



Tax policy report: New Zealand's adoption of the OECD's Multilateral Instrument

Date:	18 April 2017	Priority:	High
Security level:	Restricted	Report no:	T2017/1004 IR2017/260

Action sought

	Action sought	Deadline
Minister of Finance	<p>Agree to the recommendations of this report</p> <p>Sign the attached Cabinet paper</p>	26 April 2017
Minister of Revenue	<p>Agree to the recommendations of this report</p> <p>Refer the attached papers to the Minister of Foreign Affairs for consultation</p> <p>Sign and refer the attached Cabinet paper and accompanying documents to Cabinet Office</p>	10am, 27 April 2017

Contact for telephone discussion (if required)

Name	Position	Telephone
Carmel Peters	Policy Manager, Inland Revenue	Withheld under section 9(2)(a) of the Official Information Act 1982
Jess Rowe	Senior Policy Advisor, Inland Revenue	
Steve Mack	Principal Advisor, The Treasury	

18 April 2017

Minister of Finance
Minister of Revenue

New Zealand's adoption of the OECD's Multilateral Instrument

Executive summary

1. New Zealand's adoption of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* ("the Multilateral Instrument" or "MLI") is one of the core parts of the Government's base erosion and profit shifting (BEPS) reform package.
2. The MLI will modify a significant number of New Zealand's existing double tax agreements (DTAs) in order to bring them into line with OECD recommendations to address BEPS. The New Zealand Government has committed to signing the MLI on 7 June 2017 at the OECD signing ceremony in Paris.
3. This report recommends that you sign and submit the attached Cabinet paper to the Cabinet Office by 10am, Thursday 27 April 2017 for consideration by the Cabinet External Relations and Defence Committee at its meeting of 2 May 2017.
4. The Cabinet paper seeks authority for New Zealand to sign the MLI. The Cabinet paper also seeks approval for the steps necessary to give effect to the provisions of the MLI under New Zealand law. As one of the steps involves Parliamentary treaty examination, the Cabinet paper seeks approval of an extended National Interest Analysis ("NIA").
5. The Ministry of Foreign Affairs and Trade has been consulted during the preparation of the attached Cabinet paper and NIA.
6. An officials' issues paper titled *New Zealand's implementation of the multilateral convention to implement tax treaty related measures to prevent BEPS* was released on 3 March 2017. The issues paper sought feedback on possible implementation issues associated with New Zealand's signature and ratification of the MLI. Submissions closed on 7 April 2017 and five were received. Two stakeholder workshops (with representatives from Chartered Accountants Australia and New Zealand (CA ANZ) and Corporate Taxpayers Group (CTG)) were held on 27 and 28 March 2017 to enable officials to better understand practitioners' concerns.
7. This report provides you with an overview of the submissions received and alerts you to aspects of the MLI considered to be the most controversial by submitters.

Withheld under section 6(a) of the Official Information Act 1982

Recommended action

We recommend that you:

(a) **Note** that five submissions were received on the MLI issues paper and this report summarises the submissions received and officials' advice with respect to those submissions.

Noted

Noted

(b) **Refer** this report and its attachments to the Minister of Foreign Affairs for consultation.

Referred/Not

referred

(c) **Agree** to the recommended position for New Zealand on each substantive provision of the MLI set out in Appendix B.

Agreed/Not Agreed

Agreed/Not Agreed

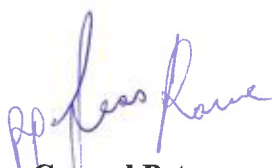
(d) **Sign and refer** the Cabinet paper, the text of the MLI, New Zealand's draft reservations and notifications, and the extended NIA to Cabinet Office before 10am on Thursday 27 April 2017.

Signed/Not signed

Signed and referred/Not signed and Referred

Withheld under section 9(2)(a) of the Official Information Act 1982

Steve Mack
Principal Advisor
The Treasury



Carmel Peters
Policy Manager
Policy and Strategy
Inland Revenue

Hon Steven Joyce
Minister of Finance

Hon Judith Collins
Minister of Revenue

Background

1. Addressing tax treaty abuse has been a major part of the BEPS project and a number of the Action items in the OECD/G20 BEPS Action Plan make recommendations that can only be implemented through changes to DTAs, including:

- preventing the granting of treaty benefits in inappropriate circumstances;
- preventing the artificial avoidance of permanent establishment status;
- neutralising the effects of hybrid mismatch arrangements that have a treaty aspect and modifying the approach to a company that is resident in both contracting states; and
- providing improved mechanisms for effective dispute resolution.

2. Some of these recommendations are BEPS “minimum standards” that countries that commit to solving BEPS are expected to adopt. All other provisions are optional, but are DTA “best practice” and now form part of the OECD Model Tax Convention following adoption of the OECD/G20 BEPS Action Plan.

3. Countries were presented with the difficulty of how to quickly and efficiently implement these measures without requiring the bilateral renegotiation of several thousand existing DTAs. To this end, the OECD brought approximately 100 jurisdictions together to develop a multilateral treaty that would swiftly modify the DTAs of participating jurisdictions, thus avoiding the need for protracted bilateral negotiations.

4. New Zealand officials were involved in the negotiation of the MLI text, which was formally adopted by the OECD in November 2016.

5. The New Zealand Government has committed to signing the MLI on 7 June 2017 at the OECD signing ceremony in Paris and the Minister of Finance has delegated this duty to the Minister of Revenue. An Instrument of Full Powers will need to be obtained from the Minister of Foreign Affairs to enable the Minister of Revenue to sign the MLI. The Ministry of Foreign Affairs and Trade will prepare this Instrument and arrange for its signature.

6. New Zealand and other participating jurisdictions have submitted a preliminary list of notifications and reservations to the OECD, which includes the DTAs New Zealand has nominated to be modified by the MLI. These lists will determine which of New Zealand’s DTAs are modified and how they are modified, but will not be considered final until New Zealand ratifies the MLI.

