

PCG 2024/1 - Intangibles migration arrangements

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Practical Compliance Guideline

Intangibles migration arrangements

📌 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.

Table of Contents	Paragraph
What this Guideline is about	1
How to use this Guideline	7
Structure of this Guideline	8
Date of effect	9
PART 1 – Our compliance approach	11
The ATO's role and compliance approach	11
Reporting your self-assessment	26
Evidencing your self-assessment	29
PART 2 – Our risk assessment framework	31
Identifying Intangibles Migration Arrangements	36
Excluded Intangibles Migration Arrangements	39
<i>Excluded Outbound Distribution Arrangement</i>	42
<i>Excluded Inbound Distribution Arrangement</i>	43
<i>Excluded Low Value Services Arrangement</i>	44
Applying the risk assessment framework	50
<i>Risk rating</i>	52
<i>Definition of terms used in the risk assessment framework</i>	55
Risk Assessment Framework Table 1 – risk factors – Migration of your intangible assets	57
Risk Assessment Framework Table 2 – risk factors – other Intangibles Migration Arrangements	58
PART 3 – Our evidence expectations	61
APPENDIX 1 – Examples of Intangibles Migration Arrangements	67
<u>Example 1 – centralisation of intangible assets – red zone</u>	69
<u>Example 2 – bifurcation of intangible assets – red zone</u>	87
<u>Example 3 – non-recognition of Australian intangible assets and DEMPE activities – red zone</u>	105
<u>Example 4 – Migration of pre-commercialised intangible assets – red zone</u>	115
<u>Example 5 – Migration of pre-commercialised intangible assets – red zone</u>	133

<u>Example 6 – transfer of intangible assets to a foreign hybrid entity – red zone</u>	143
<u>Example 7 – bifurcation of intangible assets – red zone</u>	158
<u>Example 8 – cost contribution arrangement – red zone</u>	176
<u>Example 9 – transfer of rights to intangible assets under a licence agreement – amber zone</u>	188
<u>Example 10 – centralisation of intangible assets – blue zone</u>	204
<u>Example 11 – contract research and development arrangement – blue zone</u>	222
<u>Example 12 – centralisation of intangible assets – green zone</u>	233
<u>Example 13 – contract research and development arrangement – green zone</u>	246
<u>Example 14 – cost contribution arrangement – green zone</u>	255
<u>Example 15 – service arrangement – out of scope</u>	269
APPENDIX 2 – Evidence expectations	275
Evidencing the commercial considerations and your decision-making process	277
Evidencing the legal form and substance of your Intangibles Migration Arrangements	279
<i>Legal agreements</i>	281
<i>Guidelines, manuals, policies and governance-like documents</i>	284
<i>Transfer pricing documentation</i>	286
<i>Country-by-country reporting documentation</i>	288
Identifying and evidencing the intangible assets and connected DEMPE activities	289
<i>Identifying intangible assets</i>	292
<i>Identifying DEMPE activities</i>	294
<i>Evidencing intangible assets and DEMPE activities</i>	296
Evidencing the tax and profit outcomes of your Intangibles Migration Arrangements	299
Simplified record keeping	301

What this Guideline is about

1. This Guideline explains when we are likely to apply resources to consider the potential application of the general anti-avoidance rules (GAARs) or the transfer pricing rules to certain cross-border related party Intangibles Migration Arrangements with respect to structuring issues and tax risks associated with:

- Migration of intangible assets, and
- mischaracterisation and non-recognition of Australian activities connected with intangible assets.

2. Our compliance approach in relation to the pricing aspects of Intangibles Migration Arrangements is not covered by this Guideline. Where the basic rule in section 815-130 of the *Income Tax Assessment Act 1997* (ITAA 1997) applies, transfer pricing in respect of, and valuation of, an intangible asset is dependent on the facts and circumstances. It is therefore beyond the scope of this Guideline to specify the level of risk associated with the

pricing or valuation outcomes for particular related party dealings which arise in connection with properly characterised Intangibles Migration Arrangements.

3. In this Guideline:

- ‘Intangibles Migration Arrangements’ refers to cross-border arrangements involving the Migration of intangible assets, or arrangements with similar effect. This includes arrangements relating to Australian development, enhancement, maintenance, protection and exploitation (DEMPE) activities in connection with intangible assets held offshore.¹

Consistent with the focus of this Guideline on the tax risks outlined in paragraph 1 of this Guideline, certain distribution and low-value services arrangements potentially involving intangible assets are excluded from the scope of this Guideline. These are defined as ‘Excluded Intangibles Arrangements’ in paragraphs 41 to 53 of this Guideline.

- ‘Intangible assets’ refer to property, assets and rights that are not physical or financial assets², which are capable of being controlled for use in commercial activities, and are not restricted by any accounting or legal concepts or definitions – see paragraphs 6.6 to 6.8 of Chapter VI of the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, as approved by the Council of the Organisation for Economic Co-operation and Development (OECD Transfer Pricing Guidelines) and last amended on 20 January 2022.³
- ‘Migration’ refers to any restructure or change associated with your intangible assets that allows another entity to access, hold, use, transfer or benefit from the intangible assets.
- Any reference to ‘you’ refers to the relevant Australian entity who is a party to the Intangibles Migration Arrangement.
- All legislative references in this Guideline are to the ITAA 1997, unless otherwise indicated.

4. This Guideline does not address our compliance approach to other tax issues that might arise in connection with Intangibles Migration Arrangements (for example, tax risks associated with amounts not being appropriately characterised as royalties, including but not limited to those outlined in Taxpayer Alerts TA 2018/2 *Mischaracterisation of activities or payments in connection with intangible assets*⁴, or TA 2022/2 *Treaty shopping arrangements to obtain reduced withholding tax rates*).⁵

5. For the avoidance of doubt, our compliance approach with respect to the proposed multinational tax integrity measure (*Denying deductions for payments relating to intangible assets connected with low corporate tax jurisdictions*)⁶ is not covered by this Guideline.

6. Additional schedules or changes to the Risk Assessment Framework may be included in this Guideline in the future to provide further guidance about Intangibles Migration Arrangements in response to what the ATO is seeing.

¹ 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.

² Refer also to paragraph 6.6 of the OECD Transfer Pricing Guidelines for what is considered to be financial assets’ and therefore excluded from the definition of ‘intangible assets’.

³ Refer to subsection 815-135(2) of the ITAA 1997 for the relevant version of the OECD Transfer Pricing Guidelines covered by that section. In this Guideline, references to ‘OECD Transfer Pricing Guidelines’ are references to the version covered in subsection 815-135(2) unless otherwise specified.

⁴ In relation to the mischaracterisation of activities or payments in connection with intangible assets.

⁵ In relation to treaty shopping arrangements to obtain reduced withholding tax rates.

⁶ See [Multinational Tax Integrity and Tax Transparency](#) and [Multinational tax integrity package](#).

How to use this Guideline

7. You can use the framework set out in this Guideline to understand:
- the kinds of compliance risks that may be presented by your Intangibles Migration Arrangements, enabling you to make informed decisions about the likelihood that you will be subject to compliance action
 - the features of Intangibles Migration Arrangements we consider to present greater compliance risk
 - the evidence we are likely to ask you to produce in relation to your Intangibles Migration Arrangements, including the intensity of engagement you can expect based on the compliance risks associated with your Intangibles Migration Arrangements.

Structure of this Guideline

8. This Guideline is divided into the following parts:
- Part 1 – Our compliance approach – provides our compliance approach for Intangibles Migration Arrangements.
 - Part 2 – Our risk assessment framework – explains how we assess the compliance risks of Intangibles Migration Arrangements.
 - Part 3 – Our evidence expectations – provides an outline of the types and level of evidence that we will have regard to when examining your Intangibles Migration Arrangements.

Date of effect

9. This Guideline applies from 17 January 2024, the date of issue, and will apply to existing and new arrangements.

10. We will review the use and application of this Guideline. If we need to make changes to the Guideline (for example, by adding additional examples) we will publicly consult on these.

PART 1 – Our compliance approach

The ATO's role and compliance approach

11. We will have regard to our risk assessment framework in assessing and identifying compliance risks in scope of this Guideline that are associated with these arrangements. If we review your Intangibles Migration Arrangements, we may consider other factors beyond those contained in this Guideline, having regard to the relevant facts and circumstances of your Intangibles Migration Arrangements.

12. This Guideline sets out our compliance approach in relation to the tax risks in scope of this Guideline. The risk assessment framework of this Guideline does not assess the level of risk associated with other tax risks that might arise in connection with Intangibles Migration Arrangements, or the pricing or valuation outcomes. A risk rating under this Guideline therefore will not affect our compliance approach in relation to those issues and risks.

13. This Guideline does not reflect a statement of the Commissioner's interpretation of the taxation laws.⁷ The information provided in this Guideline does not replace, alter or affect our interpretation of the law in any way or relieve you of your legal obligations in complying with all relevant tax laws.

14. Australia's income tax law places an onus on taxpayers to self-assess their compliance with relevant tax laws. In some cases, Subdivision 815-B may require the identification of arm's length conditions with regard to arrangements or circumstances different from the form of your Intangibles Migration Arrangements (the exceptions to the basic rule contained in subsections 815-130(2) to (4)). In these cases, we will have specific regard to relevant ATO views, such as Taxation Ruling TR 2014/6 *Income tax: transfer pricing – the application of section 815-130 of the Income Tax Assessment Act 1997*.

