PCG 2024/1EC - Compendium

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Australian Government
Australian Taxation Office

Public advice and guidance compendium – PCG 2024/1

- **Relying on this Compendium**

This Compendium of comments provides responses to comments received on revised draft Practical Compliance Guideline PCG 2023/D2 *Intangibles arrangements* and the previous draft PCG 2021/D4 *Intangibles arrangements*. 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	In relation to previous draft PCG 2021/D4, a clearer statement of the purpose of the Guideline is required, including how the Guideline should be read alongside existing ATO guidance.	In response to feedback received in relation to the previous draft PCG 2021/D4, the scope was refined and narrowed in the revised draft PCG 2023/D2. Further updates have been made to paragraphs 1 to 6 of the final Guideline to clarify the scope. The Guideline focuses on structuring issues and tax risks associated with Intangibles Migration Arrangements, as defined in the final Guideline. Paragraph 4 of the final Guideline clarifies that the Guideline does not address our compliance approach to other tax issues that may arise in connection with 'Intangibles Migration Arrangements'.[1] For example, mischaracterisation of payments (including whether payments should be characterised as royalties), and other tax issues. Paragraph 2 of the final Guideline states that the pricing or valuation outcomes under the 'basic rule' in section 815-130 of the *Income Tax Assessment Act 1997* (ITAA 1997) are outside the scope of the Guideline. That is, a risk rating under the Guideline is not an assessment of the risks

[1] 'Intangibles Arrangements' (used in revised draft PCG 2023/D2) and 'Intangibles Migration Arrangements' (used to define arrangements in scope in the final Guideline) may be used interchangeably in the compendium.

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		associated with the transfer pricing or valuation outcomes of properly characterised Intangibles Migration Arrangements.
2	The definition of 'intangible assets' in the Guideline is too broad and should be narrowed. • The scope of the Guideline should be narrowed to those that are, or have the reasonable potential to be, economically significant, such as by reference whether the intangible assets are 'unique and valuable' (as described in paragraph 6.17 of the 2022 OECD Transfer Pricing Guidelines). • Some intangible assets that may not be intended to be captured by the Guideline may fall within the wide definition of 'intangible assets', for example, financial instruments, know-how involved in providing administrative services, et cetera.	The definition of 'intangible assets' is based on the OECD Transfer Pricing Guidelines[2] and excludes financial assets (as defined in paragraph 6.6 to 6.8 of the OECD Transfer Pricing Guidelines). Specific reference to this exclusion has been added in footnote 2 of the final Guideline to clarify that the Guideline is not intended to apply to those financial assets. Paragraphs 36 to 38 of the final Guideline have been included to provide further guidance on grouping intangible assets (or Intangibles Migration Arrangements) together in applying the Guideline where it is reasonable to do so. To make it easier to apply the Guideline, arrangements satisfying the criteria for 'low value service arrangements' have been excluded from the Guideline (paragraph 44 to 49 of the final Guideline).
3	While the relevance of materiality thresholds is acknowledged in paragraph 49 of the revised draft PCG 2023/D2 in relation to the level of documentation, the Guideline does not have a similar materiality threshold in respect of Intangibles Arrangements in scope of the Guideline.	To make it easier to apply the Guideline: • Paragraphs 36 to 38 of the final Guideline have been included to provide further guidance on grouping intangible assets (or arrangements related to intangible assets) together where it is reasonable to do so. • Three categories of arrangements involving intangible assets, including low value service arrangements, have been excluded from the Guideline (paragraphs 39 to 49 of the final Guideline). • In relation to the exclusion of low value services, a materiality limit is included because mischaracterisation of these arrangements (resulting in Australian entities being undercompensated) is a risk in relation to these arrangements. A materiality limit is placed to ensure coverage while also providing a practical way to exclude lower value transactions.

[2] As defined in the final Guideline.

