



資料 1

**Australia's Progress
Implementing the
BEPS Action Plan**

Presented by
Professor Graeme S Cooper
Sydney University Law School

12 July 2017



資料 2

Outline

1. Australia's BEPS measures
2. The MLI and Australia's reservations / choices
3. Some anti-BEPS measures
4. Some comments on the BEPS project

The University of Sydney Page 2

資料3

1. BEPS: the acronym that conquered Australia

Action	Topic	Response
1	Addressing the Tax Challenges of the Digital Economy	Indirect tax: GST to be applied to import of digital products by consumers. To start from 1 July 2018 Direct tax: 'Google tax' mk I
2	Neutralising the Effects of Hybrid Mismatch Arrangements	Domestic law: May 2015: Government announces will implement the OECD rules to eliminate hybrid mismatch arrangements ...' with effect from 1 Jan 2018 May 2017: no tax credit on AT1 instruments which are deductible offshore (and credits wasted if funds not used wholly offshore) Treaty changes: Australia signs MLI
3	Designing Effective CFC Rules	'Australia's CFC rules meet OECD best practice guidance'
4	Limiting Base Erosion Involving Interest Deductions and Other Financial Payments	'Australia has already tightened its thin capitalisation rules'

The University of Sydney

Page 3



資料4

Action	Topic	Response
5	Countering Harmful Tax Practices	'OECD has found Australia does not engage in any harmful tax practices' 'ATO [has] already implemented exchange of rulings'
6	Preventing the Granting of Treaty Benefits in Inappropriate Circumstances	'Australia ... will act now to incorporate the OECD's recommendations into our treaty practice ...' November 2015. Australia-Germany treaty signed June 2017. MLI signed
7	Preventing the Artificial Avoidance of Permanent Establishment Status	November 2015: Australia-Germany treaty June 2017: Australia signs MLI but reserves on art 12
8-10	Aligning Transfer Pricing Outcomes with Value Creation	April 2017: Amendment to domestic TP legislation so that it refers to Guidelines as revised in light of 2015 report.

The University of Sydney

Page 4

資料5

Action	Topic	Response
11	Measuring and Monitoring BEPS	[No reaction]
12	Mandatory Disclosure Rules	<p>May 2016: Australia will implement Action 12</p> <p>May 2016: Treasury, <i>OECD Proposals for Mandatory Disclosure of Tax Information – Discussion Paper</i> (2016)</p> <p>October 2016: Board of Taxation announces it is discussing issue</p>
13	Transfer Pricing Documentation and Country-by-Country Reporting	<p>December 2015: Div 815-E <i>Tax Administration Act</i> inserted by <i>Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015</i></p> <p>January 2016: Australia signs Multilateral Competent Authority Agreement for automatic exchange of CbC reports</p> <p>2016-17: ATO issues draft CbC forms and administrative guidance</p>

The University of Sydney Page 5

資料6

Action	Topic	Response
14	Making Dispute Resolution Mechanisms More Effective	<p>November 2015: Australia-Germany treaty includes arbitration clause</p> <p>June 2017: Australia signs MLI</p>
15	Developing a Multilateral Instrument to Modify Bilateral Tax Treaties	<p>'Australia [is] working on an instrument to quickly update bilateral treaties with BEPS outcomes'</p> <p>December 2016: Treasury Consultation Paper</p> <p>June 2017: Australia signs MLI</p>

The University of Sydney Page 6

資料7

2. Australia's attitude to MLI

Covered treaties

- Australia nominated 43 of its 44 treaties
 - not Germany
- 9 treaty partners did not sign MLI
 - includes US, Norway, PNG
- 4 countries did not treaty with Australia
 - Austria, Korea, Sweden, Switzerland
- So, only about 30 treaties likely to be affected

Tentative list of reservations / choices (and notifications)

- only a few reservations for entire MLI articles
- many reservations for parts of MLI article (ie, to preserve existing version from being potentially superseded)
- comprehensive list of notification of existing provisions (so potentially superseded)
- some idiosyncratic positions being proposed – eg, reservation in arbitration article to prevent arbitration on a matter where GAAR involved



資料8

Article	Topic	Australia's position
3	Income derived through transparent entities	Australia will adopt Reserves to retain current provisions in 2 existing treaties Notifies provisions in 3 other treaties
4	Treatment of dual resident (artificial) entities	Australia will adopt Reserves on last sentence (ie, no treaty benefits at all unless competent authorities agree) Notifies current tie-breaker provisions in all covered treaties
5	Methods for relieving double tax	[Nothing in list of reservations and notifications but Treasury says will not adopt]

資料9

Article	Topic	Australia's position
6	Preamble (minimum standard)	Notifies Preamble of all treaties Chooses clause referring to developing economic ties and tax co-operation
7	PPT (minimum standard) and S-LOB	Chooses to adopt PPT (and not S-LOB) Also chooses to apply competent authority relief. Notifies 11 treaties
8	Dividend transfer transactions	Notifies provisions of 20 treaties
9	Gains on shares in land-rich entities	Reserves for articles in 19 treaties already dealing with interests other than shares Notifies all treaties re holding period
10	PEs in third countries	Australia reserves for entire article – will not adopt
11	Saving clause	Australia will adopt Notifies 9 treaties

The University of Sydney Page 9

資料10

Article	Topic	Australia's position
12	Artificial avoidance of PE	Australia reserves for entire article – will not adopt
13	Specific activity / preliminary activity exception	Australia will adopt Reserves for 3 treaties where existing article Choose to apply Option A Notifies all treaties
14	Contract splitting	Australia will adopt But reserves for Norway treaty which has provisions about natural resources Notifies 10 treaties
15	Definition of 'closely-related'	[No mention in list of reservations and notifications but Treasury says will adopt]

The University of Sydney Page 10

資料11

Article	Topic	Australia's position
16	Mutual agreement (minimum standard)	Adopts No reservations Notifies all treaties
17	Corresponding adjustments	Adopts No reservations Notifies all treaties
18 - 26	Mandatory binding arbitration	Elects to apply Part VI Reservation to exclude cases before a Court Chooses to trigger confidentiality clause Reservation to GAAR cases from arbitration Notifies arbitration articles in Swiss and NZ treaties

The University of Sydney

Page 11



資料12

3. Anti-BEPS

Google tax mk I – announced May 2015

- inbound issue
- Reflects
 - another approach to PE avoidance problem OR
 - dissatisfaction with the whole TP nonsense

Google tax mk II – announced May 2016

- inbound and outbound
 - partly about transfer pricing
 - partly about jurisdiction / funding / structure choices
- Reflects
 - a response to administrative frustration OR
 - dissatisfaction with the whole TP nonsense OR
 - a new definition of the tax base

The University of Sydney

Page 12

4. Five random comments on BEPS

Welcome to the 1950s

- defending a tax that (economists say) should be scrapped
- differentiating the ordinary return v. return to risk v return on economic rents

Where is the conceptual underpinning

- The \$64 Question: just where are profits earned anyway?

The games has moved on

- think about indirect asset transfers / corporate inversions / diverted profits taxes / CRS+FATCA / public disclosures

And we didn't even fix the problem

- Google / Apple / Starbucks / Amazon / Microsoft / et al
- maybe the Inclusive Framework will achieve what the BEPS project couldn't

A missed opportunity

- OECD can't touch the PE threshold
- can't touch the separate entity fiction (even extending it to branches via AOA)
- can't improve the *TP Guidelines* to get something workable for the real world