

# MLI Article 4(1)

## Administrative Approach

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### **Australia and New Zealand administrative approach**

Australia and New Zealand are signatories to the Multilateral Convention<sup>1</sup> (MLI) and have both deposited their instruments of ratification with the OECD. This reinforces the commitment of Australia and New Zealand to addressing base erosion and profit shifting (BEPS) risks and ensuring a better functioning international tax system.

In recognition of the Single Economic Market agenda between Australia and New Zealand, which seeks to create a seamless trans-Tasman business environment, and the fact that our respective tax systems and administrations are comparable and both countries are committed to adopting measures to address BEPS risks, this joint approach represents a measured risk-based approach that seeks to provide certainty and minimise compliance costs for taxpayers. It is envisaged that this approach will only be implemented between Australia and New Zealand at this stage.

For taxpayers that satisfy all of the eligibility criteria outlined below for the relevant year, the Australian Taxation Office (ATO) and New Zealand Inland Revenue (IR) jointly determine that:

- Where an eligible taxpayer reasonably self-determines its place of effective management (PoEM) to be located in Australia, it will be deemed to be a resident of Australia for the purposes of the *Convention between Australia and New Zealand for the avoidance of double taxation with respect to taxes on income and fringe benefits and the prevention of fiscal evasion* (Australia-New Zealand treaty)
- Where an eligible taxpayer reasonably self-determines its PoEM to be located in New Zealand, it will be deemed to be a resident of New Zealand for the purposes of the Australia-New Zealand treaty.

This determination is made for the purposes of the Australia-New Zealand treaty as modified by Article 4(1) of the MLI.

Where an eligible taxpayer reasonably self-determines its PoEM to be located in New Zealand and it is deemed to be a resident of New Zealand for the purposes of the Australia-New Zealand treaty, the taxpayer will also be a prescribed dual resident under the definition in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

This approach is designed to reduce the compliance burden and costs for lower materiality taxpayers as they are able to assess their eligibility based on readily available information. It also allows the ATO and IR to focus compliance resources on arrangements that could have material revenue consequences and/or pose higher risk of non-compliance with the tax laws.

Where the taxpayer is uncertain as to whether they satisfy the eligibility criteria or uncertain as to the self-determination of PoEM, we encourage the taxpayer to engage with either competent

authority about their circumstances. If the taxpayer does not meet the eligibility criteria, then an application will need to be lodged (see: <http://taxpolicy.ird.govt.nz/tax-treaties/australia>).

The ATO and IR will review the operation of this administrative approach in 12 months, or earlier if appropriate.

## **Eligibility criteria**

### Structure

1. The taxpayer is an ordinary company<sup>2</sup> incorporated under either the *Corporations Act 2001* in the case of Australia or the *Companies Act 1993* in the case of New Zealand.
2. The taxpayer has reasonably self-determined its place of effective management to be solely in either Australia or New Zealand for the purposes of the Australia-New Zealand treaty.

### Financials

3. The taxpayer's group<sup>3</sup> annual accounting income<sup>4</sup> is less than AUD \$250 million or NZD \$260 million based on prepared financial statements for the most recent reporting period.<sup>5</sup>
4. The taxpayer's gross passive<sup>6</sup> income is less than 20% of its total assessable income for the most recent income tax year.
5. The total value of intangible assets<sup>7</sup> (other than goodwill) held by the taxpayer is less than 20% of the value of its total assets based on prepared financial statements for the most recent reporting period.

### Compliance activities

6. The taxpayer or any member of the group<sup>8</sup> is currently **not**, and has **not** been in the last five years, subject to any compliance activity<sup>9</sup> undertaken by either the ATO or IR which relates to the determination of residency for taxation purposes.
7. The taxpayer or any member of the group<sup>10</sup> is currently **not** engaged in an objection,<sup>11</sup> challenge,<sup>12</sup> settlement procedure or litigation in either Australia or New Zealand in relation to a dispute with either the ATO or IR.

Where the taxpayer has only failed criterion 7 (that is, the taxpayer meets all other criteria), we encourage the taxpayer to contact either competent authority to discuss their particular facts and circumstances prior to lodging an application for a competent authority determination.

The administrative approach will only be valid if the taxpayer satisfies all of the following conditions on an on-going basis:

8. Upon being notified by either the ATO or IR of a new compliance activity,<sup>13</sup> the taxpayer notifies the ATO or IR that it has been eligible for the dual resident administrative approach and the jurisdiction of residence for the purposes of the Australia-New Zealand treaty has been determined under this approach.
9. The taxpayer or any member of the taxpayer group<sup>14</sup> has **not** entered into, or carried out:
  - a tax avoidance scheme whose outcome depends, in whole or part, on the location of its residence

- a tax avoidance scheme affecting the location of its central management and control, including previous or subsequent 'migration' of residency
- arrangements to conceal ultimate beneficial or economic ownership
- arrangements involving abuse of board processes (including backdating of documents) or the board not truly executing its functions, or
- arrangements under which any benefits under the Australia-New Zealand treaty would be potentially denied under the conditions of the Principal Purpose Test in paragraph 1 of MLI Article 7.

### **Taxpayer obligations**

Where there is a material change, the taxpayer is required to re-assess their eligibility and approach either competent authority if the practical administrative approach no longer applies to their circumstances.

