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## **Public advice and guidance compendium – PCG 2018/9**

This is a compendium of responses to the issues raised by external parties to draft PCG 2018/D3 *Income tax: central management and control test of residency: identifying where a company's central management and control is located*.

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

### **Summary of issues raised and responses**

<b>Issue No.</b>	<b>Issue raised</b>	<b>ATO response / action taken</b>
1	Paragraph 16 of the draft Guideline should have greater emphasis within the Guideline.	The concepts in paragraphs 16 and 17 of the final Guideline are demonstrated through many of the examples in the Guideline.
2	Does high-level decision making include the decision to approve and adopt yearly financial accounts or the decision to pay, or not pay, a dividend? Where business has not changed in a particular year – these may be the only decisions made by the board and some case law indicates the decision whether to pay a dividend as an important indicia of central management and control (CM&C).	New example 12 of the final Guideline addresses this point.
3	To provide further certainty, a variation of Possibility A in Example 2 of the draft Guideline, including detail around work done by Australian staff in creating recommendations for the board to consider, with ultimate decision in relation to sell, restructure or otherwise, deal with the investments remains with the foreign board.	Taxation Ruling TR 2018/5 <i>Income tax: central management and control test of residency</i> makes it clear that where the ultimate decision making power with respect to the key strategic decisions of a business rests with the board, and the board exercise that power, central management and control remains with the board.
4	Example 2 and Example 11 of the draft Guideline are similar and any differences between the two may not be sufficiently clear. In particular, is the engagement	We have amended the wording in Example 11 of the final Guideline to make it clearer that the example involves the engagement of an external manager.

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	of an external manager a key difference? This should be more clearly articulated.	
5	<p>It is recommended to include variations to Example 3 of the draft Guideline to provide more certainty around:</p> <ul style="list-style-type: none"> <li>• differing levels of discretion given to Australian employees</li> <li>• the size of the Australian business operations in terms of the scale of the overall business</li> <li>• the Australian business adoption of global group policies (and whether the transitional compliance approach would have application).</li> </ul>	<p>Example 3 of the final Guideline sets out what would be considered the key strategic decisions of the business.</p> <p>The transitional compliance approach applies to all foreign incorporated entities who consider that under TR 2018/5 they may be residents of Australia and they may not have been under Taxation Ruling TR 2004/15 <i>Income tax: residence of companies not incorporated in Australia - carrying on business in Australia and central management and control</i>.</p>
6	Another variation to Example 4 of the draft Guideline would be useful to deal directly with interim years where nothing happens and no business is conducted in Australia.	New example 12 of the final Guideline addresses this point.
7	Example 6 of the draft Guideline and its linkages with other examples would benefit from some further clarification.	The amendments to the examples should better highlight the links between them.
8	Possibility B in Example 10 of the draft Guideline needs some reconsideration as to the likelihood of that being realistic. Also consider 'dormant or inactive' business example.	Example 10 of the final Guideline has been refined to improve the practicality of the example and new Example 12 of the final Guideline has been included to provide further guidance in relation to years in which little activity happens within a business.

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9	Example 11 of the draft Guideline when coupled with paragraph 17 of the draft Guideline doesn't provide sufficient certainty for other fund management vehicles, in particular those with lumpy assets.	New Example 12 of the final Guideline has been included to deal with 'lumpy' assets or 'inactive years'.
10	Suggest additional content to Example 12 of the draft Guideline to clarify the period of time under consideration that is, one year or a period of years.	Example 13 of the final Guideline provides guidance on isolated instances of CM&C being exercised in Australia outside the normal course of how CM&C is exercised. That is, it makes clear that CM&C is not assessed on a point in time basis but is evaluated over a period of time to determine whether certain instances of CM&C being exercised are out of pattern and isolated.
11	It would be useful to list in Example 13 of the draft Guideline some of the indicia that lead to the conclusion that the three other directors simply assent to the managing director and have no input.	Example 14 of the final Guideline has been amended to provide further clarification on this issue.
12	In cases of split CM&C, further practical guidance is needed to assist in determining whether a 'substantial degree' of CM&C is in Australia.	Determining CM&C is dependent on the detailed facts of each case and for this reason it is difficult to provide guidance covering situations where CM&C may be in more than one place. As noted in paragraph 4 of the final Guideline, we encourage people to contact us in relation to their particular circumstances if they are unsure of their residency status after considering TR 2018/5 and this Guideline.
13	Other possible examples would be useful.	As noted at paragraph 3 of the final Guideline, the Guideline cannot address all possible circumstances and there is a need to balance coverage with likelihood. We encourage people to contact us in relation to their particular circumstances if they are unsure of their residency status after considering TR 2018/5 and the Guideline.

