



Multilateral instrument will change NZ's DTAs

Snapshot

The **text** of the OECD's multilateral instrument ("MLI") to implement Base Erosion and Profit Shifting ("BEPS")-related changes to over 2,000 Double Tax Agreements ("DTAs") worldwide has been released.

The MLI will implement relevant BEPS changes across treaty networks rather than requiring treaty-by-treaty renegotiation. In NZ, the MLI could potentially apply to all 40 of our DTAs.

However, the MLI text is only the first step. The positions to be taken by individual countries will be the key to its effect.

The NZ Government expects to sign the MLI in June 2017. Inland Revenue will consult on the MLI shortly.

The MLI will come into force when at least 5 countries have ratified it. Changes to specific DTAs will take effect after each country has included the treaty as a covered tax agreement and ratified the MLI.

The negotiation of the MLI has been shrouded in secrecy

Now that the exact provisions are known, it will be up to specific countries to determine which parts to accept or reject (and which DTAs should be modified)

This will be a strategic choice for many, including NZ, based on a range of conflicting considerations

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Why is the MLI relevant?

BEPS implementation on steroids

The MLI is designed to implement, in one hit, into more than 2,000 tax treaties BEPS-related treaty recommendations across four actions:

- BEPS Action 2 – Neutralising Hybrid Mismatches (Part II of the MLI)
- BEPS Action 6 – Preventing Treaty Abuse (Part III)
- BEPS Action 7 – Preventing Permanent Establishment Avoidance (Part IV)
- BEPS Action 14 – Improving Disputes Resolution (Part V)

How the MLI works

Countries must first decide whether they want specific DTAs to be modified by the MLI – as Covered Tax Agreements (“CTAs”) – or not. Both countries must agree that the DTA is a CTA, for the MLI to have effect for that treaty.

For CTAs, there are minimum standards that must be implemented through the MLI, such as the BEPS Actions on Treaty Abuse and Disputes Resolution. (Obviously if these are already in a specific DTA, the MLI will not change that DTA.)

Other measures (e.g. changes to the Permanent Establishment definition) are optional. A country can choose to opt out partially or completely through a reservation mechanism. These measures are only changed for a specific CTA if both countries choose the same option.

However, a country must choose a single position for all DTAs it chooses to be CTAs. It cannot take a position for one country that would not apply to another. E.g. NZ cannot seek to implement modified Permanent Establishment provisions with Australia, but not Japan, through the MLI.

Countries can subsequently withdraw or modify their DTAs through bilateral negotiation, including areas covered by the MLI.

Entry of the MLI into force

- The MLI will have legal effect when at least 5 countries have ratified it. This is expected to be sometime in 2017.
- The MLI will apply to modify a specific CTA when NZ and the relevant partner country have each ratified the MLI. The effective dates will be:
 - For withholding taxes, 1 January of the year after both countries ratify.
 - For other items, the taxable period starting 6 months after ratification.

How is the MLI likely to apply in New Zealand?

That is the million dollar question. It’s not clear. The negotiation of the text of the MLI has been shrouded in secrecy. Countries have treated it as the equivalent of a bilateral tax treaty negotiation. Each country, including NZ, has to decide which of the optional MLI provisions to accept or reject.

This will be a strategic choice for many. Considerations include the impact of any modifications on business competitiveness and capital investment and the need to be consistent. These will need to be balanced against domestic tax base protection considerations and the need to be seen to be a good global tax citizen.

The NZ Government has indicated that Inland Revenue will consult on the MLI. Exactly on what and when is still to be confirmed. There may be a limited opportunity for business to have their say on which MLI options should be taken by NZ. Watch this space.

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