15. To the extent relevant and appropriate, any action we may take in applying the transfer pricing provisions will be made so as to best achieve consistency with the relevant transfer pricing guidelines published by the OECD.⁸ This includes our risk assessment approach to the application of transfer pricing provisions in relation to the tax risks in scope of this Guideline. Of particular relevance are Chapters I, VI and IX of the OECD Transfer Pricing Guidelines.⁹

16. While valuation and pricing outcomes are outside the scope of this Guideline and are not part of the risk assessment framework, in reviewing Intangibles Migration Arrangements, we also review Intangibles Migration Arrangements to ensure they properly comply with other Australian tax obligations with regards to the recognition of gains associated with intangible assets and Australian DEMPE activities, such as those imposed by the capital gains tax (CGT), capital allowance provisions and provisions in relation to the recognition of gains from the results of certain R&D activities under Division 355.¹⁰ We

⁷ For example, this Guideline does not limit the operation of Subdivision 284-E of Schedule 1 to the *Taxation Administration Act 1953* (TAA), which sets out special rules about unarguable positions for cross-border transfer pricing.

⁸ See, for example, paragraphs 815-20(2)(a) and 815-135(2)(a). Of particular relevance is the relevant edition of the OECD Transfer Pricing Guidelines.

⁹ Broadly, these chapters cover:

- the basic operation of the arm's length principle (Chapter I)
- the special considerations for Intangibles, including the identification and ownership of intangibles and DEMPE activities (Chapter VI), and
- guidance on analysing the transfer pricing outcomes in relation to business restructuring situations (Chapter IX).

¹⁰ For example, also refer to ATO Interpretative Decisions ATO ID 2015/4 *Income tax: Research and Development: Disposal of research & development results* and ATO ID 2015/5 *Income tax: Research and Development: Disposal of research & development results and future payments*.

will have regard to evidence relevant to the tax and profit outcomes of your Intangibles Migration Arrangement in doing so.

17. We may also consider the application of the GAARs (including the diverted profits tax (DPT))¹¹, particularly in circumstances where an arrangement (or a part of an arrangement) lacks substance or there is insufficient objective probative evidence of the stated non-tax or commercial rationale for the arrangement (or any part of the arrangement). In these circumstances, we will have specific regard to our administrative processes and published guidance including Law Administration Practice Statements PS LA 2005/24 *Application of General Anti-Avoidance Rules* and PS LA 2017/2 *Diverted profits tax assessments*, and Practical Compliance Guideline PCG 2018/5 *Diverted profits tax*. The application of the GAARs might preclude the application of the transfer pricing, CGT or capital allowance provisions, for example, if the alternative postulate is that there would have been no transfer or licensing of intangible assets rather than a dispute about the conditions or the consideration that should have applied to the transfer or licensing of intangible assets.

18. Our compliance approach will vary depending on the risk zone of your Intangibles Migration Arrangement. The risk rating will influence whether and how we are likely to engage with you to understand your Intangibles Migration Arrangement:

Table 1: Risk zones

Risk zone	Risk rating
Green	Lower risk
Blue	Lower to medium risk
Amber	Medium risk
Red	Higher risk
White	Further risk assessment not required

19. If your arrangement is in the green zone (lower risk), we will not apply our resources to further examine or audit your arrangement with respect to tax risks in scope of this Guideline, other than to verify your self-assessment.

20. If your arrangement is in the blue zone (lower to medium risk) or amber zone (medium risk), we may engage with you to understand the compliance risks of your Intangibles Migration Arrangement. In our engagement with you, we will have regard to the risk rating of your arrangement. The higher the risk rating, the more likely it is that we will seek evidence beyond your risk assessment as part of any review.

21. If your arrangement is in the red zone (higher risk), we will prioritise our resources to review your arrangement. This may involve commencing a further review or audit. The red zone is a reflection of the features that we consider indicate greater risk; however, it is not a presumption that there is necessarily non-compliance with Australian tax law. We will have regard to the relevant facts and circumstances, including evidence verifying the commercial or non-tax rationale, when we review your Intangibles Migration Arrangement.

22. If your Intangibles Migration Arrangement is in the white zone, you do not need to apply the risk assessment framework. We are unlikely to apply compliance resources to further re-examine your arrangement beyond verifying that you can substantiate that the conditions for white zone have been met.

¹¹ As outlined in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936).

23. Your Intangibles Migration Arrangement is in the white zone if any of the following apply to your Intangibles Migration Arrangement for the current year:

- (a) There is a settlement agreement between you and the ATO, where the terms of the settlement cover the Australian tax outcomes related to the arrangement for the current year, and you have met the conditions of the agreement.
- (b) There is a court decision in relation to the Australian tax outcomes of the arrangement, where you were a party to the proceeding.
- (c) We have conducted a review or audit of the arrangement and provided you with a 'low risk' rating¹² (or a 'high assurance' rating as part of a Justified Trust review) in relation to the Australian tax outcomes of any relevant Migration and the characterisation and recognition of Australian DEMPE activities connected with the Intangibles Migration Arrangement.

AND

- (d) There has not been a material change in the conditions of the Intangibles Migration Arrangement since the time of the agreement, decision, review or audit. This includes a material change in the conditions which informed the basis of the ATO's risk or assurance rating in the context of a review or audit.

24. Where you are seeking entry to the advance pricing arrangement (APA) program, we will have regard to your risk rating in accordance with our risk assessment framework.¹³ We will also have regard to evidence of the nature identified in this Guideline with respect to your Intangibles Migration Arrangements both when you are seeking entry to the APA program, as well as during the APA period.

25. If, having considered the compliance risks presented by your arrangements in accordance with our risk assessment framework, you consider there is a potential compliance risk associated with your Intangibles Migration Arrangements, you can engage with us by contacting IntangiblesArrangements@ato.gov.au. Alternatively, if you have a dedicated relationship manager, you may approach them directly for assistance with your Intangibles Migration Arrangement. Engaging with us early, including prior to entering into your Intangibles Migration Arrangements, will assist us to cooperatively work with you to assure your arrangement or resolve any issues that may be associated with your Intangibles Migration Arrangements.

Reporting your self-assessment

26. You may be required to report your risk rating for each Intangibles Migration Arrangement or on another basis. For example, you may have other disclosure requirements if you are required to complete a reportable tax position schedule.

27. It is best practice to apply this Guideline to assess your Intangibles Migration Arrangements, however, we will not require reporting of the risk rating in relation to past Migration in reportable tax position schedules beyond a period specified in the relevant instructions.

28. While we may not require the reporting of risk rating for past Migration in reportable tax position schedules, we may still review such arrangements and you should consider our evidence expectations.

¹² Including a 'no further action' outcome based on a finding of low risk.

¹³ Refer to PCG 2018/5 for further information with respect to how DPT matters may be considered in an APA.

Evidencing your self-assessment

29. We may engage with you to verify your self-assessment, having regard to your application of our risk assessment framework and our evidence expectations (as outlined in Part 3 and Appendix 2 to this Guideline).

30. We may also prioritise our resources to further examine or audit your Intangibles Migration Arrangements where we are unable to obtain evidence to substantiate your self-assessment against our risk assessment framework, notwithstanding that your Intangibles Migration Arrangement may be in a lower-risk zone based on the risk assessment framework.

PART 2 – Our risk assessment framework

31. This Part is designed to explain how to assess the compliance risks of your Intangibles Migration Arrangements.

32. Our risk assessment framework includes an assessment of the risk of your Intangibles Migration Arrangements based on risk factors set out in Risk Assessment Framework Tables 1 and 2 in this Part, which cover the features of arrangements that we consider indicate compliance risks.

33. In this risk assessment framework:

- Risk Assessment Framework Table 1 (RAF Table 1) should be used to assess the compliance risks in relation to a Migration of your intangible assets
- Risk Assessment Framework Table 2 (RAF Table 2) should be used to assess the compliance risks associated with your Australian activities connected with intangible assets held overseas, in particular, any risks of mischaracterisation and non-recognition of such activities.

34. Your self-assessment will involve an assessment of your Intangibles Migration Arrangements against each of the risk factors in the applicable table to determine the risk rating of your arrangement with respect to that risk.

35. You should apply our risk assessment framework to **each** Intangibles Migration Arrangement that you have during the income year before tax returns for the relevant income year are lodged.

Identifying Intangibles Migration Arrangements

36. For the purposes of applying this Guideline, arrangements (whether or not in writing) relating to the DEMPE or Migration of multiple intangible assets should be treated as one Intangibles Migration Arrangement if, having regard to the facts and circumstances, it is more reasonable and appropriate to treat them as one Intangibles Migration Arrangement. For example:

- You may have more than one dealing or arrangement connected with the same intangible asset (such as a contract R&D service agreement as well as a licensing agreement with the owner of certain intangible assets). It is likely to be more reasonable and appropriate to treat all your dealings or arrangements in connection with the same intangible assets as one Intangibles Migration Arrangement.
- Some intangible assets may be naturally or substantively grouped together in the context of your business, for example, all intangible assets associated with a particular product or service, or all policies relating to a particular business function. In such circumstances and where appropriate, you may adopt the grouping according to your business systems and governance systems and consider the dealings and transactions related to the intangible assets as one Intangibles Migration Arrangement if it is more reasonable and appropriate to do so in the circumstances. Other examples include substantially similar or related manuals, standards and protocols that relate to the same aspects of a process of producing or modifying a product.