Issue No.	Issue raised	ATO response / action taken
	<b>Ongoing compliance approach</b>	
14	<p>The proposed ongoing compliance approach of the draft Guideline is limited and ambiguous, in particular:</p> <ul style="list-style-type: none"> <li>(a) what is meant by a public group?</li> <li>(b) what is meant by an ordinary incorporated company?</li> <li>(c) what is meant by a substantial majority?</li> <li>(d) the requirements in paragraph 104 (iii) are vague.</li> </ul>	<ul style="list-style-type: none"> <li>(a) Public group is now defined in footnote 4 of the final Guideline.</li> <li>(b) 'Ordinary company' takes its meaning from plain English, that is an entity that is not a trust, partnership, cooperative, or other like vehicle.</li> <li>(c) The meaning of 'substantial majority' will depend on the factors being addressed to determine CM&amp;C. Reference can be had to the examples in the final Guideline.</li> <li>(d) The requirements in the third dot point of paragraph 107 of the final Guideline are deliberately broad as opposed to prescriptive as they are dealing with integrity matters.</li> </ul>
15	<p>There should be an express reference to subsidiaries of foreign-owned companies as well. While the phrase 'subsidiary of a public group' can be read as covering such entities, it is not as clear as it could be. To improve clarity it is recommended to include 'whether Australian or foreign' after the current wording in the first dot point in subparagraph 104(ii) of the draft Guideline.</p>	<p>The third dot point in paragraph 107 of the final Guideline has been amended to make this point clearer.</p>

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Issue No.	Issue raised	ATO response / action taken
16	The proposed ongoing compliance approach of the draft Guideline does not cover listed holding companies expressly, as it refers to 'a subsidiary of a public group' and therefore would not appear to cover a publicly listed parent itself. This creates a significant disincentive to the appointment of qualified Australians to the boards of international companies, and may also discourage such companies from accessing the Australian capital market via a listing on the ASX (which may be accompanied by appointment of a local director).	The ongoing compliance approach of the final Guideline has been amended to include listed holding companies of a public group.
17	Subparagraph 104(ii) of the draft Guideline should be revised to provide that majority of directors do not need to attend board meetings in person only in 'that' jurisdiction.	The third dot point of paragraph 107 of the final Guideline has been amended to address this issue.
18	The proposed ongoing compliance approach of the draft Guideline should not be limited to 'public groups' as paragraph 104(iii) of the draft Guideline adequately deals with areas of key concern.	The ongoing compliance approach does not extend to private groups as they have a lower level of public transparency and a greater level of diversity in the ways in which they are structured and how they operate.
19	The proposed ongoing compliance approach of the draft Guideline should also include isolated/inadvertent lapses.	Example 13 of the final Guideline provides guidance on isolated instances of CM&C being exercised in Australia outside the normal course of how CM&C is exercised. The Commissioner accepts in those circumstances that the CM&C is not exercised to a substantial degree in Australia and the entity would not be a resident of Australia under the CM&C test.

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Issue No.	Issue raised	ATO response / action taken
20	The proposed ongoing compliance approach of the draft Guideline should also include foreign companies that are entitled to use the place of incorporation tiebreaker test in a double tax agreement.	The application of Double Tax Agreements is outside the scope of this Guideline.
21	The ongoing compliance approach should also include joint venture companies.	The exact nature of a joint venture arrangement will depend upon a number of considerations, including each partner's contribution. The final form will reflect those considerations and the negotiations of the joint venture partners. This level of particularisation within a joint venture arrangement does not lend itself easily to an identification of risk and therefore is not suitable for explicit inclusion within the ongoing compliance approach. However, some joint venture companies that are members of a public group may meet the requirements of the ongoing compliance approach. Further, the final Guideline aims to provide guidance for all companies and in particular for joint venture companies the examples on split CM&C may assist. As noted in paragraph 4 of the final Guideline, we encourage people to contact us in relation to their particular circumstances if they are unsure of their residency status after considering TR 2018/5 and the Guideline.
22	The proposed ongoing compliance approach of the draft Guideline should include an invitation to entities to discuss their circumstances with the Commissioner if not covered by the examples, and stating that the ATO will take a reasonable approach.	Paragraph 4 of the Guideline encourages entities to discuss their circumstances with us if after reading TR 2018/5 and the Guideline they are unsure of their residency status.
	<b>Transitional compliance approach</b>	
23	The period of the transitional compliance approach should be extended to a date that aligns with the end of an income year for example 31 December 2018 or 30 June 2019 or a date linked to the release of the final Guideline.	The end date of the transition period is now 30 June 2019.

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24	What will the ATO accept as evidence of changed governance arrangements?	The examples in the Guideline provide numerous indicators of what the ATO would accept as evidence relating to CM&C. The ATO does not consider it appropriate to include a checklist or guide relating to evidence of changed governance arrangements.
	<b>Other issues</b>	
25	TR 2018/5 replaced the earlier strategic tax ruling introduced after Board of Tax policy review and broader policy consideration is needed.	This issue is beyond the scope of the Guideline.
26	<p>There are collateral consequences of the view in TR 2018/5 that require additional guidance. These other matters include:</p> <ul style="list-style-type: none"> <li>• prescribed dual residents</li> <li>• Subdivision 768-A of the ITAA 1997</li> <li>• Subdivision 768-G of the ITAA 1997</li> <li>• inadvertent residence leading to double tax when an unfranked dividend is paid.</li> </ul>	These issues are beyond the scope of the Guideline however the ATO is considering if further guidance is required.
27	Further advice is needed on the application of the 'place of effective management' test in double tax agreements.	<p>This issue is beyond the scope of the Guideline.</p> <p>As noted in the Compendium to TR 2018/5 consideration is being given to providing public advice and guidance on this issue.</p>
28	A review should take place 12 months after the Guideline is finalised to consider the effectiveness of the Guideline.	Paragraph 25 of Practice Compliance Guideline PCG 2016/1 <i>Practical Compliance Guidelines: purpose, nature and role in the ATO's public advice and guidance</i> provides that Guidelines will be subject to periodic review.