7. Where both parties to a DTA include that DTA in their respective lists of notifications and reservations, that DTA is a “covered tax agreement”. A list of New Zealand’s current covered tax agreements based on preliminary notifications and reservations as at 11 April 2017 is included at Appendix C. Based on current draft notifications, New Zealand is expected to have 29 covered tax agreements. While this list is not final, it provides a fairly

good indication of the likely coverage of the MLI. New Zealand's approach is to nominate most of its 40 DTAs. This gives New Zealand the best chance of strengthening our DTAs with as many jurisdictions as possible. The only DTAs not nominated are those with counterparties who are not expected to sign the MLI.

8. A list of the provisions New Zealand has indicated it will adopt is included as Appendix B. New Zealand's approach has been to adopt all applicable minimum standard and optional provisions. This is because the OECD Model Tax Convention plays an important role in informing New Zealand's treaty policy and New Zealand has committed to resolving BEPS more generally. New Zealand also believes the changes to be made by the MLI are correct in principle and should be as widely adopted as possible.

Public consultation

9. An officials' issues paper titled *New Zealand's implementation of the multilateral convention to implement tax treaty related measures to prevent BEPS* was released on 3 March 2017. The issues paper sought feedback on possible implementation issues associated with New Zealand's signature and ratification of the MLI.

10. While we do not generally consult on tax treaties, because of the novel nature of the MLI we recommended seeking submissions from the private sector on how it will work in practice. This issues paper focused on implementation issues, however submitters also commented on the substantive provisions as well.

11. Submissions closed on 7 April 2017 and five were received from Chartered Accountants Australia and New Zealand (CA ANZ), Corporate Taxpayers Group (CTG), EY, PwC and KPMG.

12. Two stakeholder workshops with representatives from CA ANZ and CTG were held on 27 and 28 March 2017 to enable officials to better understand practitioners' concerns prior to formal submissions being made.

Overall comments

13. CA ANZ and EY supported the adoption of the MLI as the most effective way to implement the treaty-related BEPS recommendations. EY agreed that the MLI should be implemented as widely as possible, taking up minimum standards and virtually all optional articles, with few reservations.

14. PwC acknowledged that participating in OECD and G20 initiatives to target BEPS is a key focus for the New Zealand Government, while not explicitly supporting the adoption.

15. CTG did not express an overall view on adoption, but submitted that New Zealand should not adopt all of the optional provisions.

16. KPMG acknowledged that the New Zealand Government has the constitutional ability to decide New Zealand's tax treaty position and that it therefore makes sense to achieve this in the shortest time at the least cost through the MLI, but KPMG noted that despite this constitutional position, it is also clear that in the current environment there is a demand for transparency and actual consultation for New Zealand's treaties. KPMG submit that this has not occurred with New Zealand's decision to sign the MLI, even with the release of the issues paper and views the implementation of the MLI as a "fait accompli". KPMG references in their submission as a point of comparison, the detailed consultation undertaken by the Australian Government.

17. Officials note that, consistent with international treaty practice, the negotiation of the MLI was on a strictly confidential basis and that public consultation by Australia and the UK (like New Zealand), was undertaken after the MLI had been negotiated and formally adopted. Unlike New Zealand, however, Australia consulted on what position the Australian Government should take in relation to specific provisions. The New Zealand Government did not choose to take that approach – instead focussing on implementation.

Specific submissions

18. The main issues raised in submissions relate to:

- substantive positions taken by New Zealand;
- requests for additional guidance and administrative resources to help taxpayers apply DTAs as modified by the MLI; and
- technical domestic law changes.

Substantive positions taken by New Zealand

19. Consistent with New Zealand's approach to DTAs more generally, submissions were not requested on New Zealand's position on the substantive provisions of the MLI.

20. We note the MLI has been negotiated and adopted at an international level, and is not able to be changed. The text was formally adopted by the OECD in November 2016. New Zealand supported the outcomes of the OECD/G20 BEPS Action Plan which are reflected in the MLI. The strengthened provisions contained in the MLI will be incorporated into the OECD Model Tax Convention and New Zealand's negotiating model going forward.

21. The issues paper did include a summary of the provisions New Zealand is intending to sign up to, in order to provide additional context for submitters. Submitters did comment on New Zealand position on the substantive provisions. We have highlighted the most controversial aspects in Appendix D. Generally speaking, the issues raised in relation to the substantive provisions are able to be managed administratively, are necessary to ensure New Zealand's DTA network is strengthened against common BEPS techniques or are consistent with New Zealand's overall position as a supporter of the OECD/G20 BEPS Action Plan. The

positions are also broadly consistent with the direction of New Zealand's treaty policy over time.

22. The substantive points raised by submitters and officials' responses are summarised in the table in Appendix D.

Additional guidance and administrative resources

23. A strong theme in submissions was the need for administrative guidance and access to competent authority resource to resolve uncertainty associated with the implementation of the MLI.

24. Submitters requested:

- guidance on how Article 3 (the fiscally transparent entity provision) affects collective investment vehicles with non-resident beneficiaries;
- specific guidance on the competent authority process for the application of dual resident entity provision (Article 4) and in the case of Australia (at least) the existence of a streamlined process or a self-assessment system;
- guidance on the application of the 365 day rule in the dividend transfer provision (Article 8) where the 365 day rule has not yet been met;
- administrative guidance on a simplified measurement rule for assessing whether a company is a land rich company rule (Article 9), for example a rule based on quarterly measurements;
- guidance on the interaction between section BG 1 and the treaty principal purpose test (PPT) (for example, a standard practice statement);
- guidance on New Zealand's position on profit attribution to permanent establishments;
- that Inland Revenue should maintain a list on its website of covered tax agreements, dates of "entry into effect for specific taxes" for each of New Zealand's covered tax agreements and any changes/additions by DTA partners so that taxpayers can easily determine when a DTA has been modified and the effective date of amendments to particular provisions;
- that Inland Revenue should produce consolidated versions of New Zealand's DTAs as modified by the MLI; and
- more competent authority resource to address cases of double taxation and assist taxpayers with disputes.