- Where a group of associated or related intangible assets are more valuable in combination compared to in isolation¹⁴, it may be less reasonable to treat dealings and arrangements in relation to each individual asset as separate Intangibles Migration Arrangements. For example, the patent, associated trademarks and regulatory approval in relation to a pharmaceutical product where the value of each asset may be of limited value but significantly more valuable in combination. It would also be relevant to consider if the assets are naturally grouped together by your business and in your systems.

37. There can be more than one Relevant Entity¹⁵ in relation to one Intangibles Migration Arrangement – for example, if you have engaged different entities to perform contract R&D and contract manufacturing activities related to the same product, those entities are relevant entities in relation to the one Intangibles Migration Arrangement.

38. The examples in Appendix 1 to this Guideline illustrate how the principles of grouping can be applied to identify Intangibles Migration Arrangements in applying the risk assessment framework.

Excluded Intangibles Migration Arrangements

39. An arrangement is an Excluded Intangibles Arrangement if, once you have identified your Intangibles Migration Arrangements in accordance with paragraphs 36 to 38 of this Guideline, it is in one of the following 3 categories.

40. These exclusions from the scope of the Guideline are to make it easier for you to apply this Guideline. These exclusions do not represent an assessment of other tax and transfer pricing risks that are outside of the scope of this Guideline (such as the characterisation of payments or receipts, for example, the tax risks described in TA 2018/2).

41. The exclusions do not preclude us from reviewing your arrangements if consideration of the facts and circumstances indicate that further compliance activities are appropriate.

Excluded Outbound Distribution Arrangement

42. An arrangement is an Excluded Outbound Distribution Arrangement if all of the following criteria are satisfied:

- It is an arrangement that only involves the grant of rights by you to a foreign distributor (Relevant Entity) where the Relevant Entity (and its associates in the same jurisdiction) do not undertake any activities other than the importation and distribution functions in relation to tangible finished goods in the foreign jurisdiction where the Relevant Entity is located.
- The grant of rights under the agreement is limited to the right to use the intangible assets (typically brand, logos, trademarks) for the purposes of performing the distribution function in that jurisdiction only – for example, the rights granted should not include any sub-licensing rights or right for further development of the intangible assets.

¹⁴ Refer to paragraph 6.94 of the OECD Transfer Pricing Guideline.

¹⁵ Refer to paragraph 55 of this Guideline for further discussion on the meaning of Relevant Entity in the context of each Risk Assessment Framework Table.

- You include the residual profits¹⁶ relating to the use of the intangible assets (such as residual profits from the sale of products associated with the intangible assets) in your Australian assessable income in the current income year.

Excluded Inbound Distribution Arrangement

43. An arrangement is an Excluded Inbound Distribution Arrangement if all of the following criteria are satisfied:

- you are a distributor of imported tangible finished goods in Australia
- you have been granted the right to use intangible assets by an international related party solely in connection with the distribution function, and such rights are limited to Australia only
- the intangible assets over which rights are granted are not connected to¹⁷ intangible assets that have previously been Migrated from Australia by you or an Australian associate of yours at any time
- the intangible assets are not connected to products that were originally developed in Australia, unique to the Australian market, or predominantly sold in the Australian market (either currently or historically), and
- you and your Australian associates have not conducted development, enhancement or maintenance (DEM) activities including R&D or regulatory activities in Australia (including where you have engaged other entities to perform such DEM activities) that are related to these intangible assets or intangible assets that are connected to these intangible assets, either currently or historically. If you or your Australian associates have claimed Australian R&D tax offsets in relation to these intangible assets (or connected intangible assets) currently or historically, you do not satisfy this criterion.

Excluded Low Value Services Arrangement

44. It is important to note that this exclusion only applies if your self-assessment reflects the substance of the arrangement as a low value adding intra-group service arrangement.

45. An arrangement is an Excluded Low Value Services Arrangement if it is an arrangement under which you receive or provide low value adding intra-group services that:

- are only supportive in nature
- do not constitute your core business or that of an Australian associate, or that of the related party receiving such services from you

¹⁶ Refer to the description of residual profit (or loss) in the definition of “residual analysis” in paragraph 2.152 and the Glossary of the 2022 OECD Transfer Pricing Guidelines. In summary, residual profit (or loss) refers to the residual profit (or loss) remaining in a residual analysis, after allowing for profits in the first category, being profits attributable to the contributions which can be reliably benchmarked: typically less complex contributions for which reliable comparables can be found. Ordinarily this initial remuneration for the first category would be determined by applying one of the traditional transaction methods or a transactional net margin method. For the purposes of this Guideline, royalty or licensing income based on a percentage of revenue is not considered to be residual profits.

¹⁷ Examples of intangible assets that are connected to other intangible assets include but are not limited to: later versions of intangible assets that have features of, or are developed based on all or parts of other intangible assets, prototypes of later versions of software or other intangible assets, et cetera.

- satisfy the definition outlined in paragraphs 7.43 to 7.63 of Section D of Chapter VII of the OECD Transfer Pricing Guidelines
- are not services described in paragraphs 48 to 49 of this Guideline, and
- the materiality threshold is satisfied if you provide services under the arrangement.

46. The materiality threshold for outbound low value services arrangement is met if the costs of the relevant services you provide under the arrangement is \$2 million or less, **or** not more than 10% of the total expenses of your Australian economic group¹⁸, whichever is lower.

47. Examples of low value adding intra-group services arrangements include:

- administration services, for example, activities that involve or relate to the control, facilitation and monitoring of your business' human (staffing) and financial resources (assets)
- information technology services that are not part of the principal activity of the group
- accounting, auditing, processing and management of accounts activities, and
- other general services of an administrative or clerical nature.

48. For the purposes of this Guideline, a service between related parties is not a low value adding intra-group service if it:

- is not of a merely supportive nature
- contributes significantly to the creation, enhancement or maintenance of value in the multinational economic group
- requires the use of unique and valuable intangibles or leads to the creation of unique and valuable intangibles, or
- involves the assumption of control of substantial or significant risk by or gives rise to the creation of significant risk for, the service provider.

49. Services that are **not** low value adding intra-group services¹⁹ include:

- services constituting the core business of the multinational group
- R&D activities, including software development and other technical services
- manufacturing and production services
- purchasing or procurement activities relating to raw materials or other materials that are used in the manufacturing or production process
- sales, marketing and distribution activities
- financial transactions
- extraction, exploration, or processing of natural resources
- insurance and reinsurance activities, and

¹⁸ For the purposes of this Guideline, consistent with paragraphs 76 and 77 of Practical Compliance Guideline PCG 2017/2 *Simplified transfer pricing record-keeping options*, an Australian economic group consists of an entity together with all the entities it is required by the Australian Accounting Standards Board AASB 10 *Consolidated Financial Statements* to include in its consolidated financial statements. An entity can be a company, partnership, superannuation or trust.

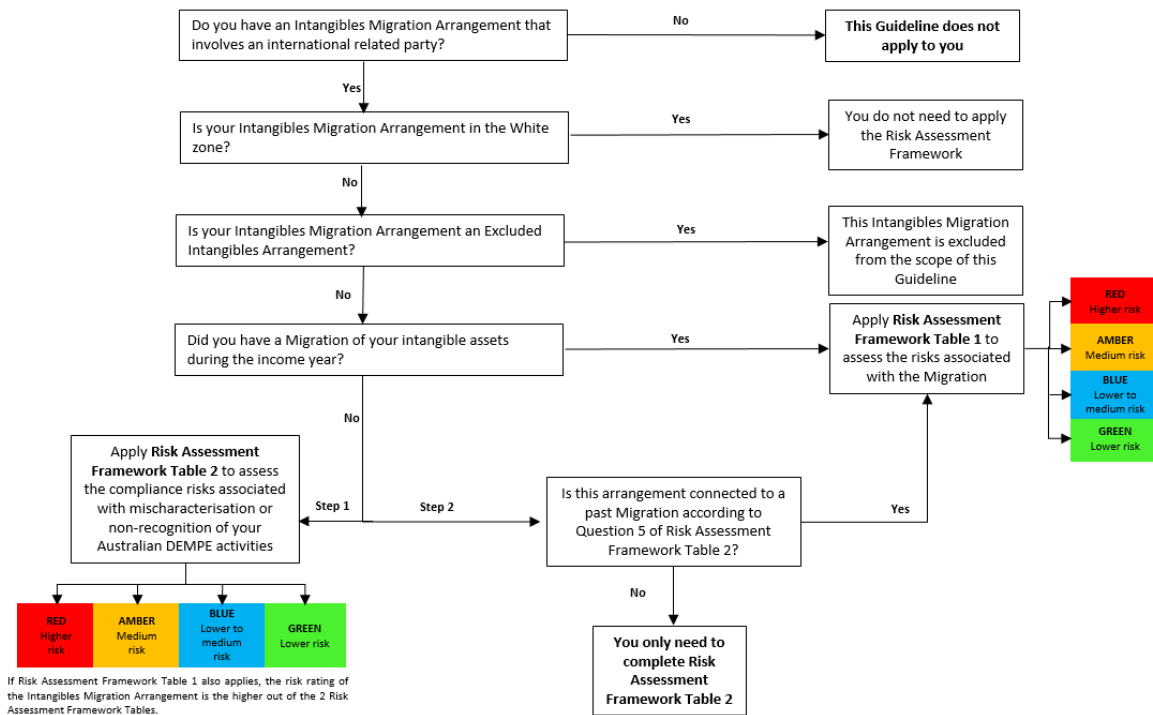
¹⁹ Consistent with paragraph 7.47 of the OECD Transfer Pricing Guidelines.

- strategic management services (other than management supervision of services that qualify as low value adding intra-group services).

