

PCG 2017/4 - ATO compliance approach to taxation issues associated with cross-border related party financing arrangements and related transactions

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ATO compliance approach to taxation issues associated with cross-border related party financing arrangements and related transactions

Relying on this Guideline

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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What this Guideline is about

1. This Practical Compliance Guideline (Guideline) outlines our compliance approach to the taxation outcomes associated with a 'financing arrangement', as defined in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997), or a related transaction or contract, entered into with a cross border related party. Such an arrangement, transaction or contract is referred to in this Guideline as a 'related party financing arrangement'. This Guideline does not cover financing arrangements characterised as equity in accordance with Division 974 of the ITAA 1997.
2. We use the framework in this Guideline and the accompanying schedules to assess risk and tailor our engagement with you according to the features of your related party financing arrangement, the profile of the parties to the related party financing arrangement and the choices and behaviours of your group. The tax risk associated with your related party financing arrangement is assessed having regard to a combination of quantitative and qualitative indicators.
3. If your related party financing arrangement is rated as low risk, then you can expect the Commissioner will generally not apply compliance resources to review the taxation outcomes other than to fact check the appropriate risk rating. If your related party financing arrangement falls outside the low risk category, you can expect the Commissioner will monitor, test and/or verify the taxation outcomes. The higher the risk rating, the more likely your arrangements will be reviewed as a matter of priority.
4. You can use the framework set out in this Guideline to:
 - (a) assess the tax risk of your related party financing arrangement
 - (b) understand the compliance approach we are likely to adopt given the risk profile of your related party financing arrangement
 - (c) work with us to mitigate the transfer pricing risk in relation to your related party financing arrangement and be confident you have reduced your risk exposure, and

- (d) understand the type of analysis and evidence we would require when assessing the risk outcomes of your related party financing arrangements.

Structure of this Guideline

- 5. This Guideline is structured as follows:
 - (a) the main body sets out general principles relevant to our framework for considering risk and applying compliance resources to related party financing arrangements, and
 - (b) schedules that expand on these principles giving more specific details and indicators relevant to considering the risk of compliance activity in relation to your related party financing arrangement.
- 6. You will need to read and apply the schedules in conjunction with the general principles set out in the Guideline.
- 7. This Guideline does not provide advice or guidance on the technical interpretation or application of Australia's transfer pricing rules or other taxation provisions.
- 8. Additional schedules may be included as part of this Guideline providing specific risk indicators for particular types of entities or other financing arrangements. For example, financial guarantees, interest free loans and related party derivative arrangements.
- 9. Where more than one schedule applies to you or your financing arrangement, you should use the schedule which most specifically addresses your circumstances.

Date of effect

- 10. This Guideline will have effect from 1 July 2017 and will apply to existing and newly created financing arrangements.
- 11. Each schedule may have effect from a different date. Where this is the case the date of effect will be stated in the relevant schedule.
- 12. The use and application of this Guideline will be under continuous review over the next three years. Any revisions to improve its efficacy will be made at the end of the review period or on an 'as necessary' basis. We will consult with you in relation to proposed material changes.

Arrangements to which this Guideline applies

- 13. This Guideline applies to any financing arrangement entered into with a related party that is not a resident of Australia and which the cross border test under Subdivision 815-B of the ITAA 1997 applies. The Guideline applies to both inbound and outbound related party financing arrangements.
- 14. Unless explicitly stated in a schedule, the Guideline does not apply to a financing arrangement that is either:
 - (a) entered into by a member of a wholly owned group containing an ADI (as defined in section 995-1 of the ITAA 1997)
 - (b) entered into by a member of a wholly owned group containing an Australian resident securitisation vehicle (as defined in section 995-1 of the ITAA 1997) or an entity to which section 820-39 of the ITAA 1997 applies to
 - (c) entered into by a member of a wholly owned group that is (or contains) an Australian resident taxpayer that has appropriately applied the simplified transfer pricing recorded keeping options in relation to loans (inbound and outbound), and

- (d) a form of Islamic finance.

The ATO's compliance approach

15. We concentrate our efforts on international related party dealings that pose the highest risk of not complying with the transfer pricing rules or other relevant provisions identified in a particular schedule.

16. As a consequence of new legislation and court decisions, the approach used by some taxpayers may no longer be appropriate. Therefore, this Guideline highlights arrangements where we see risk of non-compliance and offers opportunities for taxpayers to transition their arrangements to lower risk positions.

17. This Guideline does not constitute a 'safe harbour' and the information provided in this Guideline does not replace, alter or affect, in any way, our interpretation of the relevant law. It does not relieve you of your legal obligation to self-assess your compliance with all relevant taxation laws.

18. Following this Guideline does not limit or waive the operation of the law. However, if you follow this Guideline and align your related party financing arrangement (or your related party financing arrangement already aligns) with the low risk category, we will generally not allocate compliance resources to examine the relevant tax outcomes.

19. We review both inbound and outbound financing arrangements. Australia's transfer pricing rules do not differentiate between inbound and outbound dealings. As such, our interpretation and application of the provisions does not differentiate between scenarios involving inbound or outbound arrangements and transactions.