Withheld under section 6(a) of the Official Information Act 1982

26. In relation to the request for specific guidance on the interaction between section BG 1 and the PPT, officials note that the Commissioner of Inland Revenue has previously issued a

substantial Interpretation Statement on the interpretation and application of the GAAR (IS 13/01 “Tax Avoidance and the interpretation of sections BG 1 and GA 1 of the Income Tax Act 2007”). It is not considered that further guidance on how the PPT and the GAAR will apply would be helpful, and specific cases will depend on particular facts and circumstances. We also note that the OECD/G20 final report on Action 6 gave guidance on the interaction of domestic law general anti-avoidance rules and tax treaties, including the PPT.

27. In terms of providing guidance on New Zealand’s approach to profit attribution to permanent establishments, this topic is not directly covered by the MLI and is still subject to work at the OECD level. Once that work is complete, consideration could be given to producing guidance on New Zealand’s position on this issue.

28. In response to the request for Inland Revenue to produce consolidated versions of the DTAs modified by the MLI, we note that publishers may produce consolidated texts as they currently do with amending protocols and original DTAs. However, based on requests for Inland Revenue to produce these and the fact that many of our counterparties are already considering producing them, we are looking into whether it would be feasible for Inland Revenue to produce informal consolidated versions (or endorse those produced by our treaty partners), in respect of New Zealand’s most significant DTAs. These informal versions would not be legally binding.

29. In addition to this, New Zealand Inland Revenue officials are continuing discussions with overseas counterparts to determine what additional certainty the competent authorities may be able to provide to taxpayers (for example, through a memorandum of understanding which sets out in further detail how each MLI provision applies to the DTA).

Technical domestic law changes

30. Submitters suggested a number of technical changes to domestic law.

31. In particular, they were concerned about ensuring that the arbitration process under the MLI would function seamlessly with New Zealand’s domestic dispute resolution procedures. Officials will report separately to you on domestic law changes needed in this respect.

32. Submitters also suggested that domestic time limits for refunds should be extended (from the current 4 years) where a refund is the result of MAP or arbitration, given the length of time these processes can take.

33. Submitters also raised the need for clarity around the interaction between the strengthened permanent establishment provisions in the MLI and the proposed permanent establishment anti-avoidance provision currently being considered by the Government. Officials will advise Ministers on this issue when reporting on the outcomes of consultation on the Government Discussion Document *BEPS – Transfer pricing and permanent establishment avoidance*.

34. One submitter suggested there should be a domestic law change to prevent section BG 1 of the Income Tax Act 2007 applying in cases where the PPT in a DTA has been invoked.

Officials do not support this suggestion. It runs counter to the recent reform to ensure section BG 1 overrides DTAs in avoidance cases. The application of either or both provisions to a particular transaction will depend on the facts and circumstances of the case.

35. Officials will report to you separately with recommendations on these domestic law issues.

Next steps

36. This report recommends that you sign and refer the attached Cabinet paper to Cabinet Office. It is intended that the Cabinet paper be considered by the Cabinet External Relations and Defence Committee at its meeting of 2 May 2017. The Cabinet Office deadline for receiving papers for that meeting is 10am, Thursday 27 April 2017.

37. The Cabinet paper seeks agreement for New Zealand to sign the MLI. The Cabinet paper also seeks approval for the steps necessary to give effect to the provisions of the MLI under New Zealand law. As one of the steps involves Parliamentary treaty examination, the Cabinet paper seeks approval of an extended NIA.

38. After the MLI is signed, it will need to be given effect under New Zealand domestic law. This will be achieved by an Order in Council made under section BH 1 of the Income Tax Act 2007. We will report to you on the Order in Council once the MLI has been signed and other relevant steps have been taken, including the completion of Parliamentary treaty examination.

39. The Cabinet Manual requires that Cabinet approval for any treaty action be sought either jointly or in consultation with the Minister of Foreign Affairs. The Cabinet paper and accompanying documents therefore need to be referred to the Minister of Foreign Affairs for consultation.

40. The Cabinet paper and extended NIA, along with the full text of the MLI and New Zealand's proposed reservations and notifications are attached. The accompanying documents are to be appended as annexes to the Cabinet paper when it is submitted to Cabinet Office.

41. The reasons for signing the MLI are set out in the Cabinet paper and extended NIA, along with an analysis of the advantages and disadvantages of the MLI for New Zealand.