Applying the risk assessment framework

50. If you have more than one Intangibles Migration Arrangement, complete the risk assessment framework in relation to **each** Intangibles Migration Arrangement.²⁰ The risk assessment framework is also depicted in Diagram 1:

Diagram 1: Roadmap to the risk assessment framework



51. Answer the following questions to apply the risk assessment framework to each of your Intangibles Migration Arrangements:

1. Do you have an Intangibles Migration Arrangement that involves an international related party?

You have an Intangibles Migration Arrangements if you have entered into an arrangement involving the Migration of intangible assets in the current year, or have an arrangement relating to Australian DEMPE activities in connection with intangible assets held offshore.²¹

If **no**, the risk assessment framework and compliance approach set out in this Guideline do not apply to you.

²⁰ Refer to paragraphs 36 to 38 of this Guideline for guidance on identifying Intangibles Migration Arrangements for the purposes of applying the risk assessment framework.

²¹ 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.

2. Is your Intangibles Migration Arrangement in the white zone according to paragraph 23 of this Guideline?

If **yes**, you do not need to apply the risk assessment framework to this Intangibles Migration Arrangement.

3. Is your Intangibles Migration Arrangement an Excluded Intangibles Arrangement?

If **yes**, this arrangement is excluded from the scope of this Guideline and the risk assessment framework and compliance approach set out in this Guideline do not apply to this Intangibles Migration Arrangement.

4. Did you have a Migration of your intangible assets during the income year?

A 'Migration' refers to any restructure or change associated with your intangible assets that allows another entity to access, hold, use, transfer, or benefit from the intangible assets.

- If **yes**, apply RAF Table 1.
- If **no**, apply RAF Table 2 – refer to Question 5 of RAF Table 2 to determine whether you also need to apply RAF Table 1 to a connected past Migration.

Risk rating

52. For each of your Intangibles Migration Arrangements, your risk zone rating is determined by the number of points you score in either RAF Tables 1 or 2 of this Guideline:

- Red zone (higher risk) – 35 points or more
- Amber zone (medium risk) – 25 – 34 points
- Blue zone (lower to medium risk) – 20 to 24 points
- Green zone (lower risk) – less than 20 points.

53. The risk rating under each RAF table reflects the assessment of the compliance risks posed by an arrangement with respect to a Migration of intangible assets or the mischaracterisation or non-recognition of Australian activities connected with intangible assets respectively.

54. If you achieve a different risk rating under the 2 RAF tables, the higher risk rating would be the overall risk rating for an Intangibles Migration Arrangement.

Definition of terms used in the risk assessment framework

55. The following terms are used in the risk assessment framework. A reference to the singular is also a reference to the plural.

- **Relevant Entity** means:
 - in RAF Table 1, the international related party referenced in Question 1 for the type of transaction or change that applies to your Intangibles Migration Arrangement, as well as any other international related party referenced in Question 2 where the Relevant Intangible

Assets have been Migrated²² to that entity under a related arrangement to the initial transaction or change

- in RAF Table 2, the international related party referenced in Question 1 of RAF Table 2
 - where the party to the transaction or change is a branch (in a jurisdiction other than Australia) of a Relevant Entity, this term also refers to that branch of the Relevant Entity.
- **Relevant Intangible Assets** means the intangible assets which are the subject of your transaction or arrangement that you have identified in Question 1 of RAF Table 1 or 2.
 - **International related party** takes its definition from the instructions to the International Dealings Schedule for the relevant income year²³, and also includes an entity which is part of your income tax consolidated group or multiple entry consolidated group and satisfies that definition.
 - **Specified jurisdiction** takes its definition from ‘specified countries’ in the instructions to the International Dealings Schedule for the relevant income year.²⁴

56. For the purpose of RAF Table 1, related arrangements are arrangements that are connected to the restructure or change. Examples include but are not limited to:

- transactions included in your internal documentation as part of an overall restructure or change, for example, transactions included in a step plan for a restructure or project
- a back-to-back assignment of assets, and
- a cost sharing agreement under which another party may obtain the rights or economic ownership to an asset initially acquired by another cost sharing agreement participant.

Risk Assessment Framework Table 1 – risk factors – Migration of your intangible assets

57. Complete RAF Table 1 to assess the compliance risks in relation to a Migration of intangible assets.

Risk Assessment Framework Table 1: Risk factors for Migration of intangible assets

<p>A. Restructure or change</p> <p>1. Did you have a restructure or change associated with intangible assets held by you or from which you benefit (whether in legal form or in substance), where any of the following apply?</p> <p>(a) You sold, transferred, assigned or novated contractual rights in relation to, or otherwise made available the intangible assets (including legal or beneficial interests therein) to an international related party (Relevant Entity).</p>
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²² Refer to definition of Migration in paragraph 3 of this Guideline.

²³ In relation to RAF Table 1, the relevant income year for Migration that took place before the date of issue of this Guideline is the 2024 income year (being the income year in which the Guideline takes effect), and the year in which the Migration took place for other Migration. In relation to RAF Table 2, the relevant income year is the current year.

²⁴ In relation to RAF Table 1, the relevant income year for Migration that took place before the date of issue of this Guideline is the 2024 income year (being the income year in which the Guideline takes effect), and the year in which the Migration took place for other Migration. In relation to RAF Table 2, the relevant income year is the current year.

- (b) You have entered into an arrangement (whether or not in writing) where you have licensed, granted contractual rights or access to, or otherwise made available the intangible assets to an international related party (Relevant Entity).
- (c) You, or an international related party, have entered into or terminated a cost contribution agreement (or a similar agreement) relating to your intangible assets such that an international related party (Relevant Entity) obtains rights or access to your intangible assets.²⁵
- (d) You have:
- i. written off (for accounting or tax purposes) some or all of the intangible assets, or discontinued your development, enhancement or maintenance activities in respect of the intangible assets, and
 - ii. an international-related party (Relevant Entity) is provided with, or otherwise obtained access to, intangible assets including any work-in-progress results of your development or enhancement activities.
- (e) You have otherwise changed the arrangement in connection to your intangible assets where the functions, assets or risks relating to activities contributing to the DEMPE of the intangible assets have been transferred to or assumed or undertaken by an international related party (Relevant Entity) which has resulted, or can reasonably be expected to result, in a change in the profit outcomes of your arrangements in Australia.

For example, there has been a change in your activities such that you are no longer considered to be an 'entrepreneur' and have become a 'distributor' or 'service provider', or where the activities of your international related party in relation to those intangible assets have changed such that they have become an 'entrepreneur' instead of a 'service provider' to you.

2. In connection with or following the restructure or change identified in Question 1, do any of the following apply? If yes, assign **5 points**.
- (a) You have entered into an arrangement with an international related party (Relevant Entity) that involves your continued use of, or benefit from, the Relevant Intangible Assets (or intangible assets that relate to the Relevant Intangible Assets).
- (b) You continue to be involved in the development, enhancement, maintenance or protection (DEMP) of the Relevant Intangible Assets (or intangible assets that relate to the Relevant Intangible Assets).
- Examples include but are not limited to:
- the use of such intangible assets in the manufacturing, marketing or distribution of products or rendering of services connected to or otherwise utilising the Relevant Intangible Assets
 - the performance of R&D activities in connection with such intangible assets in Australia either on a contract basis or for your own benefit
 - the licensing of, or entry into, a cost sharing agreement granting you the right to use such intangible assets.

²⁵ This covers situations where you are already a party to a cost contribution agreement, and another international related entity enters the agreement and thereby obtaining rights or access to your intangible assets.

B. Circumstances of the Relevant Entity

3. Following the restructure or change identified in Question 1, what is the category that best describes the circumstances of the Relevant Entity in connection with the Relevant Intangible Assets?

In this question, references to Relevant Intangible Assets include intangible assets related to the Relevant Intangible Assets that Question 2 applies to.

Where there is more than one Relevant Entity in your Intangibles Migration Arrangement, include the score for the Relevant Entity with the highest number of points.

Category 1 (assign 15 points) if any of the following apply:

- The Relevant Entity is newly established or in the initial stages of establishing operations.
- The Relevant Entity has no or very few staff or it does not currently have qualified staff with the expertise or skills to independently manage, perform or control the DEMPE activities connected to the Relevant Intangible Assets.
- DEMPE activities connected to the Relevant Intangible Assets continue to be or are primarily conducted by persons located in Australia (including operating through a branch).
- The Relevant Entity has no, or very limited, capacity²⁶ to assume the risks associated with the DEMPE activities in relation to the Relevant Intangible Assets.
- The Relevant Entity completely or predominantly outsources DEMPE activities.
- Not including activities outsourced to other entities, the Relevant Entity's activities are wholly or predominately the holding or management of intangible assets.

Category 2 (assign 10 points) if any of the following apply:

- The Relevant Entity employs qualified staff, and has the ability to independently perform, manage and control some of the DEMPE activities connected to the Relevant Intangible Assets, however, is not currently able to wholly manage, perform and control the DEMPE activities connected to the Relevant Intangible Assets, including the assumption of the associated risks. This includes circumstances where the Relevant Entity is anticipated to transition to a position where it has qualified staff, capacity and capability to perform, manage and control all of the DEMPE activities in the future. However, in circumstances where the qualified staff employed by the Relevant Entity to perform such activities in relation to the Relevant Intangible Assets are predominantly the same staff who had previously performed the same activities in Australia (but relocated, were contracted to, or became employed by the Relevant Entity), the circumstances would be considered to fall in Category 1.
- The Relevant Entity outsources some DEMPE activities²⁷ but there is not a high degree of oversight and supervision from the Relevant Entity (refer to Example 13 of this Guideline for an example of a high degree of oversight and supervision).