Documenting your legal arrangements

20. If we undertake a review of your financing arrangements, our starting point will be the legal agreement(s). Therefore, for arrangements falling within the higher risk zone it is recommended that agreements are put in place reflecting the relative rights, responsibilities and undertakings of each party that accurately reflect the substance of the financing arrangement. The agreements do not need to be as extensive as arrangements involving independent parties, but should include the key terms and conditions that borrowers and lenders would require to enter into the arrangements.

THE RISK ASSESSMENT FRAMEWORK

21. Our compliance approach will vary depending on the risk rating of your related party financing arrangement. The following principles will assist you to understand how we assess risk in relation to related party financing arrangements and generally allow you to assess your compliance risk.

22. If you fall outside the low risk zone, there is no presumption your related party financing arrangement is uncommercial or otherwise fails to comply with the Australian tax law. Falling outside the low risk zone means we consider your related party financing arrangement, or your treatment of that arrangement, is at risk of giving rise to an inappropriate tax outcome. Therefore, we will generally conduct some form of compliance activity to further test the taxation outcomes of your arrangement.

23. If we conduct a review of your related party financing arrangement, we may take account of other factors beyond those contained in this Guideline. This is because we will need to evaluate, among other things, the evidence that supports the commerciality of your related party financing arrangement.

24. The ATO's related party financing arrangement risk framework is made up of six risk zones.

Risk zone	Risk level
White	arrangements already reviewed and concluded
Green	low risk
Blue	low to moderate risk
Yellow	moderate risk
Amber	high risk
Red zone	very high risk

What, when and how to risk assess your related party financing arrangement(s)

25. You will need to risk assess each financing arrangement you enter into with a related party that is not a resident of Australia:

- (a) for existing arrangements, either
 - (i) at the start of each income year with subsequent reviews during the year where additional information becomes available (for example, if global group accounts are finalised two months after the start of the income year, the arrangement should be reviewed at that stage), and
 - (ii) before income tax returns for the relevant income year are lodged and more contemporaneous financial information is available to assess outcomes for that income year
- (b) where a new arrangement is entered into during an income year, at the time it is entered into.

26. To determine the risk rating for your related party financing arrangement, you need to compare the conditions that actually exist in relation to your related party financing arrangement (or that have been reasonably assumed by you for the purposes of pricing your related party financing arrangement) with the indicators in the relevant schedule. Each indicator carries a particular score and the aggregate score for all relevant indicators will be your 'risk zone' number.

27. Each indicator is expressed either as:

- (a) a closed (yes/no) question, or
- (b) a qualitative or quantitative range.

28. The indicators and their relative weightings reflect features the ATO has observed:

- (a) from market data, relating to transactions between independent parties, obtained from a variety of sources widely used by companies
- (b) independent parties acting at arm's length consider relevant in pricing financing arrangements, and
- (c) through its interaction with taxpayers, to be indicative of tax risk.

29. You should not adjust your arrangements so you sit higher within a particular range (as set out in the relevant schedule) merely because it does not change your risk zone. We will monitor outcomes for related party financing arrangements to ensure there is no such 'drift' within a range for an indicator. For example, if your gearing level (ratio of debt to book capitalisation) is historically 40%, we will monitor instances where your level of debt drifts to 50% but you remain within the same risk zone.

30. Your risk zone for an income year will reflect that of your highest risk financing arrangement. For example, if you have entered into three related party financing arrangements, two of which you assess as being in the yellow zone and one you assess as being in the amber zone, your overall risk zone will be amber.

31. Generally, the risk scoring is to be based on the most relevant finalised financial accounts available. However, if you feel a multi-year average, a point in time approach or an alternative approach is more appropriate for your circumstances, you may request an exception to the general rule by emailing your rationale to PGIFinancing@ato.gov.au

32. You will be taken to be in the same risk zone for the entire year unless you subsequently enter into additional related party financing arrangements, which places you in a higher risk zone.

33. You are deemed to be in the white zone and do not need to self-assess the risk rating of your related party financing arrangement where:

- (a) any of the following apply to a related party financing arrangement for the current year
 - an advance pricing arrangement (APA)
 - a settlement agreement between you and us
 - a court decision, and
 - we have conducted a review of your related party financing arrangement (where the review commenced on or after 1 January 2015) and provided you with a low risk rating for your financing arrangement

AND

- (b) there has not been a material change in the conditions of the related party financing arrangement including the terms, pricing, global group funding arrangements, comparability factors and/or risks since the time of the agreement, decision or review.

34. In performing your self-assessment you may consider certain features of your business or circumstances result in a risk-zone that is not reflective of your underlying risk. Where this occurs you may engage with us with your rationale and, if we find it acceptable, a white zone risk assessment may be granted.

35. For example, a capital intensive project in start-up phase may report a low interest coverage ratio which results in a higher risk zone. If this interest coverage ratio is the only indicator causing you to fall outside the green zone, you may engage with us to request a white zone risk assessment.

36. You must confirm eligibility with us before self-assessing yourself within the white zone.

Evidencing your self-assessment

37. We may, in the course of our ordinary compliance activities or any specific assurance activity relating to this Guideline, fact-check your assessment of your risk zone. If you are unable to provide adequate evidence to support your assessment, we may undertake further compliance activity.

38. Where you have concluded the actual conditions of your related party debt do not reflect arm's length conditions, you should prepare and retain comprehensive analysis and data in order to support your choice of substituted conditions which do satisfy arm's length conditions.