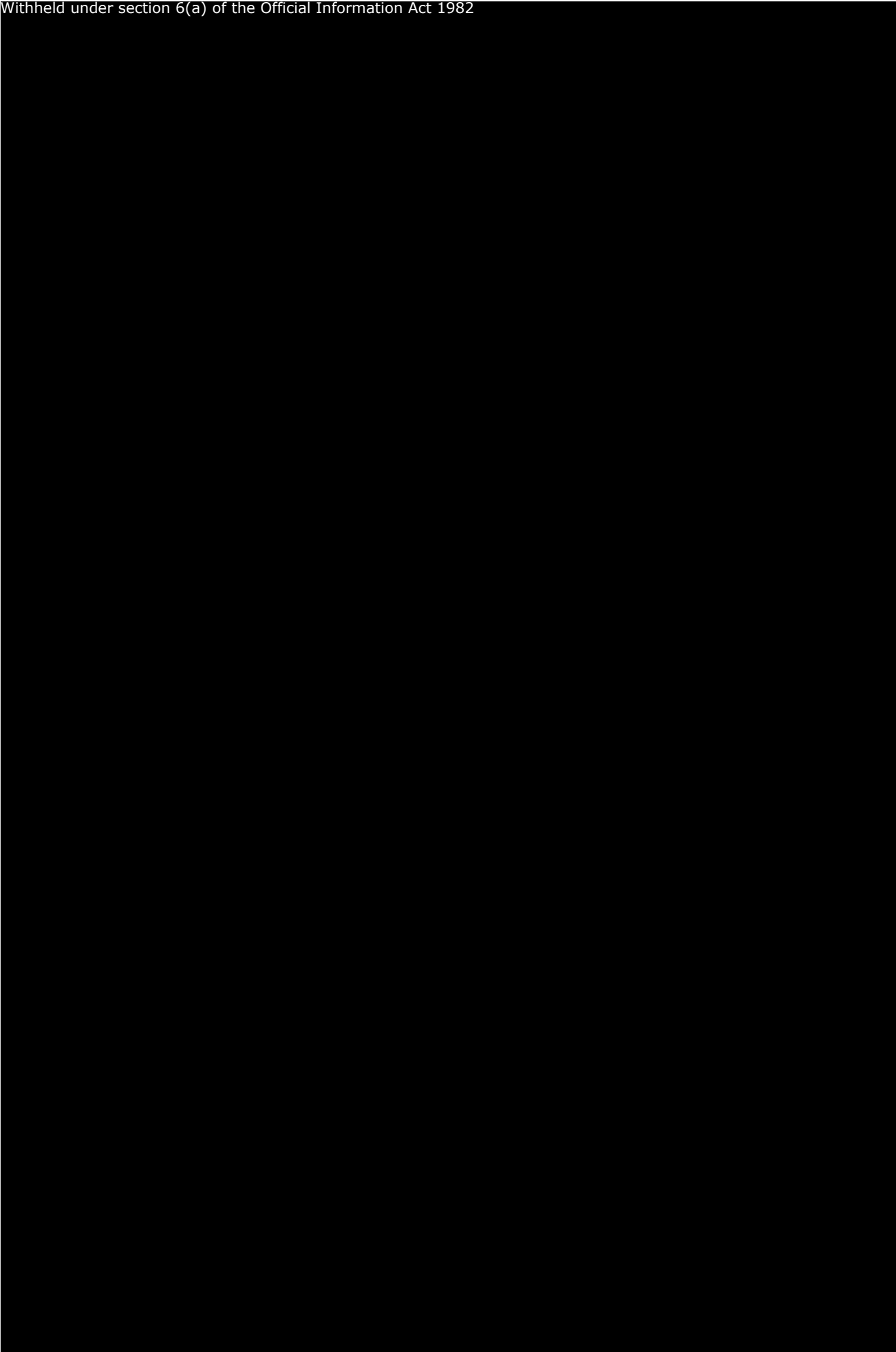
42. The Cabinet paper recommends, in particular, that Cabinet:

- approve the text of the MLI and New Zealand's reservations and notifications, and authorise the signing of the MLI;
- approve the extended NIA;

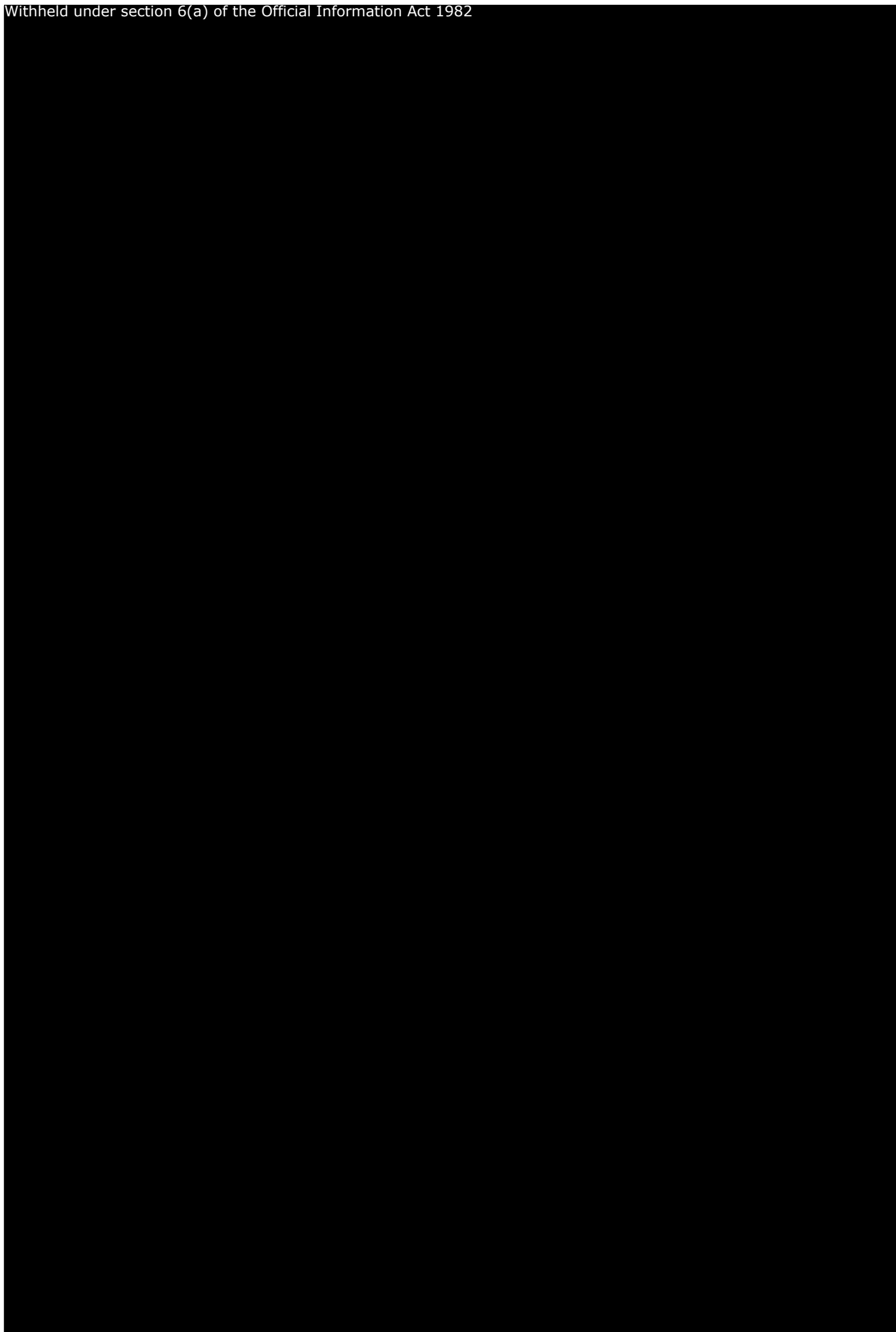
- agree that, following signature, the MLI and NIA be submitted for Parliamentary treaty examination;
- invite the Minister of Revenue to issue drafting instructions for an Order in Council to give effect to the MLI; and
- authorise officials (once all necessary steps have been completed) to deposit New Zealand's instrument of ratification with the MLI Depositary and confirm New Zealand's notifications and reservations.