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		More generally, the definition of 'Intangibles Migration Arrangements' has been updated to clarify that the Guideline covers Migration or arrangements involving Australian development, enhancement, maintenance, protection and exploitation (DEMPE) activities in connection with intangible assets held offshore. This includes where the Australian activities are for the benefit of another entity that holds, or has legal or economic ownership of, the Intangible assets.
4	A 'white zone' should be included similar to other Guidelines.	A 'white zone' is included in the final Guideline – refer to paragraphs 22 to 23 of the Guideline.
5	Intangibles Arrangements already subject to other disclosure requirements (such as International Dealings Schedule and country-by-country reporting) should be categorised as 'white zone'.	In addition to identifying Intangibles Migration Arrangements of concern to us, the Guideline also has the purpose of providing guidance to taxpayers regarding the kinds of features we consider may indicate greater tax risk or behaviours of concern. We do not consider disclosure alone to be a reliable assessment of the level of tax risk (as covered by this Guideline) that may be associated with an Intangibles Migration Arrangement.
6	The definition of 'Migration' should be narrowed and the degree of change that would constitute a 'Migration' should be clarified. Related issues raised include: • further consideration of how the Risk Assessment Framework Table 1 (RAF Table 1) applies to an outbound licensing arrangement • clarification of how the broad definition of 'Migration' may apply to global file sharing systems and when that may constitute a 'Migration'.	'Migration' is intended to be broadly defined. In response to feedback, 'Excluded Outbound Distribution Arrangement' (paragraph 42 of the final Guideline) has been excluded from the application of the risk assessment framework. Further, in relation to RAF Table 1: • changes have been made to RAF Table 1, including Questions 1(a), (c) and (e) to clarify the scope of the relevant questions • changes have been made to Question 3 in RAF Table 1 to better address different circumstances that may arise under a Migration arrangement. Clarification has also been made to the final Guideline in other sections more generally, including the identification and grouping of Intangibles Migration Arrangements, that should assist taxpayers in applying the Guideline.

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		The means of accessing the intangible assets under an arrangement is not expected to affect how the grouping rules or risk assessment would apply.
7	Clarification of the Guideline's interaction or relationship with the proposed multinational tax integrity measure (*Denying deductions for payments relating to intangible assets connected with low corporate tax jurisdiction)* is required.	Paragraph 5 of the final Guideline expressly states that our compliance approach with respect to this proposed measure is not covered by this Guideline. This is consistent with the revised draft PCG 2023/D2.
8	The revised draft PCG 2023/D2 and previous draft PCG 2021/D4 states that the Guideline is proposed to apply retrospectively. The ATO should provide further guidance in the final Guideline regarding the retrospective application of the documentation and evidence expectations and how many years back the ATO expects taxpayers to address the documentation and evidence expectations in the Guideline.	Paragraph 9 of the final Guideline has been updated and states that the final Guideline applies from the date of issue and will apply to existing and new arrangements. The documentation and evidence expectations outlined in the Guideline sets out, as guidance, what we are likely to have regard to when examining Intangibles Arrangements and would typically expect taxpayers to be able to produce to substantiate their arrangements. We note that these are consistent with our existing compliance approach.
9	There is no points reduction in the risk assessment framework for documentation supporting that the transaction: • is priced at arm's length, or • has occurred for genuine documented commercial reasons.	The level of documentation will not be re-introduced into the risk assessment framework. This is based on the feedback from the previous draft PCG 2021/D4, that a risk assessment framework should be focused on features of the arrangements rather than the level of documentation. It should also be noted that pricing or valuation outcomes of an arrangement is outside the scope of this Guideline (paragraph 2 of the final Guideline). However, the risk rating of an arrangement will influence the likelihood of us seeking evidence beyond the risk assessment in any review. Paragraph 16 of the final Guideline clarifies that evidence relevant to the tax and profits outcomes of Intangibles Arrangements will be considered as part of any review. Paragraph 21 of the final Guideline has been updated to explain that while it will influence our resource allocation and compliance approach, we do not presume that there is necessarily non-compliance with Australian tax law if an arrangement is in the red zone. In addition, evidence verifying the commercial or non-tax rationale, will be considered when we review an Intangibles Migration Arrangement.