Where the taxpayer has assessed their circumstances and eligibility to apply the practical administrative approach, they are still required to meet the general record-keeping requirements under domestic law.<sup>15</sup> This includes supporting documentation that must be clearly identifiable for each relevant year for which they have determined their residency for the purposes of the Australia-New Zealand treaty under this approach.

### **Review of agreement**

The ATO and IR will generally not seek to review a taxpayer's self-determined PoEM as long as all material facts and circumstances remain the same. The ATO and IR reserve the right to review the outcome of a taxpayer's self-determined PoEM especially in instances where the ATO or IR is of the opinion that any anti-avoidance rules may apply.

In most circumstances, the tax law puts a time limit on the period in which the ATO or IR can amend a tax assessment. These time limits provide certainty and finality for both the taxpayer and the Commissioner. Generally the period of review of a taxpayer's assessment is four years. However, in a case where the ATO or the IR forms an opinion of fraud or evasion, there is no time limit for amending an assessment.

When a review concludes, the outcome will be communicated in writing, generally within seven days of a decision. If the outcome of the review results in the reversal of a taxpayer's self-determined position the result will be retrospectively applied from the later of:

- the date of the MLI (1 January 2019)
- the date of the change in a taxpayer's circumstances that resulted in the determination ceasing to be correct.

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<sup>1</sup> *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.*

<sup>2</sup> Ordinary company takes its meaning from plain English that is, an entity that is not a trust, partnership, cooperative, or other like vehicle. For the purposes of assessing this criterion, 'ordinary company' does not include an entity acting in the capacity of a trustee.

<sup>3</sup> For the purposes of assessing this criterion, 'group' consists of an ultimate Australian or New Zealand parent together with all the entities (including any offshore subsidiaries) it is required by the Australian Accounting Standard *AASB 10 Consolidated Financial Statements* or the New Zealand Accounting Standard equivalent *NZ*

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*IFRS 10* to include in its consolidated financial statements (or would be required to consolidate if it had been required to prepare consolidated financial statements).

If there are two or more entry points into Australia that are under the control of the same offshore ultimate parent, for the purposes of assessing this criterion, 'group' includes all relevant Australian top-tier parent entities and their subsidiaries as required by *AASB 10* to be included in their respective consolidated financial statements (or would be required to be consolidated if the entities had been required to prepare consolidated financial statements).

If there are two or more entry points into New Zealand that are under the control of the same offshore ultimate parent, for the purposes of assessing this criterion, 'group' includes all relevant New Zealand top-tier parent entities and their subsidiaries as required by *NZ IFRS 10* to be included in their respective consolidated financial statements (or would be required to be consolidated if the entities had been required to prepare consolidated financial statements).

<sup>4</sup> Income includes revenue, gains from investment activities and other inflows that go to the determination of the profit or loss in accordance with the Australian Accounting Standard *AASB 101 Presentation of Financial Statements* or with the New Zealand Accounting Standards equivalent *NZ IAS 1*.

For the avoidance of doubt, if the Australian or New Zealand parent is within a larger global group, criterion 3 refers to the consolidated annual accounting income of the ultimate Australian or New Zealand parent (for multiple entry groups, it will be the sum of the consolidated annual accounting income of the relevant top-tier parent entities (refer to note 3)).

<sup>5</sup> If the taxpayer starts or ceases a business part way through a reporting period, a reasonable estimate of what their annual accounting income would have been if the entity had carried on the business for the entire reporting period should be used.

<sup>6</sup> For the purposes of assessing this criterion, 'passive income' is any of the following as defined in section 23AB of the *Income Tax Rates Act 1986*:

- dividends other than non-portfolio dividends
- franking credits on such dividends
- non-share dividends
- interest income (some exceptions apply)
- royalties
- rent
- gains on qualifying securities
- net capital gains
- income from trusts or partnerships, to the extent it is referable (either directly or indirectly) to an amount that is otherwise base rate entity passive income.

<sup>7</sup> 'Intangible asset' is as defined under the Australian Accounting Standard *AASB 138 Intangible Assets* and under the New Zealand Accounting Standard *NZ IAS 38 Intangible Assets*.

<sup>8</sup> Determined under the same definition contained in note 3.

<sup>9</sup> This includes any risk review, audit or any other compliance activity carried out by the ATO or IR and notified to the taxpayer.

<sup>10</sup> Determined under the same definition contained in note 3.

<sup>11</sup> An objection lodged by a taxpayer against an assessment under section 175A of ITAA 1936 is a formal avenue of dispute resolution which attracts appeal rights. This is in contrast to a request for amendment of an assessment under section 170 of the ITAA 1936 to correct a mistake or omission where there is no dispute about the facts or the law.

<sup>12</sup> The challenge process in Part 8A of the *Tax Administration Act 1994* (TAA) is a formal avenue of dispute resolution which attracts appeal rights. This is in contrast to a request for amendment of an assessment under section 113 of the TAA to correct a mistake or omission where there is no dispute about the facts or law.

<sup>13</sup> This includes any risk review, audit or any other compliance activity carried out by the ATO or IR and notified to the taxpayer.

<sup>14</sup> Determined under the same definition contained in note 3.

<sup>15</sup> Section 262A of the ITAA 1936 or section 22 of the TAA.