43. There is an opportunity for the Minister of Revenue to sign the MLI at a signing ceremony arranged by the OECD, to be held in Paris on 7 June 2017. If the Minister of Revenue is not able to attend, then it is possible that another Minister or the New Zealand Ambassador to the OECD may be able to attend the signing ceremony.

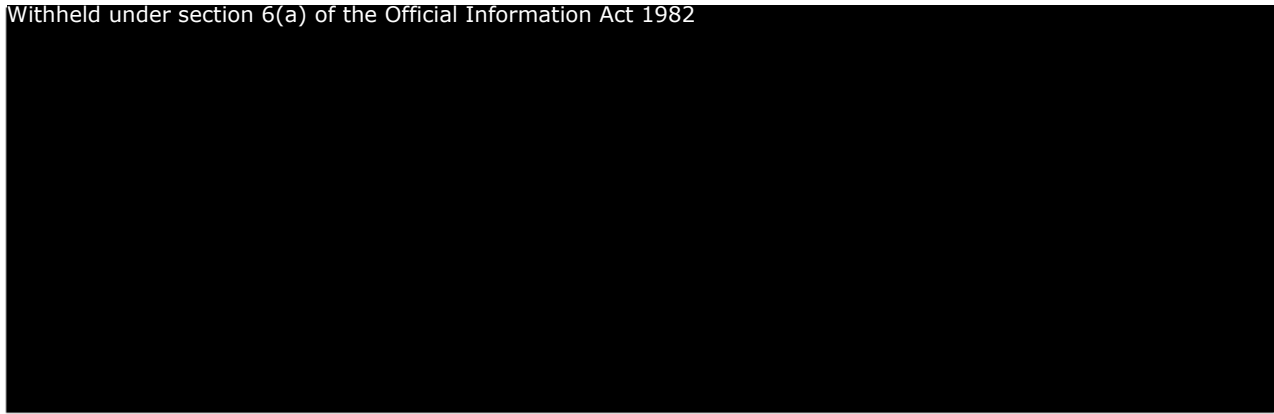
Withheld under section 6(a) of the Official Information Act 1982



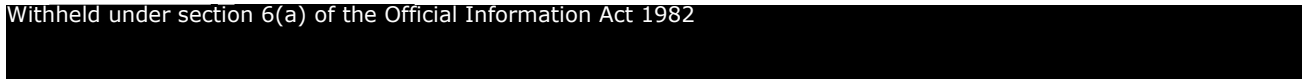
Withheld under section 6(a) of the Official Information Act 1982



Withheld under section 6(a) of the Official Information Act 1982



Withheld under section 6(a) of the Official Information Act 1982



Appendix B

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
1. Neutralising the effects of hybrid mismatch arrangements that have a treaty aspect (Action 2 report)	Fiscally transparent entities <p>The MLI introduces or amends a fiscally transparent entity (FTE) provision. FTEs (like trusts or partnerships) create arbitrage opportunities because they are treated differently for tax purposes by different countries. The MLI provision clarifies that treaty benefits will only be allowed to the extent to which the item of income is taxed in the state in which the entity is resident. New Zealand already includes this provision (or an equivalent provision) in its DTAs with Australia, United States, Chile and Japan.</p> <p><i>Article 3 of the MLI</i></p>	No	Yes	<p>Similar substantive position to NZ.</p> <p>Adopt for DTAs that do not contain a detailed provision addressing FTEs.</p>
	Dual resident entities <p>The MLI introduces or amends a dual resident entity (DRE) tie breaker provision. Like FTEs, DREs can be used to take advantage of arbitrage opportunities. The proposed provision will require CAs to agree the residence status of a DRE. Where there is no agreement, either treaty benefits will be denied or only allowed to the extent the CAs agree.</p> <p><i>Article 4 of the MLI</i></p>	No	Yes	<p>Similar substantive position to NZ.</p> <p>Adopt, but exclude the last sentence (for constitutional issues).</p>
	Relief of double taxation <p>The MLI allows countries to strengthen their application of the exemption method to relieve double taxation. New Zealand already applies the (more robust) credit method in all of its DTAs, and therefore proposes not to adopt any of the options.</p> <p><i>Article 5 of the MLI</i></p>	No	Not applicable	<p>Same as NZ</p> <p>Not applicable</p>

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
2. Preventing the granting of treaty benefits in inappropriate circumstances (Action 6 report)	Preamble language – minimum standard	Yes	Yes	Same as New Zealand
	<p>The MLI will amend the preamble to DTAs to emphasise that as well as aiming to relieve double taxation, the treaty also aims to prevent opportunities for non-taxation, reduced taxation or tax avoidance.</p> <p><i>Article 6(1) and (2) of the MLI</i></p>			
	Preamble language – optional amendment	No	No	Different to New Zealand.
	<p>The MLI allows countries to adopt the following optional amendment to the preamble to DTAs:</p>			Adopt
	<p>“Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,”</p> <p><i>Article 6(3) and (6) of the MLI</i></p>			