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10	Related to Issue 9 of this Compendium, there appears to be a bias toward keeping the intangible assets in Australia in the risk assessment framework, as opposed to the best available option under the OECD Transfer Pricing Guidelines.	Refer to our response to Issue 9 of this Compendium regarding the consideration of genuine documented commercial reasons in our review of an Intangibles Migration Arrangement.
11	Various issues were raised in relation to the risk assessment framework in the revised draft PCG 2023/D2, which related to the distribution of outcomes under the risk assessment framework between low, medium and high risk. Clarification was also recommended on various aspects of the risk assessment framework questions, including the meaning and intended scope of certain questions.	We have recalibrated the risk assessment framework and risk outcomes. Broadly, these include: • reallocation of risk scores (including to tax outcomes) • exclusion of certain arrangements from the scope of the Guideline (paragraphs 39 to 49 of the final Guideline). Other changes have been made to clarify and enhance the robustness of the Risk Assessment Framework Tables, such as changes to the definition of Relevant Entity and expansion of what 'Relevant Intangible Assets 'covers in Questions 3 and 4 of RAF Table 1, and the wording of certain questions in the RAF Tables.
12	Capital gains should be accounted for in Question 6 of RAF Table 1 in the final Guideline.	We have maintained the exclusion of upfront gains in this question in RAF Table 1 after considering the following: • Valuation outcomes are dependent on facts and circumstances and cannot be appropriately risk assessed under the current risk assessment framework. • Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) (including the diverted profits tax (DPT)) can apply to a Migration arrangement notwithstanding the recognition of upfront gains. • Refer to Issue 9 of this Compendium for our reasoning for not incorporating pricing or valuation documentation into the risk assessment framework. Question 6 of RAF Table 1 has been updated to clarify that upfront gains, including upfront payments under a licence, should be excluded to ensure that there is no asymmetry between a Migration that involves a disposal and one that does not. Paragraph 16 of the final Guideline clarifies that evidence relevant to the tax and profits outcomes of Intangibles Arrangements will be considered as part of any review.

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		Taxpayers are encouraged to refer to our evidence expectations and substantiate their Intangibles Migration Arrangements.
13	In relation to the inclusion of tax losses, R&D tax offsets or credits, or amortisation and depreciation deductions as a risk indicator in RAF Tables 1 and 2: • The utilisation of these features is not by itself necessarily a harmful tax practice. • Inclusion of this as a risk indicator can result in an Intangibles Arrangement having a higher risk rating. • It will not always be clear whether the income of the intangible assets is 'substantially offset or shelter'.	These and other tax outcomes included in the risk assessment framework are based on higher-risk arrangements that we have seen. The words 'substantially offset or shelter' were included in the revised draft PCG 2023/D2 and in the final Guideline to ensure that a more balanced outcome is achieved under the question. Also refer to Issue 11 of this Compendium for the ATO's response in the overall recalibration of the risk assessment framework and outcomes. In any further engagement with us, evidence relevant to the Intangibles Migration Arrangements such as evidence relevant to the commercial reasons or decision-making, and evidence relevant to the tax and profits outcome, will be considered along with the facts and circumstances of each case.
14	In relation to questions related to DEMPE (or DEMP) activities in the Risk Assessment Framework Tables: • The Guideline should distinguish between the range of DEMPE activities that can be performed, for example, applying only to 'substantial' DEMPE activities. • The categories in relation to substance of Relevant Entity in RAF Table 1 should consider situations where the Australian entity remains as entrepreneur or is otherwise deriving 'residual profits'.	Mischaracterisation is identified as a relevant risk associated with Intangibles Migration Arrangements, which may include mischaracterisation of the degree of significance of DEMPE activities. In response to some of the feedback received, changes have been made to Question 3 in RAF Tables 1 and 2 regarding the Circumstances of the Relevant Entity. Certain arrangements (Excluded Intangibles Arrangements) have been excluded from the final Guideline (paragraphs 39 to 49 of the final Guideline).
15	The risk assessment framework imposes a high level of inquiry on the operations of international related parties in their non-Australian market, including the market in which products or services are 'predominantly' sold. This requirement is either duplicative or potentially goes beyond what taxpayers are required to perform in preparing Subdivision 284-E of Schedule 1 to the *Taxation Administration Act 1953* (TAA) compliant transfer pricing documentation.	It is not our intention to impose burdensome evidentiary requirements in respect of evidence required to substantiate a risk assessment. Part 3 of the final Guideline explains and clarifies the evidence expectation for taxpayers, including the acknowledgment that the type and level of documentation we expect can be influenced by a number of factors, such as complexity of their business, the extent to which their Intangibles Migration Arrangements contribute to that business, an appropriate materiality threshold based on their natural business system and their governance processes. (Refer also to our response to Issue 25