Reporting your self-assessment

39. You may be required to disclose whether you have self-assessed the risk rating of your related party financing arrangement. If you are notified by us to complete a Reportable Tax Position (RTP) schedule, you will be asked to disclose your self-assessed risk zone. It is not a requirement for you to self-assess your risk rating, but if you are unable to (or choose not to) you will also need to disclose this on the RTP schedule. Only arrangements entered into since 1 January 2015 should be reported for RTP schedule reporting purposes.

40. You do not need to report your risk rating if you are in the white zone.

What you can expect given your risk zone

41. You can expect the following treatment depending on your risk zone.

Risk zone	ATO treatment
White	No review other than to confirm on-going consistency with the agreed/determined approach
Green	<p>If there have been no material changes (as outlined in paragraph 33(b) of this Guideline), then we will:</p> <ul style="list-style-type: none"> (a) generally only apply compliance resources to the arrangement to: <ul style="list-style-type: none"> i. confirm your calculations were done according to our guidance ii. verify your eligibility, including factually confirming your scores for relevant indicators (b) extend the benefits of Practical Compliance Guideline <i>PCG 2017/2 Simplified Transfer Pricing Record Keeping Options</i> to your financing arrangement (c) where requested, agree on an APA (d) not seek to apply the Diverted Profits Tax to your financing arrangements <p>We will apply compliance resources to review your related party financing arrangement in exceptional circumstances, such as where:</p> <ul style="list-style-type: none"> (a) we are not satisfied your risk zone assessment is adequately supported with evidence (b) we become concerned, from our own data and analysis, your scores for certain indicators are inaccurate (c) we become concerned, from our own data and analysis, there is 'drift' within a range for an indicator (d) your related party financing arrangement relates to a broader set of circumstances being reviewed by us in relation to provisions not addressed in the relevant schedule (e) any other circumstances identified in the relevant schedule.
Blue	<p>We will actively monitor your arrangements using available data and will review arrangements by exception</p> <p>Alternative dispute resolution (ADR) might be effective in resolving any areas of difference</p>

Yellow	We will work with you to understand and resolve areas of difference ADR might be effective in resolving any areas of difference
Amber	Reviews are likely to be commenced as a matter of priority We will work with you to understand and resolve areas of difference ADR might be effective in resolving any areas of difference
Red	Reviews are likely to be commenced as a matter of priority Cases might proceed directly to audit You will not be eligible to access the APA program We are likely to use formal powers for information gathering Practically, it will be more difficult to resolve disputes through settlement or ADR You might face an increased prospect of litigation

Transitioning existing arrangements to the green zone

42. The Commissioner recognises the publication of this Guideline may cause taxpayers to review their related party financing arrangements. Consequently, some taxpayers may modify their related party financing arrangements to prospectively come within the green zone.

43. To encourage willing and co-operative future compliance, for a limited period, the Commissioner is willing to remit penalties and interest if certain pre-conditions are met. Specifically, the Commissioner undertakes that if you make a voluntary disclosure¹ in relation to the back years² and adjust your historic and prospective pricing or level of debt to come within the green zone, the Commissioner will exercise his discretion to remit:

- (a) penalties arising under Division 284 of Schedule 1 of the *Tax Administration Act 1953* (TAA) to nil³, and
- (b) shortfall interest charges arising under Division 280 of Schedule 1 of the TAA to base rate.⁴

44. This undertaking is conditional on you making a full and true disclosure.

45. In recognition of the complexity of these arrangements, the Commissioner's undertaking will remain in place for 18 months from either the date of publication of this Guideline or the effective date for any schedule to this Guideline.

46. Should you engage with us in good faith, this engagement will be on a without prejudice basis. Taxpayers may inform us they wish to transition their arrangements during or before a risk review, pre-compliance review, justified trust review or any similar product, but not after any notification to the taxpayer of the commencement of formal audit activity.

47. For the back years within the amendment period when the financing arrangement was in place, you may be subject to the compliance approach outlined in this Guideline for the risk zone your related party financing arrangements fall within.

48. Taxpayers wishing to modify their financing arrangements on a prospective basis can notify us through existing ATO relationship teams or via email to

¹ See Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* for further information in relation to what may be considered a voluntary disclosure.

² Back years refer to all the years where the arrangement is in place.

³ See Practice Statement PS LA 2014/2 *Administration of transfer pricing penalties for income years commencing on or after 29 June 2013*, Practice Statement PS LA 2012/5 *Administration of penalties for making false or misleading statements that result in shortfall amounts*, Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard* and Taxation Ruling TR 2014/8 *Income tax: transfer pricing documentation and Subdivision 284-E*.

⁴ See Practice Statement PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods* for further information.

PGIFinancing@ato.gov.au of their intention to transition their arrangements. Taxpayers are required to provide us details regarding:

- (a) existing financing arrangements including how those arrangements comply with this Guideline
- (b) proposed financing arrangements and their compliance with this Guideline
- (c) how the transition will be executed and any tax consequences associated with the transition, and
- (d) any proposal for resolution of relevant open years.⁵

49. Where we reach agreement with you on your transitional arrangements that agreement will be executed by way of deed and will apply for the duration of the new financing arrangements, subject to any critical assumptions agreed to as part of the deed.

Who to contact

50. We have a dedicated team responsible for the oversight and management of related party financing arrangement risks. If you wish to discuss your related party financing arrangement with the ATO you may contact Shahzeb Panhwar, Assistant Commissioner, Public Groups and International at PGIFinancing@ato.gov.au

51. Alternatively, if you have a dedicated relationship manager, you may approach them directly for assistance with your case.