Category 3 (assign 5 points) if all of the following apply in relation to the current income year:

- The restructure or change does not involve a change in ownership of the Relevant Intangible Assets.
- The Relevant Entity:
 - is granted access, use, or rights to use the Relevant Intangible Assets limited to the Relevant Entity in deriving its own active business income²⁸, and
 - does not carry on a business which predominantly involves the holding, management or development of intangible assets (including licensing or undertaking substantial additional DEMPE activities).
- You receive and include the residual profits²⁹ associated with the Relevant Intangible Assets (such as residual profits from the sale of products associated with the intangible assets) in your Australian assessable income.

Category 4 (assign 0 points) if any of the following apply:

- The Relevant Entity has always managed and controlled DEMPE activities (and the associated risks) in relation to the global group's intangible assets and employs staff with the relevant expertise and skills to do so.

<ul style="list-style-type: none"> All DEMP activities are undertaken by the Relevant Entity or Australian and other associates perform services (such as contract R&D or distribution functions) for the Relevant Entity under a high degree of oversight and supervision from the Relevant Entity (refer to Example 13 of this Guideline for an example of a high degree of oversight and supervision). <p>4. Is the Relevant Entity a tax resident in the jurisdiction which is also the jurisdiction in which the products or services related to the Relevant Intangible Assets are predominantly sold to unrelated or third parties?</p> <p>If yes, and if the circumstances of the Relevant Entity are best described as Category 2 or 3, you can subtract 5 points.</p>
<p>C. Tax outcomes</p> <p>5. Do any of the following apply to the Intangibles Migration Arrangement? Assign 10 points if one of the following apply, assign 20 points if 2 or more apply.</p> <p>In this question, references to Relevant Intangible Assets include intangible assets related to the Relevant Intangible Assets that Question 2 applies to.</p> <p>(a) The Relevant Entity or the Relevant Intangible Assets are subject to a preferential tax regime considered to be harmful according to the OECD Forum on Harmful Tax Practices.</p> <p>(b) The Relevant Entity derives (or is anticipated to derive) income relating to the Relevant Intangible Assets and has (or anticipates the benefit of) a tax holiday, exemption or concession that is likely to substantially shelter or reduce its tax payable.</p> <p>(c) The Relevant Entity is tax resident of, or a branch in, a Specified jurisdiction.</p> <p>(d) The Relevant Entity derives (or is anticipated to derive) income relating to the Relevant Intangible Assets and has available to it R&D tax offsets or credits, deductible amortisation or depreciation in relation to the Relevant Intangible Assets, or significant tax losses, that are anticipated to substantially offset or shelter its income.,</p> <p>(e) The Relevant Entity is a foreign hybrid company under Division 830 of the ITAA 1997, and a member of your tax consolidated group or multiple entry consolidated group or is characterised differently for income tax purposes in 2 or more jurisdictions.³⁰</p> <p>(f) The Relevant Entity was previously an Australian tax resident and has subsequently become a tax resident in another jurisdiction.</p> <p>(g) The restructure or change is recognised as an acquisition of the Relevant Intangible Assets in a foreign jurisdiction for tax purposes but is not recognised or taxed as a disposal in Australia for income tax purposes.</p> <p>If only (g) applies, your risk score for this question is 15 points.</p> <p>6. Where there is more than one Relevant Entity in your Intangibles Migration Arrangement, include the score for the Relevant Entity with the highest number of points for this question. Assign 10 points if, as a result of the restructure or change identified in Question 1, excluding the upfront gains arising from the restructure or change in the year of the</p>

²⁶ Including financial capacity.

²⁷ Including where you, or your Australian-related parties, are performing services (such as R&D) for the Relevant Entity.

²⁸ This would not be the case where, for example, the Relevant Intangible Assets (or related assets) are further developed or enhanced by the Relevant Entity, or where the Relevant Entity has licensed or allowed other entities to use the Relevant Intangible Assets, including where income is derived from licensing or allowing other entities to use the Relevant Intangible Assets.

²⁹ Refer to the description of residual profit (or loss) in paragraph 2.152 and the Glossary of the 2022 OECD Transfer Pricing Guidelines. In summary, residual profit (or loss) refers to the residual profit (or loss) remaining in a residual analysis, after allowing for profits in the first stage, being profits attributable to the contributions which can be reliably benchmarked: typically less complex contributions for which reliable comparables can be found. Ordinarily this initial remuneration for the first category would be determined by applying one of the traditional transaction methods or a transactional net margin method. For the purposes of this Guideline, royalty or licensing income based on a percentage of revenue is not considered to be residual profits.

³⁰ For example, the entity is viewed as opaque (for example, taxed as a company) in a jurisdiction but is viewed as flow-through or disregarded in one or more other jurisdictions.

transaction (whether capital or revenue)³¹, your taxable income is, or might reasonably be expected to be, less than it would have been if the restructure or change had not been entered into.

In considering your response to this question, take into account the outcomes of the restructure or change over the life of the arrangement or the life of the intangible assets.

D. Undocumented or unrecognised dealings

7. Assign **15 points** if your arrangement is of the kind described in Example 3 in Appendix 1 to this Guideline, where the Relevant Entity is substantially using or directly benefiting from your intangible assets and:

- you or your group do not have any documentation that identifies the intangible assets relevant to your Intangibles Migration Arrangement or evidences the processes and activities associated with the intangible assets, and
- you do not receive any remuneration in relation to such use or benefit.

While this is dependent on the facts and circumstances, examples of where this can apply include:

- where the Relevant Entity is using the intangible assets in income generating activities or activities that are core to their business, such as the sale of goods or provision of services to related or third parties
- where the Relevant Entity is using the intangible assets to further develop or improve their own intangible assets, the use of which results in, or might reasonably be expected to result in, increased revenue for the Relevant Entity
- where the Relevant Entity is deriving income by allowing other entities to use your intangible assets.

Risk Assessment Framework Table 2 – risk factors – other Intangibles Migration Arrangements

58. Complete RAF Table 2 if, during the income year, you had an Intangibles Migration Arrangement involving Australian activities in connection with intangible assets held offshore.

59. If you have applied RAF Table 1 to a Migration that took place in the current year, you do not need to apply RAF Table 2 in relation to the resulting arrangement in the same year. However, you should apply RAF Table 2 to assess any ongoing arrangement in subsequent years.

60. You may need to also complete RAF Table 1 if your current Intangibles Migration Arrangement is connected to a past restructure or change (see Section D). Refer to paragraphs 26 to 28 of this Guideline for our expectations regarding reporting of your self-assessment in relation to a past restructure or change.

³¹ Including capital gains from the disposal of the intangible asset (under CGT or Division 40), upfront payment under a licensing agreement or a cost contribution agreement.

Risk Assessment Framework Table 2: Risk factors for mischaracterisation of Australian activities in connection with intangible assets**A. Your overall characterisation**

1. Under the arrangement, do you undertake development, enhancement, maintenance or protection (DEMP) activities in connection with intangible assets for the benefit of an international related party (Relevant Entity) that holds, or has legal or economic ownership of the intangible assets (Relevant Intangible Assets)?

If your answer is **yes**, assign the following risk score depending on how many of the following DEMP activities apply to you (that is, **1 – 10 points**, **2 – 15 points**, **3 – 20 points**), and proceed to the next question.

- You conduct or perform R&D activities in connection with those intangible assets in Australia.
- You perform business activities or functions which might reasonably be expected to enhance or add value to those intangible assets in Australia. Examples include manufacturing activities, marketing activities, installation, customisation or other support services for digital products, conducting regulatory functions³² to seek market access and authorisation.
- You perform other DEMP activities in connection with those intangible assets in Australia.

If your answer to this question is **no**, apart from considering whether or not you need to also complete RAF Table 1 in relation to a connected Migration in the past (see Question 5), you do not need to proceed with the rest of this Risk Assessment Framework Table for this arrangement.

B. Circumstances of the Relevant Entity

2. What is the category that best describes the activities of the Relevant Entity in connection with the Relevant Intangible Assets?

In answering this question, the 'Relevant Entity' is the related party that has granted the right to use, or otherwise made available the intangible assets to you.³³

Where there is more than one Relevant Entity in your Intangibles Migration Arrangement, include the score for the Relevant Entity with the highest number of points.

Category 1 (assign 15 points) if any of the following apply:

- The Relevant Entity is newly established or in the initial stages of establishing operations.
- The Relevant Entity has no or very few staff or it does not currently have qualified staff with the expertise or skills to independently manage, perform or control the DEMPE activities connected to the intangible assets.
- DEMPE activities connected to the intangible assets continue to be or are primarily conducted by persons located in Australia (including operating through a branch).
- The Relevant Entity has no, or very limited, capacity³⁴ to assume the risks associated with the DEMPE activities in relation to the intangible assets.
- The Relevant Entity completely or predominantly outsources DEMPE activities.
- Not including activities outsourced to other entities, the Relevant Entity's activities are wholly or predominately the holding or management of intangible assets.

Category 2 (assign 10 points) if any of the following apply:

- The Relevant Entity employs qualified staff, and has the ability to independently perform, manage and control *some* of the DEMPE activities connected to the

³² This includes where, the products sold or activities performed in Australia are regulated in Australia and you (or your Australian associates) are the legally responsible entity for regulatory purposes.