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
	<p data-bbox="483 300 752 328">Treaty anti-abuse rules</p> <p data-bbox="483 360 1424 424">The MLI requires jurisdictions to introduce an anti-abuse rule into DTAs. Jurisdictions can meet this minimum requirement in one of three ways:</p> <ol data-bbox="483 464 1424 711" style="list-style-type: none"> <li data-bbox="483 464 927 493">1. a principal purpose test (PPT) alone; <li data-bbox="483 528 1424 616">2. a PPT plus a “simplified limitation on benefits” (LOB) clause. The LOB is a mechanical provision that seeks to identify, through a series of black-letter tests, whether a person is genuinely entitled to the benefits of a DTA; or <li data-bbox="483 651 1424 711">3. enter into bilateral negotiations to include a detailed LOB provision plus a PPT or anti-conduit rules. <p data-bbox="483 743 1424 887">New Zealand has indicated it wishes to adopt a PPT alone. The PPT is similar to New Zealand's domestic law GAAR and will deny treaty benefits if the principal purpose of an arrangement was to secure those benefits. Also, in officials' view, it generally covers the same treaty shopping issues as the alternative approaches.</p> <p data-bbox="483 959 696 991"><i>Article 7 of the MLI</i></p>	Yes	Yes	Same as New Zealand
	<p data-bbox="483 1062 831 1091">Dividend transfer transactions</p> <p data-bbox="483 1123 1424 1267">The MLI introduces a provision that requires shares to be held for a minimum of 365 days for the shareholder to be entitled to the reduced withholding tax (WHT) rates on dividends. This is to stop shareholders buying shares temporarily to access the reduced WHT rates and then immediately selling them.</p> <p data-bbox="483 1339 696 1370"><i>Article 8 of the MLI</i></p>	No	Yes	Same as New Zealand

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
	<p data-bbox="481 304 772 331">Land rich company rules</p> <p data-bbox="481 363 1424 427">The MLI introduces a treaty provision that strengthens the anti-abuse “land-rich company” test (land rich companies are companies whose assets are mainly land).</p> <p data-bbox="481 464 1424 608">Some treaties do not contain this provision at all, so the MLI also allows it to be inserted into those treaties. The new rule reinforces the position that the source jurisdiction can tax land held by non-resident owners in the other jurisdiction through corporate vehicles.</p> <p data-bbox="481 644 1424 788">To prevent artificial and temporary dilution of the amount of land held by a company just before sale, the MLI provision requires the threshold for the amount of land ownership which triggers the rule to be measured on every day in the 365 day period leading up to the sale of the shares.</p> <p data-bbox="481 825 1424 888">The MLI provision also ensures the same rule applies to other investment vehicles such as partnerships and trusts.</p> <p data-bbox="481 925 696 948"><i>Article 9 of the MLI</i></p>	No	Yes	<p data-bbox="1861 304 2085 411">Similar substantive position to New Zealand.</p> <p data-bbox="1861 464 2085 655">Adopt generally, but do not adopt para. (b) for DTAs that already contain an equivalent provision.</p>

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
	<p>Third-state PE rule</p> <p>The MLI introduces a treaty provision that denies treaty benefits in the case of income derived by a PE of a resident of one of the parties to the DTA, where that PE is situated in a low tax third-state.</p> <p><i>Article 10 of the MLI</i></p>	No	Yes	<p>Different to New Zealand</p> <p>Do not adopt.</p>
	<p>Right to tax own residents</p> <p>The MLI introduces a provision that preserves a jurisdiction's right to tax its own residents. For example, this rule prevents New Zealand residents engaged in a tax avoidance arrangement claiming a DTA prevents New Zealand from using the domestic law GAAR to impose tax.</p> <p><i>Article 11 of the MLI</i></p>	No	Yes	<p>Same as New Zealand.</p>
<p>3. Preventing the artificial avoidance of PE status</p>	<p>Commissionaire arrangements and similar strategies</p> <p>Currently, a number of artificial structures, including the civil law concept of a "commissionaire", arrangements whereby contracts which are substantially negotiated in a State are not concluded in that State because they are finalised or authorised abroad and arrangements whereby a related party who habitually concludes contracts on behalf of an enterprise is characterised as "independent agents", can be used to avoid having a PE in a jurisdiction. A new provision will deem non-residents using these structures to have a PE in the jurisdiction.</p> <p><i>Articles 12 and 15 of the MLI</i></p>	No	<p>Withheld under section 6(a) of the Official Information Act 1982</p>	

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
	<p>Specific activity exemptions – preparatory and auxiliary qualification</p> <p>Certain specific activities carried on in a jurisdiction are deemed not to constitute a PE (for example, premises used for simply storing goods or stock maintained for display or delivery). These specific carve-outs from the PE definition allowed quite substantial economic activities to fall within them.</p> <p>The MLI proposes clarifying that the specific carve-outs listed in the DTA must be subject to an additional requirement that they be “preparatory and auxiliary” in nature. There are two options for dealing with this issues – Option A (which New Zealand favours) which subjects all of the existing specific activities to an explicit “preparatory and auxiliary” test, and Option B, which does not subject the specific activities to the “preparatory and auxiliary” test (because these activities are considered to be inherently preparatory and auxiliary in nature), but subjects any other activity or combination of activities to the “preparatory and auxiliary” test.</p> <p><i>Articles 13 and 15 of the MLI</i></p>	No	Yes	<p>Similar substantive position to New Zealand.</p> <p>Adopt Option A for DTAs that do not already contain an equivalent provision.</p>
	<p>Specific activity exemptions – Anti-fragmentation rule</p> <p>The MLI introduces an “anti-fragmentation” rule that will prevent an enterprise from dividing up all of its activities so that related parties each carry on a separate part of the business (that fall within the PE exceptions), but taken together they constitute a PE.</p> <p><i>Articles 13 and 15 of the MLI</i></p>	No	Yes	<p>Same as New Zealand.</p>