Commissioner of Taxation

18 December 2017

⁵ Open years are those within the amendment period.

Schedule 1: Related party debt funding

Scope of this Schedule

52. Generally, we expect pricing of a related party debt to align with the commercial incentive of achieving the lowest possible 'all in' cost to the borrower. We also expect in most cases, the cost of financing to align with the costs that could be achieved, on an arm's length basis, by the parent of the global group to which the borrower and lender both belong. The indicators in this Schedule and their weighting have been developed with this expectation in mind.

53. This Schedule is limited to risks relating to the application of the transfer pricing rules in Division 815 of the ITAA 1997 or an international tax agreement, as defined in section 995-1 of the ITAA 1997. It does not set out our approach reviewing other taxation issues that might arise in relation to related party debt such as the:

- application of the debt/equity rules in Division 974 of the ITAA 1997
- substantive deductibility of interest payments or other losses (for example, under subsection 230-15(2) of the ITAA 1997)
- application of the thin capitalisation rules in Division 820 of the ITAA 1997
- existence or otherwise of liability for interest withholding tax, and
- application of Pt IVA of the *Income Tax Assessment Act 1936* (ITAA 1936).

Interaction with future schedules

54. The risk indicators contained in paragraphs 63 and 64 of this Schedule may be modified by future schedules to this Guideline. The exact nature and extent of any modification or further interaction between this Schedule and others will be contained in the subsequent schedules.

Review of Schedule

55. We may review and modify the indicators contained in this Schedule to align it with changes in the Australian debt market conditions. Our review will be contingent on the movement of certain indicators contained in the 'Aggregate Measures of Australian Corporate Bond Spreads and Yields' statistical table maintained by the Reserve Bank of Australia.

56. For example, the basis points applied in the Price indicator reflects the current Australian debt capital market conditions. If these market conditions significantly change, the score and the basis points applied to this indicator will be reviewed and may be modified to reflect those changes.

57. Any changes to the scoring will align with the change in the underlying indicator. The changes will be prospective and will not be applicable to any income tax return completed prior to the change being published.

Related party financing risk indicator guide

58. Determining your risk zone requires you to:

- (a) select the appropriate criteria for your financing arrangement (an outbound loan; that is, you're an Australian taxpayer lending to a related party or an inbound loan; that is, you're an Australian taxpayer borrowing from a related party)
- (b) identify the indicators (left hand column of the tables) relevant to your circumstances, and

- (c) determine your score (first row of the tables) for each indicator based on the actual conditions applying to your related party debt (or you have taken to exist for the purposes of pricing the related party debt according to arm's length conditions).

59. Where the indicator is expressed as a range, your score for that indicator will be determined by reference to where you sit in that range.

60. An indicator with a score of 10 or 15 is individually capable of resulting in a risk score outside the green zone.

61. Your risk zone is determined by combining your outcomes under the pricing and motivational risk scoring tables (paragraphs 63 and 64 of this Guideline, respectively) according to the following matrix:

		MOTIVATIONAL		
		A	B	C
PRICING	1			
	2			
	3			
	4			
	5			

62. An explanation of each indicator (including how to calculate, where relevant) is given at paragraphs 66 to 104 of this Guideline.

63. Pricing risk scoring table.

Indicator	Outbound			Outbound & Inbound	Inbound			
	10	3	1	0	1	3	10	15
Price relative to: - traceable third party debt - relevant third party debt of the group - global group cost of funds	Zero charged	Less than the cost of refinerrable debt		Inbound: ≤50 bps over cost of refinerrable debt (or less than refinerrable debt) Outbound: Cost of refinerrable debt or higher	>50 but ≤100 bps over cost of refinerrable debt	>100 but ≤150 bps over cost of refinerrable debt	>150 but ≤200 bps over cost of refinerrable debt	>200 bps over cost of refinerrable debt
Appropriate collateral				Yes		No		
Subordinated debt (including mezzanine debt)				No		Yes		
Currency of debt is not consistent with operating currency	Yes			Inbound – No Outbound – No, except when the currency is consistent with lender's accounting and tax functional currencies			Yes	
Presence of exotic features or instruments				No			Yes	
Sovereign risk of borrower entity	B, CCC	BB	A, BBB	AAA, AA				

Zone	
1	0
2	1-3
3	4-9
4	10-14
5	15 or more

64. Motivational risk scoring table.

Indicator	Outbound			Outbound & Inbound	Inbound				
Score	10	3	1	0	-1	1	3	10	15
Leverage of borrower				Consistent with or lower than the global consolidated leverage	Greater than global consolidated leverage but ≤50% of historic cost base of assets	Greater than global consolidated leverage but ≤60% leverage		>60% leverage*	
Interest coverage ratio				Consistent with or greater than the global consolidated group		Lower than global consolidated group ratio but ≥4.2	≥1.4 but <4.2	<1.4	
Applicable tax rate of lender entity jurisdiction				≥30%, or lender entity is global parent or global treasury operation		21-29%	16-20%	1-15%	0%
Involves an arrangement covered by a taxpayer alert	Yes			No				Yes	
Involves a hybrid arrangement	Yes			No					Yes

Zone	
A	≤4
B	5-13
C	14 or more

Evidencing your self-assessment of your risk zone

65. The following are examples of evidence, which would be prudent to have in place in order to minimise the burden of any such fact-checking, as described in paragraph 37 of this Guideline.