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		of this Compendium.) These comments equally apply to evidence substantiating a taxpayer's risk assessment. In relation to Question 4 in RAF Table 1, that question is included to provide a means to reduce points where the situation applies and if it is more reasonable to do so, taxpayers can choose not to determine and substantiate whether the question applies.
16	The concept of Relevant Entity under the final Guideline should be defined by reference to an entity's country or jurisdiction. There may be commercial reasons why the legal intellectual property ownership and employees are located in different entities in the same jurisdiction.	No change has been made in the final Guideline. The definition of Relevant Entity on an individual entity basis is based on Intangibles Migration Arrangements that we have seen. This does not preclude appropriate consideration of evidence of commercial reasons why the legal intellectual property ownership and employees are located in different entities in the same jurisdiction.
17	The mechanics of the draft Guidelines can provide inconsistent risk assessment results for the same arrangement that is subject only to whether the arrangement involves an inbound or outbound transaction.	The Guideline is focused on assessment of the risk relating to the mischaracterisation and non-recognition of Australian DEMPE activities. The focus of this Guideline on Australian activities in relation to intangible assets held offshore (as opposed to offshore activities in relation to intangible assets held by an Australian entity where this is no Migration) is clarified through changes made to the definition of 'Intangibles Migration Arrangements' from the original definition of 'Intangibles Arrangements' in revised draft PCG 2023/D2 and previous draft PCG 2021/D4.
18	Inbound distribution arrangements are required to be assessed under the RAF Table 2, as well as the risk assessment framework in PCG 2019/1 *Transfer pricing issues related to inbound distribution arrangements*.	Arrangements satisfying the criteria for Excluded Inbound Distribution are excluded from the scope of the final Guideline (paragraph 43 of the final Guideline). This Guideline and PCG 2019/1 relate to different tax risks. Paragraph 6 of PCG 2019/1 states that PCG 2019/1 is limited to the transfer pricing risks associated with inbound distribution arrangements.
19	Different reward structures (for example, profit split versus cost-based remuneration) should be taken into account in assessing the risk profile of an Australian entity in RAF Table 2.	Question 3 in RAF Table 2 has been included in the final Guideline to reflect the impact of different reward structures (such as Australian entities receiving a profit split) on the risk profile of an Intangibles Migration Arrangement.