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
	<p>Anti-contract splitting rule</p> <p>Currently a construction, installation or building project does not constitute a PE unless it last for more than 12 months (or six months in the case of many of New Zealand's treaties). Entities were abusing this time limit by having back-to-back contracts so they never exceeded the time threshold. Generally the contracts were undertaken by different companies within the same group of companies. The new an "anti-contract splitting" rule will aggregate related projects to prevent PE avoidance.</p> <p><i>Articles 14 and 15 of the MLI</i></p>	No	Yes	<p>Similar substantive position to New Zealand.</p> <p>Adopt except for provisions of DTAs that cover exploration for or exploitation of natural resources.</p>
<p>4. Providing improved mechanisms for effective dispute resolution</p>	<p>MAP – access to the CAs of either jurisdiction</p> <p>In covered tax agreements that do not already have it, the MLI will introduce a provision allowing taxpayers to request mutual agreement procedure (MAP) in cases where they believe taxation is not in accordance with the treaty. If a MAP provision is already contained in a DTA, the MLI will amend it to allow taxpayers to approach the CA of <i>either</i> jurisdiction to resolve uncertainty as to how the DTA applies (New Zealand's DTAs currently contain MAP provisions, but taxpayers are only entitled to approach the CA of the jurisdiction of which they are a resident).</p> <p><i>Article 16 of the MLI</i></p>	Yes	Yes	<p>Same as New Zealand.</p>
	<p>MAP – corresponding adjustment</p> <p>Requires contracting states to make appropriate corresponding adjustments in transfer pricing cases.</p> <p><i>Article 17 of the MLI</i></p>	No	Yes	<p>Similar substantive position to New Zealand. Adopt, except for DTAs that already contain an equivalent provision.</p>

BEPS measure	Detail	Minimum standard	Should NZ adopt?	Australia's position
	<p data-bbox="488 308 622 331">Arbitration</p> <p data-bbox="488 363 1429 587">If, under the MAP process, the CAs do not agree on the correct interpretation of the DTA, the CAs can submit the matter to an independent arbitrator (or a panel of three arbitrators) for decision. The arbitrators will decide which of the CAs is correct. The CAs are generally bound by the decision of the arbitrators, but the taxpayer is not. Therefore, the taxpayer could pursue a court case if it disagrees with the arbitrators' decision.</p> <p data-bbox="488 619 1429 882">New Zealand's approach is to adopt what is referred to as "final offer" or "last best offer" arbitration (in Article 23(1)), but to accept "independent opinion" arbitration if the other party to the Covered Tax Agreement chooses this (by entering a reservation under Article 23(2)). In the case of "independent opinion" arbitration, New Zealand will adopt Article 24(2) and (3) which means that the arbitrators' decision will not be binding on the CAs if they come to an alternative resolution of all unresolved issues within 3 calendar months of the delivery of the arbitrators' decision.</p> <p data-bbox="488 914 1429 1058">New Zealand also proposes to require undertakings of confidentiality by all parties involved in arbitration (Article 23(5)) and reserves the right not to include arbitration provisions in Covered Tax Agreements with jurisdictions that do not require the same (Article 23(6) and (7)).</p> <p data-bbox="488 1090 1429 1193">New Zealand intends to enter a free form reservation in respect to arbitration to carve out cases that involve the application of New Zealand's general anti-avoidance rule contained in section BG 1 of the Income Tax Act 2007.</p> <p data-bbox="488 1217 779 1241"><i>Articles 18 – 26 of the MLI</i></p>	No	Yes	<p data-bbox="1865 308 2089 491">Very similar substantive position to New Zealand (including reserving on GAAR).</p> <p data-bbox="1865 547 2089 810">But has not reserved the right to not adopt arbitration with jurisdictions which do not require confidentiality of proceedings.</p>

Appendix C

New Zealand has 40 DTAs currently in force. The table below shows the coverage of the MLI across New Zealand's treaty network.

	DTA	Status
Covered tax agreements	1. Australia	Covered tax agreement under the MLI
	2. Belgium	Covered tax agreement under the MLI
	3. Canada	Covered tax agreement under the MLI
	4. Chile	Covered tax agreement under the MLI
	5. China	Covered tax agreement under the MLI
	6. Czech Republic	Covered tax agreement under the MLI
	7. Denmark	Covered tax agreement under the MLI
	8. Finland	Covered tax agreement under the MLI
	9. France	Covered tax agreement under the MLI
	10. Germany	Covered tax agreement under the MLI
	11. Hong Kong (China)	Covered tax agreement under the MLI
	12. India	Covered tax agreement under the MLI
	13. Indonesia	Covered tax agreement under the MLI
	14. Ireland	Covered tax agreement under the MLI
	15. Italy	Covered tax agreement under the MLI
	16. Japan	Covered tax agreement under the MLI
	17. Malaysia	Covered tax agreement under the MLI
	18. Mexico	Covered tax agreement under the MLI
	19. Netherlands	Covered tax agreement under the MLI
	20. Poland	Covered tax agreement under the MLI
	21. Russia	Covered tax agreement under the MLI
	22. Singapore	Covered tax agreement under the MLI
	23. South Africa	Covered tax agreement under the MLI
	24. Spain	Covered tax agreement under the MLI
	25. Sweden	Covered tax agreement under the MLI
	26. Switzerland	Covered tax agreement under the MLI
	27. Turkey	Covered tax agreement under the MLI
	28. United Kingdom	Covered tax agreement under the MLI
	29. Korea	Covered tax agreement under the MLI
Not modified by the MLI	30. Viet Nam	Withheld under section 6(a) of the Official Information Act 1982
	31. Thailand	
	32. Philippines	
	33. Norway	
	34. Austria	
	35. United Arab Emirates	
	36. Papua New Guinea	
	37. Samoa	
	38. Taiwan	
	39. Fiji	
	40. United States	