Indicator	Example of evidence
<ul style="list-style-type: none"> Pricing of your related party debt Size of your related party debt Tenor Subordination Exotic features Currency Existence of guarantees or security 	<ul style="list-style-type: none"> Relevant executed legal agreements setting out these terms
<ul style="list-style-type: none"> Traceable third party debt 	<p>Relevant executed legal agreement setting out the terms of that external loan</p> <p>Contemporaneous records, such as Board minutes, indicating the funds drawn down under the external loan were on lent via the related party debt</p>
<ul style="list-style-type: none"> Operating currency of the Australian group 	<p>Bank statements</p> <p>Industry data (supported by financial statements)</p> <p>Major sales contracts indicating the currency used</p>
<ul style="list-style-type: none"> Hybrid arrangement 	<p>Evidence of registration under the relevant legislation in the jurisdiction of incorporation</p> <p>Constitutions (or equivalent legal agreements) of the parties to the related party debt</p>
<ul style="list-style-type: none"> Leverage of the Australian group or global group Interest coverage ratio Global group's cost of funds 	<p>Audited financial accounts of the Australian group or the audited consolidated financial accounts of the group's parent entity (or the equivalent to such accounts where such accounts, or a single set of such accounts, are not prepared)</p>
<ul style="list-style-type: none"> Residency of the lender 	<p>Evidence of the jurisdiction of incorporation or registration</p> <p>Other evidence of central management and control</p>
<ul style="list-style-type: none"> Arrangements where arm's length conditions are substituted for actual conditions for the purposes of deriving an interest rate (for example, a legally subordinated loan is priced as a senior loan) 	<p>Documentation as to the arm's length conditions applied and how the pricing was determined (usually contained within transfer pricing documentation)</p>

Definitions

Global group

66. The definition of global group differs based on the structure of the group.

Structure	Definition
Publicly listed companies	As per the definition of a member of a group of entities consolidated for accounting purposes in accordance with paragraph 960-555(2)(a) of the ITAA 1997 ⁶
Privately owned companies	Includes the taxpayer and their associates as defined in section 318 of the ITAA 1936
Joint venture/consortium entities	Where a JV partner or consortium member with more than 20% direct or indirect interest in the entity has provided capital by way of debt, that particular instrument is assessed against the global group of that particular joint venture partner or consortium member

Consistent with the global consolidated group

67. 'Consistent with global consolidated group' means a ratio that has been calculated in accordance with their respective definition, which is either equal to or within a 10% differential. For example, if your leverage is within a factor of 0.9 to 1.1, they will be taken as consistent.

Priced relative to traceable third party debt, relevant third party debt of the group, or global group cost of funds

68. This indicator requires a comparison of the 'all in' cost of debt under the related party financing arrangement to the cost of debt issued to an unrelated third party. 'All in' cost is all the cost associated or connected to the pricing of the debt. For example, guarantee fees, associated hedging cost, line fees and any anticipated foreign exchange gains or losses.

69. Three options for comparison are available, which must be considered in the following order:

1. Traceable third party debt.
2. Relevant third party debt.
3. Global group cost of funds.

70. The comparison can only be in respect of one of the options. For example, where traceable third party debt is available for use it must be used and the other two options cannot be used.

71. Related party debt is considered traceable third party debt when:

- (a) the key terms, conditions and events (including but not limited to, start date of the arrangement, principal drawdown, repayments and the interest rates) of the related party debt provided to or by the taxpayer mirror those of the third party debt obtained by the group, and
- (b) the group's accounting systems can demonstrate the appropriate amount of cash being provided by the third party to a group member(s) and that this entity then provided the same amount of cash to the borrowing entity.

⁶ Although section 960-555 of the ITAA 1997 refers to significant global entities (SGEs), this is not limited to only SGEs.

72. Relevance for third party debt of the borrowing entity exists where the nature of the third party and the related party borrowing are consistent. For example, medium or long term bonds issued by the borrowing entity would be relevant third party debt for long-term debt provided by a related party. By way of contrast, working capital or overdraft facilities with banks would not be considered relevant. Any third party debt of the borrowing entity should be considered first and then that of other members of the global group.

73. Global cost of funds is defined as:

$$\frac{\text{Group interest}}{\text{Average of opening and closing debt balances}}$$

Where:

Group Interest	=	gross interest expense plus other borrowing expenses (for example, fees, swap costs) per the income statement of the consolidated global group accounts, in Australian dollar (AUD) equivalent
Debt	=	short-term debt plus current portion of long-term debt plus long-term debt (net of current portion) plus liability for capital leases (if not already included in debt) per the balance sheet or asset statement of audited financial reports, in AUD equivalent. Note debt does not include other types of liabilities
Closing balance	=	balance as at the end of the accounting period that most closely matches the income tax year of the taxpayer
Opening balance	=	balance as at the end of the previous accounting period, relative to the closing period

OR

For a newly issued debt instrument, the global cost of funds is what the group's cost of debt would be for that particular instrument at the time it is entered into, where the taxpayer can provide evidence of this.

