

# AUSTRALIAN TAX REVIEW

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EDITORIAL – *Guest Editor: Antony Ting*

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## ARTICLES

**The Oracle, Transparent Entities and Access to Tax Treaties – Mark Brabazon SC**

A puzzling and fundamental paradox underlies the jurisprudence of treaty access for fiscally transparent entities and their income. How can access to treaty benefits be established where the entity is transparent in the residence country of its participants, and therefore not itself resident, but opaque in the source country? Treaty access is clearly intended at the level of policy, but the legal basis of its delivery is generally unclear, and it is not always achieved (as seen in the recent Resource Capital Fund cases). To solve the problem, it is necessary to consider the relevant theory, history, treaty practice and international case law. The paradox is resolved in light of these, at least in respect of a transparent entity clause, by regarding that clause as a contextual adaptation of the general rule on persons covered by a tax treaty (Art 1). ..... 250

**Impact of the Multilateral Instrument on the Interpretation of Australia’s Income Tax Treaties – Peter Stinson**

This article examines the impact of the Multilateral Instrument to Modify Bilateral Tax Treaties (MLI) on the interpretation of Australian income tax treaties. It notes the genesis and development of the MLI in the OECD BEPS Project, which culminated in its release in 2016 and subsequent signing in June 2017. It provides a detailed account of the operation and effect of the MLI (including compatibility clauses, the reservation mechanism and notification procedures), as well as the process relating to its implementation for signature countries. It discusses the impact of the MLI on the interpretation of Australia’s tax treaties and notes some difficulties, including ascertaining the exact text of a MLI-modified tax treaty. It also considers the range of permissible materials that can be utilised in interpreting a modified tax treaty. .... 281

**Deducting Hybrid Mismatch Rules – Fit for Purpose? – Buck Xiao and Anna Bullimore**

The deducting hybrid mismatch rules in Subdiv 832G of the *Income Tax Assessment Act 1997* (Cth) were purportedly introduced to combat tax avoidance by large multinational enterprises through duplication of deductions. Its effect is to quarantine certain tax losses. However, its scope, as originally enacted, was broad, with the unintended consequence of affecting many simple and small-scale cross-border transactions. A recent amendment has the effect of scaling down the scope of Subdiv 832G – but it also opens opportunities for tax avoidance. This article argues that both Subdiv 832G and the corresponding OECD recommendations in Action 2 of the BEPS Project wrongly target the hybrid structures as the mischief in question, leading to excessive taxation of economic profit, and that “loss duplication” is the real issue at hand. Consequently, it proposes further amendments under which a tax loss can only be used in either Australia or a foreign country, but not in both countries. .... 297

**Digital Services Taxes and the Unified Approach under the Pillar One Proposal:  
Exploring the Nexus Frameworks Through the Example of Alibaba – Victoria Plekhanova**

With the rise of online marketplaces operating across national borders, many customer jurisdictions have found themselves lacking an opportunity to tax profits from these marketplaces' activities. The year 2021 will reveal whether there is an international agreement that gives customer jurisdictions the entitlement to tax these profits under the existing international income tax system, or whether these jurisdictions have no option but to create this entitlement unilaterally and outside this system. This article uses the example of Alibaba and its Taobao business to compare nexus frameworks offered by a digital services tax unilaterally introduced in some jurisdictions and the OECD's Unified Approach under the Pillar One proposal for the international agreement. .... 309

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