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20	Examples described as 'low' or 'medium' risk in Appendix 1 to the draft Guidelines may be rated higher risk if certain tax attributes are present.	The risk assessment framework reflects our observation that tax outcomes of Intangibles Migration Arrangements can impact the level of tax risks presented by an Intangibles Migration Arrangement, particularly where Part IVA of the ITAA 1936 (including the DPT) may potentially apply. When reviewing Intangibles Migration Arrangements, we will consider evidence substantiating a taxpayer's Intangibles Migration Arrangements, including evidence relevant to commercial reasons and decision-making. This includes any review of higher-risk (red zone) arrangements.
21	While the RAF framework is a quantitative framework, some questions involve qualitative assessments and a degree of subjectivity (particularly in determining whether income is substantially sheltered or offset, or the word 'predominantly').	Given the nature of Intangibles Migration Arrangements and the complexity of the issues, some degree of qualitative assessment and subjectivity is unavoidable. Relevant evidence substantiating a taxpayer's Intangibles Migration Arrangement will be considered in our review.
22	There should be a cut-off for the requirement to assess past Migration under RAF Table 1. Some taxpayers will not be aware of the full history of all intangible assets in their Intangibles Arrangements. Documentation and evidence to support historical Migration intangibles arrangements may also be no longer available. Some guidance should be included to give taxpayers certainty in respect of the ATO's expectations in respect of past Migration Intangibles Arrangements.	A time limit is not included for assessment of past Migration because Part IVA of the ITAA 1936 can apply to ongoing tax benefits for arrangements entered into more than 7 years ago. We have updated paragraphs 26 to 28 of the final Guideline to clarify that while it is best practice for a taxpayer to assess their Intangibles Migration Arrangements, we will not require reporting of their self-assessment of past Migration in the reportable tax position (RTP) schedule beyond a period specified in the relevant instructions.
23	The ATO should consider introducing an additional risk mitigating factor (that is, deduct points) where a taxpayer is able to substantiate that the price of the intangible asset was 'stepped up' and transferred at a higher value to an overseas related party.	We do not agree that this is necessarily an indicator of lower risk.
24	Question 2 in 'Applying the RAF' in the revised draft PCG 2023/D2 is unnecessary given the likely high-risk outcome for arrangements described in Taxpayer Alert TA 2020/1 *Non-arm's length arrangements and schemes connected with the development, enhancement, maintenance, protection and*	This question has been removed from the final Guideline. Two examples from TA 2020/1 have been included as Examples 7 and 8 in Appendix 1 to the final Guideline.

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	exploitation of intangible assets. Moreover, it is unclear how many features or characteristics will need to be exhibited for this question to apply.	
25	While outcomes under the risk assessment framework in revised draft PCG 2023/D2 are no longer influenced by the level of documentation or evidence, it remains unclear whether this would result in any material change in the ATO's expectations for documentation and evidence when conducting risk assessments. The ATO places a strong emphasis on documentation, despite the fact that such materials do not directly reduce the risk assessment framework scores and risk assessment outcomes. Such emphasis creates a risk that taxpayers will be required to prepare documents not required for any other commercial purpose or by any other tax jurisdiction, purely to meet the evidence expectations set out in the Guideline.	We have updated paragraphs 19 to 21of the final Guideline in relation to our compliance approach for different risk zones, and paragraph 62 in Part 3 to clarify how a taxpayer's risk rating may influence the evidence we will seek in any review. The evidence expectations in Part 3 and Appendix 2 to the final Guideline are included as guidance to set out what we are likely to have regard to when examining Intangibles Migration Arrangements and would typically expect taxpayers to be able to produce to substantiate their arrangements. We note that these are consistent with our existing compliance approach. While the risk assessment framework influences our resource allocation and compliance approach, if we review a taxpayer's Intangibles Migration Arrangements, we will consider the relevant facts and circumstances in reaching a view on the level of risks associated with their Intangibles Migration Arrangements. This will include a consideration of the evidence substantiating their Intangibles Migration Arrangements.
26	The evidence expectations included in the previous draft PCG 2021/D4 is beyond that which is required in Subdivision 284-E of the TAA and includes the preparation of source documentation that is not created in the ordinary course of business.	Paragraph 66 of the final Guideline clarifies the status of the Guideline and the operation of Subdivision 284-E of the TAA. Paragraph 63 of the final Guideline has been included to explain that it is not the intention of the Guideline to unnecessarily impose burdensome requirements on a taxpayer in respect of the evidence required to substantiate their Intangibles Migration Arrangements. Rather, setting out the kinds of information and documents we are likely to request may assist taxpayers to mitigate the level of compliance risk posed by their Intangibles Arrangements and ensure that any engagement with us is as efficient as possible. Part 3 of the Guideline explains and clarifies the evidence expectation for taxpayers, including the acknowledgment that the type and level of documentation we expect can be influenced by a number of factors such as the complexity of their business, the extent to which the taxpayer's Intangibles Migration Arrangements contribute to that business, an