74. If the currency of the relevant reference rate is different to the currency of the related party borrowing the reference rate will require adjusting. For example, if traceable third party debt is borrowed in Euros and the related party borrowing is in AUD, the traceable third party debt would need to be converted to an AUD equivalent rate.

75. You calculate the AUD equivalent rate by taking the average of either the:

- (a) spread over the relevant currency base rate and applying that spread to a relevant AUD base rate. For example, if the group records borrowings in USD and has an average cost of debt of USD Libor + 80 bps, the AUD equivalent rate can be taken to be AUD BBSW + 80bps, or
- (b) interest rate in the relevant group's currency and converting the rate to AUD equivalent using a cross currency interest rate swap conversion tool.

76. If you have no third party debt arrangements, we recommend you contact us to discuss an appropriate pricing indicator for your specific circumstances.

Appropriate collateral

77. Appropriate collateral refers to the appropriate levels of protection that would be expected to be provided by the borrower to the lender in independent dealings. From our observations of market activity, this will generally depend on the credit rating of the issuing entity. For example, it is more common for non-investment grade entities to offer security over assets than for investment grade entities.

78. Appropriate collateral may include:

- (a) provision of security – where the borrower pledges assets as collateral for the debt, which can be repossessed if the borrower stops making loan payments. Our observations are that lenders will generally try to maximise the value of the security available against their debt.
- (b) a guarantee – defined as a legal obligation for a third party guarantor to assume the liabilities of the borrower to the lender, in the event the borrower is unable to meet its interest or principal repayments.
- (c) covenants (including representations, warranties and events of default) – promises that certain activities or events will or will not occur or that the borrower will stay above or below determined ratios. Common covenants include:
 - a prohibition from issuing debt which ranks higher
 - a restriction on the amount of debt raised, often expressed by way of a gearing ratio
 - restrictions on the sale of assets
 - minimum working capital requirements, and
 - interest cover or debt service cover ratios.

79. Answer yes if the lack of appropriate collateral has not been taken into account in pricing the financial arrangement.

Subordinated debt (including mezzanine debt)

80. Subordinated debt is defined as a loan or security that ranks below other loans and securities with regard to claims on a company's assets or earnings in the event of a default. Subordination may arise from the terms of the debt itself or through structural subordination.

81. Answer no if subordination has not been taken into account in pricing the financial arrangement.

Currency of debt is not consistent with operating currency

82. The operating currency of the borrower is either:

- (a) the currency in which it earns the majority of its revenues, or
- (b) any currency where the borrower has free cash flow greater than or equivalent to 150% of the anticipated interest expense in that particular currency.

Presence of exotic features or instruments

83. Exotic features or instruments include:

- (a) payment in kind or other forms of interest payment deferral

- (b) promissory notes or other instruments that do not provide rights to foreclose/accelerate repayment etcetera
- (c) options which give rise to premiums on interest rates (for example, early repayment by the borrower or loan calls to the lender)
- (d) convertibility to equity or other exchange
- (e) contingencies (for example, interest only repaid under certain conditions), and
- (f) the legal or borrowing currency, as reflected in the terms of the loan, and operating currency are different. Operating currency is the currency actually transferred or effectively provided by the lender to the borrower.

84. Answer no if the exotic features or instruments included in the arrangement have not been factored into the pricing of the financial arrangement.

Sovereign risk of borrower entity

85. Sovereign rating of the jurisdiction of the borrower is determined as per Moody's, Standard and Poor's (S&P), or Fitch. The equivalent ratings of these agencies are provided in paragraph 86 of this Guideline. If no sovereign rating is provided by any of the agencies then assume a CC rating or equivalent.

86.

Investment grade

Moody's	Aaa	Aa1	Aa2	Aa3	A1	A2	A3	Baa1	Baa2	Baa3
S&P	AAA	AA+	AA	AA-	A+	A	A-	BBB+	BBB	BBB-
Fitch	AAA	AA+	AA	AA-	A+	A	A-	BBB+	BBB	BBB-

Non-investment grade

Moody's	Ba1	Ba2	Ba3	B1	B2	B3	Caa1	Caa2	Caa3	Ca
S&P	BB+	BB	BB-	B+	B	B-	CCC+	CCC	CCC-	CC
Fitch	BB+	BB	BB-	B+	B	B-	CCC+	CCC	CCC-	CC

87. If your pricing arrangements have made reliable adjustments for the sovereign risk of the borrower entity relative to Australian sovereign risk, then assume the sovereign risk is AAA.

88. For example, for a loan made between an Australian entity (AAA rated) and an entity in a jurisdiction where the sovereign risk is BB, the difference in rate between AAA and BB is calculated at equivalent to 125 bps. This difference (125 bps) is then added to the lending rate to compensate for the sovereign risk.

89. If Australia's credit rating falls below AAA and a jurisdiction is rated equal to or higher than Australia then no adjustment for sovereign risk is required.

Leverage of borrower

90. This indicator requires comparison of the leverage of the Australian taxpayer and the global group or other leverage ranges listed in the table.

91. Leverage of taxpayer is defined as:

$$\frac{\text{tax debt}}{\text{total Australian assets}}$$

Where:

Tax debt	=	debt for Division 974 purposes, in AUD equivalent
Total Australian assets	=	current and non-current assets attributable to Australian operations less amounts lent to, and invested in, associate entities
		The value of these assets shall be the amount recorded in audited financial reports or historic cost where those reports are not available

92. Leverage of group is defined as:

$$\frac{\text{Debt}}{\text{Total assets as contained in the groups consolidated accounts}}$$

where debt is as defined in paragraph 73 of this Guideline.