³³ As an example, if the intangible assets are legally owned by an entity in Country A, and the legal owner has entered into a cost sharing agreement with another entity in Country B such that the second entity has economic ownership of the intangible assets over the Asia-Pacific region and the second entity is the party granting you the right to use the intangible assets in Australia, both entities are Relevant Entities.

³⁴ Including financial capacity.

intangible assets; however is not currently able to wholly manage, perform and control the DEMPE activities connected to the intangible assets including the assumption of the associated risks. This includes circumstances where the Relevant Entity is anticipated to transition to a position where it has qualified staff, capacity and capability to perform, manage and control all of the DEMPE activities in the future.

However, in circumstances where the qualified staff employed by Relevant Entity to perform such activities in relation to the intangible assets are predominantly the same staff who had previously performed the same activities in Australia (but relocated, were contracted to, or became employed by the Relevant Entity), the circumstances would be considered to fall in Category 1.

- The Relevant Entity outsources some DEMPE activities³⁵, but there is not a high degree of oversight and supervision from the Relevant Entity (refer to Example 11 of this Guideline for examples of high degree of oversight and supervision).

Category 3 (assign 0 points) if any of the following apply:

- The Relevant Entity has always managed, owned and controlled DEMPE activities in relation to the Relevant Intangible Assets and employs staff with the relevant expertise and skills.
- All DEMP activities are undertaken by the Relevant Entity or Australian and other associates perform services (such as contract R&D or distribution functions) for the Relevant Entity under a high degree of oversight and supervision from the Relevant Entity (refer to Example 13 of this Guideline for an example a of high degree of oversight and supervision).

3. If the circumstances of the Relevant Entity are considered to be Category 1 or 2, **and** you receive and include residual profits³⁶ (or a share of the residual profits) associated with the use of the Relevant Intangible Assets in your Australian assessable income in the current income year, you can subtract **5 points**.

C. Tax outcomes

4. Do any of the following apply to the Intangibles Migration Arrangement? Assign **5 points** if one or more of the following apply:
- (a) The Relevant Entity or the Relevant Intangible Assets are subject to a preferential tax regime considered to be harmful according to the OECD Forum on Harmful Tax Practices.
 - (b) The Relevant Entity derives (or is anticipated to derive) income relating to the Relevant Intangible Assets and has (or anticipates the benefit of) a tax holiday, exemption or concession that is likely to substantially shelter or reduce its tax payable.
 - (c) The Relevant Entity is tax resident of, or a branch in, a Specified jurisdiction.
 - (d) The Relevant Entity derives (or is anticipated to derive) income relating to the Relevant Intangible Assets and has available to it R&D tax offsets or credits, deductible amortisation or depreciation in relation to the Relevant Intangible Assets, or significant tax losses, that are anticipated to substantially offset or shelter its income.
 - (e) The Relevant Entity is a foreign hybrid company under Division 830 of the ITAA 1997, and a member of your tax consolidated group or multiple entry consolidated group or is characterised differently for income tax purposes in 2 or more jurisdictions.³⁷

³⁵ Including where you, or your Australian-related parties, are performing services (such as R&D) for the Relevant Entity.

³⁶ Refer to the description of residual profit (or loss) in the definition of 'residual analysis' in paragraph 2.152 and the Glossary of the 2022 OECD Transfer Pricing Guidelines. In summary, residual profit (or loss) refers to the residual profit (or loss) remaining in a residual analysis, after allowing for profits in the first category, being profits attributable to the contributions which can be reliably benchmarked: typically less complex contributions for which reliable comparables can be found. Ordinarily, this initial remuneration for the first category would be determined by applying one of the traditional transaction methods or a transactional net margin method. For the purposes of this Guideline, royalty or licensing income based on a percentage of revenue is not considered to be residual profits.

³⁷ For example, the entity is viewed as opaque (for example, taxed as a company) in a jurisdiction but is viewed as flow-through or disregarded in one or more other jurisdictions.

- (f) The Relevant Entity was previously an Australian tax resident and has subsequently become a tax resident in another jurisdiction.
Where there is more than one Relevant Entity in your Intangibles Migration Arrangement, include the score for the Relevant Entity with the highest number of points.

D. Connection with a past Migration – complete RAF Table 1 in relation to the Migration of your intangible assets

5. Do any of the following apply to your Intangibles Migration Arrangement?

- Your Intangibles Migration Arrangement relates to intangible assets (or intangible assets intrinsically linked³⁸ to such intangibles) that have previously been held legally or beneficially by you (or your Australian associate). This includes where your Intangibles Migration Arrangement relates to products or services in connection with such intangible assets.
- You have legal or beneficial ownership of the intangible assets that are subject to this Intangibles Migration Arrangement, but there was a restructure or change associated with your intangible assets of the kind described in Question 1 in RAF Table 1 (other than an Excluded Outbound Distribution Arrangement) in the past.

If **yes**, you need to also complete RAF Table 1 of this Guideline in relation to the past restructure or change.

³⁸ Examples of intangible assets that are intrinsically linked to intangible assets previously held by you include intangible assets that are new versions of, or are developed based on, such intangible assets.

PART 3 – Our evidence expectations

61. Appendix 2 to this Guideline sets out the types of evidence that we are likely to have regard to when examining your Intangibles Migration Arrangements and would typically expect taxpayers to be able to produce to substantiate their arrangements.
62. As explained in Part 1 of this Guideline and our compliance approach, the higher the risk rating, the more likely it is that we will seek evidence beyond your self-assessment as part of any review of an arrangement. The risk rating of your arrangement will also influence the type and level of evidence we expect from you to substantiate the arrangement.
63. The evidence outlined in Appendix 2 to this Guideline is intended to serve as a general guide and should not be treated as an exhaustive list. It is not the intention of this Guideline to unnecessarily impose burdensome requirements on you in respect of the evidence required to substantiate your Intangibles Migration Arrangements. However, setting out the kinds of information and documents we are likely to request may assist you to mitigate the level of compliance risk posed by your Intangibles Migration Arrangements and ensure that any engagement with us is as efficient as possible.
64. We recognise that certain evidence identified in Appendix 2 to this Guideline may not be relevant to the facts and circumstances of your Intangibles Migration Arrangements or that it may be difficult for you to assess the degree of evidence that is expected. In these circumstances, your substantiation should focus on whether there is sufficient evidence to enable us to verify the information and to reach a proper assessment of your Intangibles Migration Arrangements.
65. The type and level of evidence we expect from you will be influenced by the complexity of your business and the extent to which your Intangibles Migration Arrangements contribute to that business. We will also consider your business systems and governance processes, including any appropriate materiality thresholds that you apply or follow in your business in relation to the management or governance of your, or your global group's, intangible assets, to focus on evidence that can reasonably be expected to be created and relied on in your business.
66. The expectations outlined in this Part and Appendix 2 to this Guideline should not be viewed as replacing or substituting the requirements for transfer pricing documentation under Subdivision 284-E of Schedule 1 to the TAA (refer to Taxation Ruling TR 2014/8 *Income tax: transfer pricing documentation and Subdivision 284-E*). Notwithstanding that, our Evidence Expectations may assist you in being able to support and verify your transfer pricing documentation for the purposes of Subdivision 284-E of Schedule 1 to the TAA.

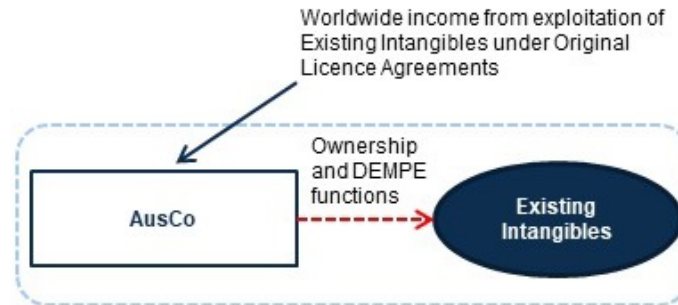
APPENDIX 1 – Examples of Intangibles Migration Arrangements

67. This Appendix provides examples of Intangibles Migration Arrangements to illustrate the kinds of matters we will generally consider in assessing the compliance risks relating to your Intangibles Migration Arrangements. The application of the risk assessment framework is also included to illustrate how the framework applies to arrangements. They highlight the circumstances in which we consider the compliance risks that may be associated with your Intangibles Migration Arrangements and the facts that may support this assessment.

68. It is important to note that any reference to a particular intangible asset, industry or commercial activity in the examples is illustrative and does not limit the particulars of an example arrangement to any one industry.

Table 2: Examples of arrangements and the level of risk

Level of risk	Examples of arrangements
Red zone (Higher risk)	Example 1 – centralisation of intangible assets Example 2 – bifurcation of intangible assets Example 3 – non-recognition of Australian intangible assets and DEMPE activities Example 4 – Migration of pre-commercialised intangible assets Example 5 – Migration of pre-commercialised intangible assets Example 6 – transfer of intangible assets to a foreign hybrid entity Example 7 – bifurcation of intangible assets Example 8 – cost contribution arrangement
Amber zone (Medium risk)	Example 9 – transfer of rights to intangible assets under licence agreement
Blue zone (lower to medium risk)	Example 10 – centralisation of intangible assets Example 11 – contract research and development arrangement
Green zone (Lower risk)	Example 12 – centralisation of intangible assets Example 13 – contract research and development arrangement Example 14 – cost contribution arrangement
Out of scope	Example 15 – service arrangement involving intangible assets

Example 1 – centralisation of intangible assets – red zone*Diagram 2: Example 1 – overview of original arrangement**Original arrangement*

69. AusCo is part of a global group that manufactures, markets and sells goods and provides services associated with those sales. AusCo and its international related parties exploit valuable intangible assets in undertaking their operations. The intangible assets include patents, know-how, trade marks, copyright and other intangible assets or rights (Existing Intangibles). These Existing Intangibles are naturally grouped together in the internal systems and governance processes of the AusCo's global group.