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		appropriate materiality threshold based on the taxpayer's natural business system, and governance processes.
27	In the final Guideline, the Evidence Expectations in Appendix 2 should include references to legal professional privilege protection and acknowledgment that information located overseas may be beyond the Australian entity's power and control to obtain and produce.	The final Guideline sets out our administrative compliance approach. The Guideline cannot (and does not purport to) displace legal professional privilege. However, it outlines the kinds of facts and evidence we generally consider relevant to addressing tax risks associated with Intangibles Migration arrangements.
28	There is a lack of certainty in the draft Guidelines as to when the documentation and evidence collated by the taxpayer would be sufficient and whether potential penalties may apply, in cases where the ATO may take a different position in the pricing or form of such arrangements, as well as whether the ATO might use the benefit of hindsight, for example when incorrect assumptions were used in commercial valuation, et cetera. Due to the complexity involved in pricing intangible arrangements, it is recommended that a 'best effort' criterion is introduced as part of the final Guideline.	The Guideline sets out our administrative compliance approach and practical guidance but cannot affect or override the operation of the law, including the relevant documentation requirements and provisions related to penalties. Refer to paragraphs 26 to 28 of the final Guideline for our approach regarding reporting requirements in the RTP schedule.
29	Some taxpayers may have a high number of Intangibles Arrangements in scope of the Guideline due to the broad definitions used. A limit of the number of disclosures required should be considered (similar to the question in respect of PCG 2017/4 *ATO compliance approach to taxation issues associated with cross-border related party financing arrangements and related transactions*. Taxpayers should be provided with reasonable notice of when the Guideline will be finalised and enough time to undertake self-assessments.	We will develop further guidance to help affected taxpayers complete their RTP schedule in due course. We will take into account the timing of publication of the final Guideline in finalising any RTP disclosure requirements, particularly in the year the final Guideline is first published. Refer to paragraphs 26 to 28 of the final Guideline in relation to RTP disclosure requirements in connection with past Migration arrangements. Certain arrangements have been excluded from the scope of the final Guideline.
30	The ATO should consider the interaction with other disclosure requirements in existing ATO forms, such as 'business restructure' in the International Dealings Schedule (IDS), other Australian country-by-country (CBC) reporting requirements, as well as RTP disclosure related to TA 2018/2 *Mischaracterisation*	Disclosure under IDS or Australian CBC reporting does not include a risk assessment of the kind set out in the Guideline. As issues related to TA 2018/2 are explicitly out of scope of the Guideline, it is not appropriate to withdraw the RTP Schedule question related to TA 2018/2.

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	of activities or payments in connection with intangible assets and TA 2020/1. Withdrawal of RTP Schedule questions related to TA 2018/2 and TA 2020/1 should be considered.	Withdrawal of the question related to TA 2020/1 will be considered when we develop guidance for the RTP schedule in due course.
31	The ATO should further elaborate on how the final Guideline will be relied upon (or not relied upon) in the Foreign Investment Review Board (FIRB) processes.	The Guideline does not currently refer to FIRB processes. We will consider whether it is appropriate to refer to the final Guideline as part of our engagement in the FIRB process on a case-by-case basis.
32	The ATO should include further guidance or examples regarding business restructures (particularly where there is no transfer of rights).	The final Guideline includes 15 examples with different risk characteristics. As noted in paragraph 10 of the final Guideline, we may update the Guideline in the future as appropriate. This may include adding additional examples. We will publicly consult if we need to make changes to the Guideline.