93. Where your leverage is consistent with your global group's consolidated leverage your score for this indicator is zero and the motivational risk scoring table in paragraph 64 is not applied to your 'standalone' leverage.

93A. If you are a financial entity for thin capitalisation purposes, you may substitute the 60% leverage benchmark in this indicator for your pre-asset revaluation safe harbour gearing ratio. For example, an inward investing financial entity that has a pre-asset revaluation safe harbour gearing ratio of 78% may replace the 60% leverage benchmark in this indicator with their safe harbour gearing ratio.

93B. Pre-asset revaluation safe harbour gearing ratio defined as:

$$\frac{\text{Pre-asset revaluation safe harbour debt amount}}{\text{Total Australian assets}}$$

Where:

Pre-asset revaluation Safe harbour debt amount	=	Safe harbour debt amount for Division 820 purposes before accounting for any asset revaluation that were conducted for thin capitalisation purpose only; in AUD equivalent
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Interest coverage ratio

94. Interest coverage ratio = $\frac{\text{EBITDA}}{\text{interest}}$

95. EBITDA = pre tax income + interest + non-recurring expenses (gains)
+ depreciation expenses + amortisation of intangibles

96. Interest = gross interest expense + other borrowing expenses

Where:

Other borrowing expenses include, for example, fees and swap costs.

Amounts are per the income statement. Note that interest income is not included.

97. Gross interest expense = interest paid or credited.

It includes amounts accrued, accumulated or capitalised.

Applicable tax rate of lender entity jurisdiction

98. The applicable tax rate is the corporate rate of taxation for the jurisdiction to which the lending entity is a tax resident.

99. Where the tax rate applied to the lending entity or the lending entity's interest income (for example, tax holidays or concessional tax treatment of certain income) is different to the headline rate (even temporarily) the actual rate applied should be used for this indicator.

100. If the lending entity is not a tax resident of any jurisdiction, assume the headline tax rate is 0%.

101. No points should be assigned for the purpose of this indicator where the lending entity is either:

- (a) the ultimate parent entity
- (b) a subsidiary of the ultimate parent entity, whose ownership chain remains in the same jurisdiction as the ultimate parent entity, and it and all members of its ownership chain are taxed as corporations in the parent's jurisdiction, or
- (c) the global Treasury entity for the group with the sole purpose to manage the capital requirements of the group including, but not limited to, the raising of third party finance, management of interest rate or currency exposures with third parties and management of the group's cash positions. There must be substance to its operation evidenced through having sufficiently senior employees and capital to effectively control, manage and bear the risks of managing the group's treasury operations.

102. Where the ultimate parent entity is exempt from paying income tax in the jurisdiction it is a tax resident of (for example, sovereign wealth funds, pension funds), no points should be assigned for the purposes of this indicator.

Involves an arrangement covered by a taxpayer alert

103. Answer yes if you have an arrangement that can reasonably be described as being covered by any of the following taxpayer alerts:

- Taxpayer Alert TA 2016/1 *Inappropriate recognition of internally generated intangible assets and revaluation of intangible assets for thin capitalisation purposes*
- Taxpayer Alert TA 2016/3 *Arrangements involving related party foreign currency denominated finance with related party cross currency interest rate swaps*
- Taxpayer Alert TA 2016/9 *Thin capitalisation – Incorrect calculation of the value of 'debt capital' treated wholly or partly as equity for accounting purposes*
- Taxpayer Alert TA 2016/10 *Cross-Border Round Robin Financing Arrangements*
- All taxpayer alerts released after the publication of this Guideline dealing with financial arrangements.

Involves a hybrid arrangement

104. Answer yes if the income (gain) or expenditure (loss) from your financial arrangements (including derivatives or spot transactions) is not subject to consistent or symmetrical tax treatment under the laws of the relevant overseas tax jurisdiction(s). Inconsistent treatment includes that due to tax deferral, or the treatment of the entity or other ownership arrangement in connection with holding or issuing of the financial arrangement. Tax treatment does not refer to differences in tax rates between jurisdictions.

Examples of how to determine your risk zone

Example 1: Australian subsidiary of a US oil and gas company

105. ForCo Inc. is a company incorporated in the United States and is the parent of the global group. AusCo Pty Ltd is an Australia subsidiary of ForCo Inc.

106. Relevant aspects of ForCo Inc. and AusCo's profiles are detailed in the following table:

	ForCo	AusCo
Year end	31 December (accounting)	31 December (tax and accounting)
Interest coverage ratio	16	13
Leverage	33% ⁷	35% ⁸
Average cost of debt	2.54%	

107. AusCo Pty Ltd is in the oil and gas industry, primarily undertaking exploration for, and extraction of, gas. It has an accounting and tax functional currency of U.S. dollars (USD). On 1 January 2016 AusCo Pty Ltd receives a loan from a related party. The relevant terms of the loan, as set out in the executed legal agreement, are:

- interest rate of 6.16%
- currency is USD
- the loan is subordinated to senior debt, and
- no security.

108. The loan:

- is not a hybrid instrument
- does not involve hybrid entities
- does not have exotic features, and
- there are no associated related party derivatives.

