transfer pricing.

### Complexity

The way the MLI will be undertaken globally gives the likelihood of significant complexity when dealing with the overlay of DTAs on local legislation but now with a further overlay of the MLI which is dependent on multiple individual positions taken by individual countries. The MCA urges Treasury to engage with its major trading partners to ensure that wherever possible they work together to try to adopt a common position on the MLI articles.

Thank you for the opportunity to provide these comments. Please contact me if you have any queries in relation to these comments (James.Sorahan@minerals.org.au or 03 8614 1816).

Yours sincerely



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