70. AusCo owns, manages and controls DEMPE activities associated with the Existing Intangibles and assumes associated risks. AusCo derives royalties from its international related parties for the exploitation of the Existing Intangibles globally under licence agreements between AusCo and its international related parties (Original Licence Agreements).

Decision to centralise intangible assets

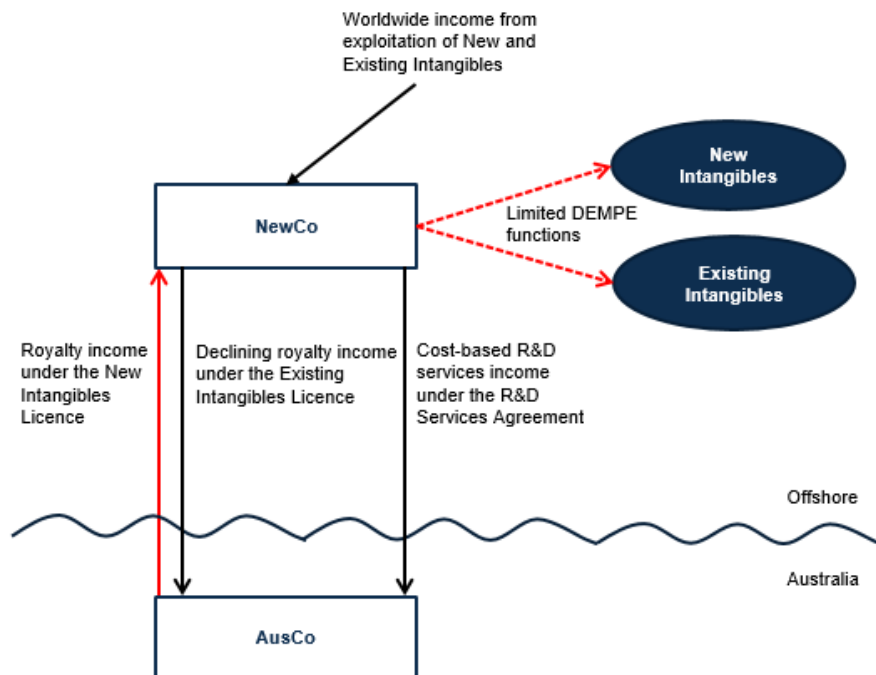
71. AusCo and the global group decide that the Existing Intangibles and any new or future intangible assets that are created or developed (New Intangibles) should be centralised in a new entity (NewCo) to be located in a foreign jurisdiction, where NewCo is expected to qualify for a tax concession for income derived from intangible assets. The New Intangibles will initially comprise adaptations of the patents, know-how, trade marks, copyright and other intangible assets or rights that form part of the Existing Intangibles.

72. As a result of the decision to centralise, AusCo enters into a licence agreement (Existing Intangibles Licence) with NewCo to transfer the rights to the Existing Intangibles to NewCo. The term of the Existing Intangibles Licence is based on a period determined to reflect the remaining useful life of the Existing Intangibles at the time. Under the Existing Intangibles Licence, NewCo will pay royalties to AusCo for the right to exploit and sub-licence the Existing Intangibles to other international related parties, including AusCo. These royalties decline over the term of the Existing Intangibles Licence and are based on a formula designed by staff in AusCo's finance department to reflect the declining value of the Existing Intangibles over the term of the Existing Intangibles Licence.

73. The Original Licence Agreements between AusCo and its international related parties are terminated. No payments are made to AusCo as a result of the termination. AusCo and its international related parties subsequently execute a master Licence Agreement with NewCo (New Intangibles Licence). Under this agreement, NewCo receives worldwide royalty income from the rights to exploit the Existing Intangibles and any New Intangibles developed.

74. *NewCo and AusCo also enter into a contract R&D Services Agreement. Under this agreement, AusCo will provide R&D services to NewCo in relation to the New Intangibles in return for a fee determined with regard to the costs incurred by AusCo in the provision of the R&D services. Any New Intangibles that are developed as a result of the R&D undertaken by AusCo under the R&D Services Agreement will be owned by NewCo.*

Diagram 3: Example 1 – overview of new arrangement



New arrangement

75. *In the first year following the centralisation of the intangible assets in NewCo, the functions performed, assets used, and risks assumed by AusCo do not substantially change. AusCo continues to employ the same specialised staff and use its expertise and assets to manage, perform and control DEMPE activities associated with the New Intangibles. While the development of the Existing Intangibles ceased as a result of the New Arrangement, AusCo continued to perform and control the management and exploitation of the Existing Intangibles. The functions performed, assets used, and risks assumed by AusCo under the R&D Services Agreement with NewCo result in the development of New Intangibles. The R&D Services Agreement states that the New Intangibles are owned by NewCo. The use of the New Intangibles is subject to the New Intangibles Licence, where AusCo and its international related parties pay royalties to NewCo. NewCo manages and performs limited DEMPE activities and assumes limited risks in connection with the Existing Intangibles or the New Intangibles.*

76. *In the second year following the centralisation of the intangible assets to NewCo, NewCo hires some additional staff and acquires additional assets to assist it in the management of DEMPE activities. These staff and assets are not sufficient to allow NewCo to wholly manage, perform or control the DEMPE activities connected with the New Intangibles and the Existing Intangibles and assume the associated risks. AusCo continues to undertake the majority of the DEMPE activities while receiving cost-based remuneration under the R&D Services Agreement and declining royalties under the Existing Intangibles Licence. NewCo receives royalty income from AusCo and its international related parties for the use and exploitation of the Existing Intangibles and New Intangibles.*

Risk assessment

77. This is a Migration of intangible assets. The relevant Intangibles Migration Arrangement includes all dealings with international related parties in relation to Existing Intangibles and New Intangibles, which are closely related intangible assets.

78. This is not an Excluded Intangibles Arrangement. It is not an Excluded Outbound Distribution Arrangement because NewCo does not merely have limited rights to the intangible assets for the purposes of distribution in that jurisdiction only, nor is it an Excluded Low Value Services Arrangement.

79. According to RAF Table 1 of this Guideline, the risk assessment is as follows:

Table 3: Example 1 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
Restructure or change	<ul style="list-style-type: none"> AusCo has licensed Intangibles to NewCo. Ausco continues to perform and control DEMPE activities for NewCo with respect to Existing Intangibles, as well as intangibles that are connected to the Existing Intangibles (New Intangibles). 	5
Circumstances of the Relevant Entity	<ul style="list-style-type: none"> NewCo is a newly established entity with few employees. Ausco continues to perform and control DEMPE activities for NewCo with respect to Existing Intangibles as well as New Intangibles. 	15
Tax outcomes – Question 5	NewCo is expected to qualify for concessional taxation on the income from the New Intangibles.	10
Tax outcomes – Question 6	Had the New Arrangement not occurred, AusCo would have continued to own and derive income from the exploitation of the Existing Intangibles and the New Intangibles. In addition, AusCo would not have been required to pay royalties to NewCo for the use of the New Intangibles that AusCo developed.	10

80. The total risk score in relation to the New Arrangement is 40.³⁹ The New Arrangement would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.

81. AusCo continued to perform and control DEMPE activities with respect to the Existing Intangibles and the New Intangibles. The New Arrangement does not appropriately recognise AusCo's contributions to the New Intangibles, either through a recognition of the intrinsic link between the Existing and New Intangibles or a recognition of the DEMPE activities performed by AusCo in substance in relation to the New Intangibles.

82. Had the New Arrangement not occurred, AusCo would have continued to own and derive income from the exploitation of the Existing Intangibles and the New Intangibles. AusCo would not have been required to pay royalties to NewCo for the use of the New Intangibles that AusCo developed after entering into the New Arrangement.

83. We will consider the potential application of the transfer pricing provisions, including the exceptions to the basic rule within Subdivision 815-B, and the CGT or capital allowances provisions where relevant. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant or principal purpose of

³⁹ If more tax outcomes listed at Question 5 of RAF Table 1 of this Guideline apply, the risk score will be higher.

obtaining a tax benefit. This may attract the operation of the GAAR in Part IVA of the ITAA 1936, the application of the DPT, or both.

Interaction and application of RAF Table 2

84. In the year of the Migration, only RAF Table 1 needs to be applied. In subsequent years, RAF Table 2 of this Guideline will also be relevant. Question 5 of RAF Table 2 requires an assessment of a connected past Migration under RAF Table 1. In this example, that would involve an assessment of the entry into the New Arrangement, which is shown in Table 3 above. The higher risk rating out of RAF Tables 1 and 2 will apply, therefore, the risk rating under RAF Table 1 for the connected past Migration will apply regardless of the risk rating under RAF Table 2. That is, the New Arrangement will be in the red zone (higher risk).

85. For illustration purposes, the application of RAF Table 2 to the New Arrangement in subsequent years after the Migration is also included below.