109. The lender is in Hong Kong, which has a headline tax rate of 16.5%.

110. AusCo claims a 3.16% interest rate on its USD loan as the loan is priced as a senior debt for tax purposes.

111. The risk indicator guide is applied to the circumstances of AusCo Pty Ltd as follows.

Pricing indicator	Application of criteria	Score
Priced consistently with global group cost of debt	3.16% is 62 basis points higher than the group average cost of 2.54%	1

⁷ Interest coverage ratio, average cost of debt and leverage are calculated according to this Guideline, using data from ForCo Inc.'s financial accounts for the year ended 31 December 2015.

⁸ Leverage and interest coverage ratio are calculated according to this Guideline, using data from AusCo Pty Ltd.'s tax filings and financial accounts for the year ended 31 December 2015, respectively.

Security	None	3
Subordination	None	0
Currency of debt is different to operating currency	No	0
Exotic features	No	0
Total		4

Behavioural indicator	Application of criteria	Score
Leverage	Consistent with parent	0
Interest coverage ratio	13	1
Headline tax rate of lender entity jurisdiction	16.5%	3
Involves an arrangement covered by a taxpayer alert	No	0
Hybrid arrangements	No	0
Total		4

112. AusCo Pty Ltd's score of four for both indicators places it in zone 3 for pricing and zone A for behaviour. It's combined score places it in the yellow zone – moderate risk.

113. AusCo Pty Ltd would likely be in the green zone if it:

- offered security as part of the terms of the loan, and
- priced the related party debt at no more than 50 basis points above the global group cost of debt (with flow on effects on AusCo Pty Ltd.'s interest coverage ratio).

Example 2: New Zealand subsidiary of an Australian asset management company

114. AusCo Limited is an Australian incorporated asset management company listed on the ASX and is the parent of the global group. ForCo Ltd is a New Zealand subsidiary of AusCo Limited.

115. Relevant aspects of AusCo Limited and ForCo Ltd.'s profiles are as follows:

	AusCo	ForCo
Year end	30 June (accounting)	30 June (accounting and tax)
Average cost of debt	2.54% ⁹	
Functional currency	Australian dollars (accounting and tax)	New Zealand dollars (accounting and tax)
Sovereign risk rating	AAA	A

116. ForCo Ltd is in the real estate industry, primarily undertaking management and investment in real estate.

117. On 1 January 2016 AusCo Limited provides a loan to ForCo Ltd; the relevant terms of the loan as set out in the executed legal agreement, are an interest rate of 0.00% and currency of Australian dollars.

118. The loan:

- is not a hybrid instrument
- does not involve hybrid entities

⁹ Average cost of debt is calculated according to this Guideline using data from AusCo Limited's audited financial accounts for the year ended 30 June 2015.

- does not involve arrangement covered by a taxpayer alert, and
- has no associated related party derivatives accompanying it.

119. The risk indicator guide is applied to the circumstances of AusCo Pty Ltd as follows:

Pricing indicator	Application of criteria	Score
Priced consistently with global group cost of debt	Zero interest on the related party facility	10
Currency of debt is different to operating currency	Yes, but consistent with AusCo's tax and accounting functional currency	0
Sovereign risk of borrower entity	Sovereign risk of New Zealand is A	1
Total		11

Behavioural indicator	Application of criteria	Score
Involves an arrangement covered by a taxpayer alert	No	0
Hybrid arrangement	No	0
Total		0

120. AusCo Limited's score of 11 for pricing and zero for behavioural places it in zone 4 and zone A, respectively. Their combined score places them in the amber zone – high risk.

121. AusCo Limited could be in the green zone if it:

- charged an appropriate interest rate on its facility with ForCo Ltd, and
- applied an appropriate adjustment for the sovereign risk of the borrower entity.

122. In this example, a review would consider the application of Australia's transfer pricing rules and potentially the application of general deductibility provisions to the extent that AusCo incurred financing costs in order to on-lend to its New Zealand subsidiary.

Amendment History

Date of amendment	Part	Comment
13 June 2018	All	Minor formatting corrections.
	Schedule 1	Inserted paragraphs 93A and 93B.
2 February 2018	Whole document	Minor amendments made throughout document to improve clarity. Minor amendments made to correct errors.

References

ATOlaw topic(s)	International issues ~~ Cross border financing ~~ Other
Legislative references	ITAA 1936 ITAA 1936 Pt IVA ITAA 1936 318 ITAA 1997 ITAA 1997 230-15(2) ITAA 1997 Div 815 ITAA 1997 Subdiv 815-B ITAA 1997 Div 820 ITAA 1997 820-39 ITAA 1997 Div 974 ITAA 1997 960-555 ITAA 1997 960-555(2)(a) ITAA 1997 995-1 TAA 1953 TAA 1953 Sch 1 Div 280 TAA 1953 Sch 1 Div 284 TAA 1953 Sch 1 Subdiv 284-E
Related Rulings/Determinations	MT 2012/3 MT 2008/1 TR 2014/8
Other references	PSLA 2006/8 PSLA 2012/5 PSLA 2014/2 PCG 2017/2 <u>Dispute or object to an ATO decision</u> <u>Independent review of the Statement of Audit Position for groups with a turnover greater than \$250m</u> <u>Taxpayer alerts</u>
ATO references	1-BAPMBWJ
BSL	PGI

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