

Asia Internet Coalition (AIC) Submission on Australian Taxation office (ATO) Draft Practical Compliance Guideline - Intangibles arrangements (PCG 2023/D2)

16 June 2023

To
Mr Chris Jordan AO,
Commissioner of Taxation and Registrar of the Australian Business Register and the Australian Business Registry Services
Australian Taxation office (ATO)

On behalf of the [Asia Internet Coalition](#) (AIC) and its members, I am writing to express our gratitude for the opportunity to submit comments to the Australian Taxation office (ATO) on [Draft Practical Compliance Guideline with a focus on Intangibles arrangements](#). AIC is an industry association of leading internet and technology companies in the Asia Pacific region with a mission to promote the understanding and resolution of Internet and ICT policy issues in the Asia region.

In the spirit of constructive collaboration with the ATO's and the Government efforts, AIC seeks to put forth for your kind consideration key comments and recommendations, which are provided below:

1. Issues related Compliance burden

We acknowledge the ATO's efforts to tighten the scope of the PCG but are concerned that the new draft still creates an unnecessary compliance burden for taxpayers, for very little administrative gain to the ATO. We would suggest further tightening the scope to remove some collateral low risk arrangements by focussing on unique and valuable intangibles only and removing intangibles arrangements which would ordinarily be considered low risk from an Australian tax perspective (e.g. plain vanilla licensing arrangements and contract R&D services arrangements) from its scope. De minimis thresholds would also be helpful.

If the ATO's intention with the new draft PCG is to assist with identifying arrangements that warrant dedicated compliance resources, we also believe there should be a 'white zone', as included in other PCGs, to cover scenarios where an intangibles arrangement is subject to an existing advance pricing arrangement (APA) or settlement outcome and has not materially changed or where taxpayers are otherwise engaged with the ATO (e.g. as part of a risk review or audit) and the ATO is already aware of the arrangements covered by the PCG. Similarly, we think the PCG should only apply to arrangements that are currently not picked up under existing disclosure requirements. E.g. a migration that also falls within the definition of a 'Business Restructure' in the OECD Transfer Pricing Guidelines would already be disclosed e.g. under the International Dealings Schedule and / or the Australian Local File.

We note that the PCG states that it is not the intention to "unnecessarily impose burdensome requirements" on taxpayers in respect of the evidence to substantiate their intangible arrangements. In that regard, it will be important to train ATO staff to remain reasonable in their expectations towards taxpayers and acknowledge that there is a spectrum of risks, intangibles arrangements and types and levels of evidence, as is also recognised in the PCG. In addition, it will be important for ATO staff to bear in mind that while the current draft has tried to remove some of the subjectivity in the previous draft,

the application of the proposed risk assessment framework is subjective in nature and taxpayers may arrive at different conclusions than the ATO for valid reasons, leaving room for uncertainty and risk.

2. Retrospective effect

Retrospective application of the PCG would create uncertainty for historic arrangements. We would welcome a forward looking application of the PCG and a transitional period. If the rules do apply retroactively, we recommend that the number of years the taxpayer must go back in considering a past migration be limited to applicable, e.g., by reference to general statutes of limitations (general or statute of limitations for transfer pricing).

3. Certainty through the advance pricing arrangement (APA) program

The PCG notes that the APA program can provide taxpayers with certainty on their intangibles arrangements but that to be accepted into the APA program, the ATO will have regard to a taxpayer's risk rating in accordance with the risk-assessment framework. This and the requirement to maintain the expected documentation and evidence outlined in the draft PCG at the time of seeking entry to an APA program creates a very high benchmark and potential barrier for taxpayers to utilise the APA program to achieve greater tax certainty on pricing of complex intangibles arrangements cases, an area not covered by the PCG. We would encourage the ATO to revisit its approach.

As such, we respectfully request the Australian Taxation office (ATO) to consider industry concerns and recommendations provided above when working on drafting of the Guideline.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact us directly at Secretariat@aicasia.org or +65 8739 1490. Importantly, we also look forward to offering our inputs and insights, directly through industry meetings and discussions.

Thank you for your time and consideration.

Sincerely,



Jeff Paine
Managing Director
Asia Internet Coalition (AIC)