



Public advice and guidance compendium – PCG 2021/5

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Practical Compliance Guideline PCG 2021/D3 *Imported hybrid mismatch rule – ATO's compliance approach*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	The ATO should provide guidance on countries with corresponding foreign hybrid mismatch rules.	The issue raised is not within the scope of this Guideline; however, we are considering what guidance could be provided on the principles that should be followed in identifying whether a country's laws correspond.
2	The commencement date of this Guideline and the Reportable Tax Position (RTP) schedule questions should only apply to income tax periods after the Guideline is finalised.	The commencement date of the final Guideline is in line with the imported hybrid mismatch rules legislation. Disclosure requirements in the RTP schedule are prospective only and will not require taxpayers to amend prior lodgements of the RTP schedule to include their rating under this Guideline. Taxpayers are encouraged to undertake self-assessment on prior years for their own compliance purposes, and this may be provided during engagement and assurance activities.
3	The ATO should make it clearer in circumstances when the Commissioner will disallow deductions relating to payments made where insufficient information has been obtained.	Taxpayers must be able to satisfy themselves that they are entitled to a deduction before that deduction is claimed in their income tax return. The intention of this Guideline is to provide taxpayers and their advisors the information that may be required to demonstrate compliance and the type of information the Commissioner would likely seek to obtain to assist taxpayers in meeting their obligations.

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4	The ATO should allow more flexibility in the application of the ATO recommended approach. In some circumstances it may be easier to use a combination of the top-down and bottom-up approaches rather than one or the other. The ATO should also provide additional clarification that the information requirements set out in the Appendix is not a prescriptive list.	Taxpayers can choose the approach that is most appropriate for their circumstances. We have updated the ATO's recommended approach to include a combination of the top-down and bottom-up approaches. The Appendix to the final Guideline sets out the information the Commissioner considers would be relevant in demonstrating compliance with the imported hybrid mismatch rule. It is intended as a general guide for enquiries and is not an exhaustive list. To ensure this is clearer, we have inserted paragraph 33 of the final Guideline, which is consistent with paragraph 70 of the final Guideline. The information listed in the Appendix to the Guideline may be requested when we are assessing risk during engagement or assurance activity. It is not the intention of this Guideline to limit the operation of the law and it does not create new documentation requirements.
5	The ATO should provide guidance to taxpayers on the consequence of being in certain risk zone categories.	The consequences of being in certain risk zone categories have been incorporated into this final Guideline under the risk assessment framework section at paragraph 60 of the final Guideline.
6	The ATO should simplify the risk zones and include higher and broader materiality thresholds to ease the compliance burden on taxpayers. While some of the lower risk zones contain materiality thresholds, they should be expanded.	The risk zones have been revised, as follows, and the low and moderate risk zones now include materiality components: • The green zone includes where payments to members of a Division 832¹ control group are less than \$2 million (in the draft Guideline, this was categorised as blue zone). • The blue zone allows for circumstances where taxpayers have evidence that demonstrates that at least 90% of the total payments made to members of their Division 832 control group do not give rise to imported hybrid mismatch or have been correctly neutralised under section 832-610. • The yellow zone applies to Australian economic groups with turnover less than \$250 million. • The 'old' red zone 2 has been merged with red zone 1 to simplify the risk zone categories. In addition, the wording has been updated to

¹ All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*.

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		clarify that red zone 1 is not intended to capture payments that are not importing payments because they are excluded by the operation of paragraph 832-525(3)(b).
7	The ATO should provide guidance to taxpayers on the expected frequency of self-assessment as this should ease the compliance burden for taxpayers in the low risk zone.	Under our risk assessment framework (refer to paragraphs 51 to 69 of the final Guideline), we have indicated that where you were in the green or blue zone in either of the two preceding income years, you will remain in the green or blue zone for the current income year. This will apply if you have reviewed the circumstances of your Division 832 control group for the current income year and they have not materially changed.
8	The ATO should be clearer in the Guideline and provide examples on when a taxpayer has taken reasonable care and has a reasonably arguable position.	The intention of this Guideline is to provide taxpayers and their advisors guidance on the information that may be required to demonstrate compliance with the imported hybrid mismatch rule. Providing examples of circumstances where the Commissioner would consider to be reasonably arguable is not within the scope of this Guideline and there is existing ATO guidance on this concept. Taxpayers should refer to Miscellaneous Taxation Ruling MT 2008/2 <i>Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable</i> for the meaning of 'reasonably arguable position'. Where taxpayers are not covered by paragraph 26, as stated at paragraph 27, of the final Guideline, assessments of reasonable care will be made on a case by case basis. Taxpayers should refer to Miscellaneous Taxation Ruling MT 2008/1 <i>Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard</i> for the meaning of 'reasonable care'.
9	This Guideline should highlight that taxpayers should generally be able to rely on an advisor to a foreign Division 832 control group member's analysis of the application of the foreign jurisdiction's tax laws with respect to the relevant offshore transaction.	A taxpayer will generally be able to rely on the advice of a suitably qualified foreign tax advisor to the extent that advice relates to the application of foreign tax law. However, if the position on the application of the foreign law changes, the application of Subdivision 832-H would need to reflect the updated advice and, if necessary, amendments be made to the taxpayer's income tax return. We have added Example 3 at paragraph 45 of the final Guideline to set out that we consider that determining whether there is an offshore hybrid mismatch under Australian law cannot be solely determined by a qualified foreign tax advisor.

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10	The ATO should consider the difficulties taxpayers have in obtaining information in what constitutes reasonable enquiries from within and outside their Division 832 control group. In particular, obtaining information from third parties, partially-owned entities or foreign entities with different tax periods.	Taxpayers must be able to satisfy on a reasonable basis that they are entitled to a deduction before that deduction is claimed in their income tax return.
11	The ATO should exclude certain payments from this Guideline. For example, payments for tangible goods or management fees between companies with no hybrid mismatch to reduce the level of information taxpayers are required to obtain. Refer to paragraphs 55(d) and (g) of the draft Guideline.	The imported hybrid mismatch rule has potential application to all types of payments and therefore this suggestion has not been adopted.
12	The ATO should confirm in the Guideline where taxpayers have conformity with global financing policies requiring transactions to be on an arm's length basis and without giving rise to a hybrid mismatch outcome, whether this is sufficient evidence to support that there is no offshore hybrid mismatch.	The moderate risk zone has been updated to reflect the relative level of risk for certain taxpayers (that is, Australian economic group turnover of less than \$250m), where they can confirm: • their global financing policy for managing the risk associated with the imported hybrid mismatches accords with the Australian economic group, and • the policy is consistent with the Organisation for Economic Co-operation and Development Action Item 2 Final Report.
13	The ATO's recommended approach should only apply to inbound based entities where it is more likely for a hybrid mismatch to exist.	The imported hybrid mismatch rule applies equally to inbound and outbound investors and therefore this suggestion has not been adopted.