Appendix D

Submission	Officials' response
<p>The dual resident entity provision in Article 4 should not be adopted. There are compliance costs associated with adopting this provision. Submitters felt many cases of dual resident entities were innocent. There are existing domestic law rules that address the mischief this rule aims to address.</p>	<ul style="list-style-type: none"> • For some time OECD countries have been dissatisfied with the existing rule. This is partly because there is no consensus on how it should be interpreted and applied, and partly because there is concern about abuse. • Eight of New Zealand's DTAs (including the New Zealand-US DTA) already contain this provision and it has not, to our knowledge, been problematic. • This provision is the new OECD best practice and will be the international standard going forward in terms of the OECD Model Tax Convention. Australia is opting for it as well. • While there are some domestic law measures that prevent certain types of abuse by dual resident entities, they do not cover all situations. • New Zealand officials will manage the compliance costs and certainty issues by providing administrative guidance, in particular through a potential agreement with Australia on how the provision will be applied in practice between our two countries.
<p>It is not necessary to adopt specific anti-avoidance measures (such as the contract splitting rule in Article 14, the dividend transfer rule in Article 8, and the land-rich company rule in Article 9), given there will be an overall general anti-abuse rule.</p> <p>These provisions will increase compliance costs.</p>	<ul style="list-style-type: none"> • Specific provisions that address known abusive arrangements are desirable. • These provisions will become part of the OECD Model Tax Convention (sometimes as alternative provisions in the commentaries) and will be the starting point for future bilateral negotiations going forward. • Some of these provisions are already included in some of New Zealand's DTAs with no apparent issues. • Officials are looking at administrative measures to reduce compliance costs (e.g. administrative guidance on accepting quarterly valuations for the land-rich company provisions).
<p>New Zealand should exclude from its list of covered tax agreements DTAs with countries who do not agree to adopt arbitration. This leaves open the possibility that "bad faith" adjustments will be made by a country under the</p>	<ul style="list-style-type: none"> • This approach would reduce the efficacy of the MLI in enabling New Zealand to meet the OECD minimum standard as New Zealand would have to endeavour to undertake bilateral negotiations with these excluded jurisdictions, which could represent about half of New Zealand's DTAs, based on current draft notifications.

<p>strengthened MLI provisions, with no ability for taxpayers to request binding arbitration of this decision.</p>	<ul style="list-style-type: none"> • This would mean that – until bilateral negotiations can take place – the DTAs excluded on this basis would remain vulnerable to the BEPS techniques the MLI is designed to address. • On balance it is in New Zealand’s interest to obtain the stronger DTA provisions, even if it is without the optional arbitration provisions. • We also note that many of New Zealand’s DTAs already include a principal purpose test and wide permanent establishment rules, but no ability to pursue arbitration. Therefore this combination is already a feature of some of our existing DTAs and, from New Zealand’s perspective, is not problematic. • We also have to expect that our treaty partners will apply DTA provisions in good faith. New Zealand’s DTAs contain MAP processes to address any issues with this. • Finally, there is hope that, over time, more countries will adopt arbitration through the MLI or bilateral negotiations.
<p>The rationale for New Zealand’s reservation on section BG 1 of the Income Tax Act (the domestic law general anti-avoidance provision (GAAR)) in respect of arbitration is not clear.</p> <p>New Zealand should not reserve on section BG 1.</p>	<ul style="list-style-type: none"> • New Zealand’s domestic GAAR overrides DTAs under section BH 1 of the Income Tax Act 2007. • This means that, to the extent to which an arbitration decision was contrary to the GAAR, New Zealand would be unable to implement it. As arbitration is required to be binding, New Zealand’s inability to implement a decision that is contrary to the GAAR is problematic. • Therefore, New Zealand has taken the position (as have a number of other countries³), that a case will be excluded from arbitration to the extent that any unresolved issues relate to the application of a domestic law GAAR. • We do not agree that New Zealand should remove this reservation as it would give rise to potential conflicts with our domestic law.
<p>New Zealand’s section BG 1 reservation with respect to arbitration should also extend to MAP.</p>	<ul style="list-style-type: none"> • This is not an option under the MLI. • Additionally, subjecting section BG 1 cases to MAP does not present the same domestic law conflict as binding arbitration.

³ Australia, Austria, Canada, Germany, Finland, Ireland, Italy, Norway, Slovenia and Spain.

<p>New Zealand should consider expanding the section BG 1 reservation to include the proposed PE avoidance rule (contained in the Government Discussion Document <i>BEPS – Transfer pricing and permanent establishment avoidance</i>)</p>	<ul style="list-style-type: none"> • This is not yet in domestic law (or even approved by Cabinet), so it would not be appropriate to include this in a reservation at this time. This is something that could be added before New Zealand deposits its instrument of ratification after further consideration.
<p>Listed companies may not be able to access arbitration as their continuous disclosure obligations (to the stock exchange) would not allow arbitration to be kept confidential</p>	<ul style="list-style-type: none"> • Confidentiality of arbitration is core to its acceptance by a large number of jurisdictions (including New Zealand). • If New Zealand did not agree to confidentiality, other countries would not agree to arbitration with New Zealand. This would mean all taxpayers – not just listed companies – would be denied arbitration. • This is not in taxpayers’ interests. • We expect that the level of disclosure could be managed to prevent the loss of arbitration.
<p>DTAs under negotiation should be included at covered tax agreements.</p>	<ul style="list-style-type: none"> • We have included DTAs currently under negotiation where the other party has agreed to this approach.
<p>New Zealand would be justified in making the application of the MLI to a particular DTA conditional on acceptance that New Zealand taxpayers include PIEs and KiwiSaver schemes and confirmation that a look through entity is also entitled to DTA relief.</p>	<ul style="list-style-type: none"> • This is not an option under the MLI. • Additionally, look through entities are also the subject of the fiscally transparent provision of the MLI which makes entitlement to treaty benefits conditional on an item of income being taxed in the state in which the entity is resident. A blanket approach to fiscally transparent entities is therefore inconsistent with the provision itself, New Zealand treaty policy and international best practice.
<p>Why has New Zealand taken a different position from Australia on the third state PE rule (in Article 10)</p>	<ul style="list-style-type: none"> • Australia has not yet made a decision on whether to adopt Article 10, so it is not yet clear whether we differ from Australia. • We have considered this provision – in particular how it applies to outbound investors – and believe it is principled, appropriate and balanced. • If the provision applies too widely or applies to innocent cases, there is competent authority discretion to grant treaty benefits.