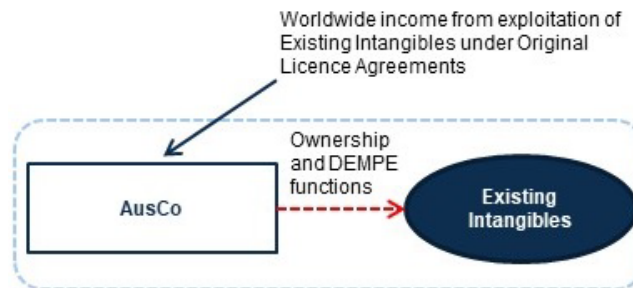
Table 4: Example 1 – assessment under RAF Table 2

Risk assessment factor	Application of criteria	Score
Overall characterisation – AusCo	AusCo performs R&D activities in relation to New Intangibles which are held by ForCo and undertakes the majority of the DEMPE activities.	20
Circumstances of the Relevant Entity	From the second year, NewCo has hired some additional staff and acquired additional assets to assist it in the management of DEMPE activities, though those are not sufficient to allow NewCo to wholly manage, perform or control the DEMPE activities connected with the New Intangibles and the Existing Intangibles and assume the associated risks. As such, the Relevant Entity may be best described as Category 2 – unless those personnel undertaking DEMPE functions were initially from AusCo, in which case the circumstances of NewCo would be considered to fall within Category 1.	10
Tax outcomes	NewCo is expected to qualify for concessional taxation on the income from the New Intangibles.	5

86. If NewCo's circumstances remain in Category 1, the risk rating under RAF Table 2 will also be in the red zone.

Example 2 – bifurcation of intangible assets – red zone

Diagram 4: Example 2 – overview of original arrangement

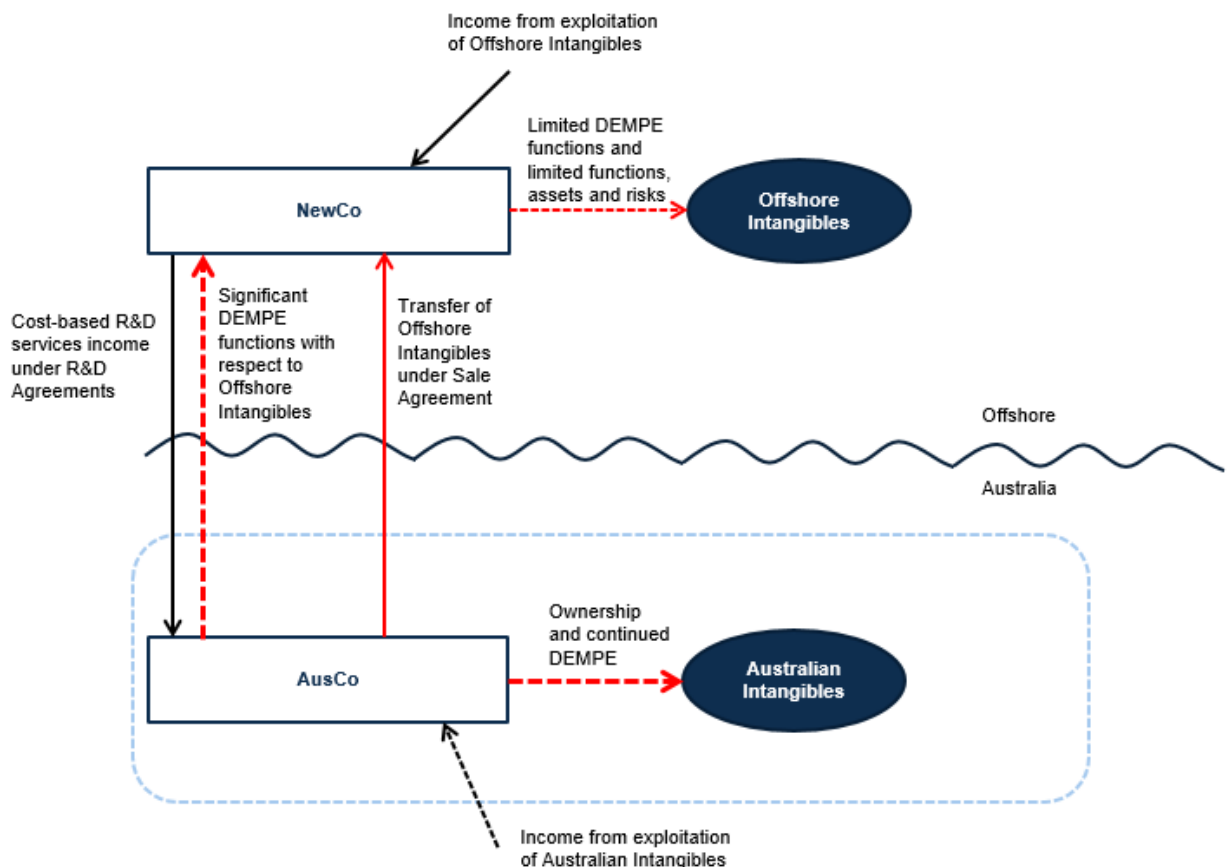


Original arrangement

87. AusCo is part of a global group that manufactures, markets and sells goods. AusCo and its international related parties exploit valuable intangible assets in undertaking their operations. The intangible assets include patents, know-how, trade marks, copyright and other intangible assets or rights (Existing Intangibles), which are grouped together in the internal systems of AusCo’s global group.

88. AusCo manages, performs and controls the DEMPE activities associated with the existing intangibles and assumes associated risks. AusCo derives royalties from the international related parties for the exploitation of the existing intangibles globally under licence agreements between AusCo and the international related parties (Original Licence Agreements).

Diagram 5: Example 2 – overview of new arrangement



New arrangement

89. *AusCo and its global group decide that a new entity located in a foreign jurisdiction (NewCo) should exploit the Existing Intangibles in offshore markets by owning the relevant intangible assets (Offshore Intangibles). NewCo is in a specified country.⁴⁰*

90. *As part of this decision, AusCo will continue to exploit the Existing Intangibles in Australia only and will own the relevant intangible assets and undertake the associated DEMPE activities as a result (Australian Intangibles).*

91. *The decision to transfer the Offshore Intangibles to NewCo (and bifurcate the Existing Intangibles into Australian Intangibles and Offshore Intangibles) is stated to be based on a desire to facilitate expansion into emerging markets and establish a global centre of expertise for new product development (New Arrangement). While AusCo has prepared transfer pricing documentation that focuses on determining whether the cost-based R&D services income received under the R&D arrangement is arm's length, it is not able to evidence the commercial rationale in making the decision to transfer the Offshore Intangibles to NewCo.*

92. *To implement the New Arrangement, AusCo enters into a sale agreement (Sale Agreement) with NewCo, transferring the Offshore Intangibles to NewCo for an amount of consideration. This amount was determined by reference to a valuation that was undertaken by AusCo in relation to the Offshore Intangibles. The Sale Agreement provides that any entitlement to royalties connected with the Offshore Intangibles will be novated to NewCo. This includes the royalties AusCo received from the international related parties under the Original Licence Agreements. No payments are made to AusCo as a result of the termination.*

93. *NewCo and AusCo also enter into an agreement where AusCo will provide R&D services to NewCo for cost-based remuneration (R&D Agreement). Under the R&D Agreement any new Offshore Intangibles that are developed as a result of the R&D undertaken by AusCo will be owned by NewCo.*

94. *At the time the New Arrangement is implemented, NewCo does not have sufficient assets or employ sufficiently qualified staff to wholly manage, perform or control the DEMPE of the Offshore Intangibles and assume the associated risks.*

95. *Some members of AusCo's management relocate to the jurisdiction of NewCo to facilitate the New Arrangement. However, AusCo continues to otherwise employ specialised staff and use its expertise and assets to manage, perform and control DEMPE activities associated with the bifurcated Australian Intangibles and the Offshore Intangibles, and assume the associated risks. AusCo is remunerated for these activities with a cost-based service fee pursuant to the R&D Agreement with NewCo.*

96. *AusCo continues to own the Australian Intangibles, which allows it to manufacture, market and sell goods in the Australian market. AusCo continues to manufacture, market and sell goods associated with the Australian Intangibles in the Australian market and derive associated profits, but no longer receives royalties from international related parties for the exploitation of the Offshore Intangibles in undertaking similar functions offshore.*

97. *In subsequent years, AusCo continues to primarily manage, perform and control the DEMPE of both the Australian Intangibles and the Offshore Intangibles. There is limited new product development undertaken by NewCo independent of the DEMPE activities outsourced to, and managed and controlled by, AusCo in relation to the Offshore Intangibles.*

⁴⁰ All references to 'specified country' in Appendix 1 to this Guideline are to jurisdictions defined as 'specified countries' in the instructions to the International Dealings Schedule for the relevant income year.

Risk assessment

98. *This is a Migration of intangible assets. The Migration involves the transfer of Offshore Intangibles to NewCo. NewCo is the Relevant Entity.*

99. *According to RAF Table 1 of this Guideline, the risk assessment is as follows.*

Table 5: Example 2 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>AusCo has transferred Offshore Intangibles to NewCo; post-transfer, AusCo provides R&D services to NewCo. AusCo also continues to conduct DEMPE on intangibles that are connected or closely related to Offshore Intangibles, being the Australian Intangibles.</i>	<i>5</i>
<i>Circumstances of the Relevant Entity</i>	<i>At the time the New Arrangement is implemented, NewCo does not have sufficient assets or employ sufficiently qualified staff to wholly manage, perform or control the DEMPE of the Offshore Intangibles and assume the associated risks. The relocation of staff who had previously performed the same activities in Australia would not result in this being in a category other than Category 1.</i>	<i>15</i>
<i>Tax outcomes – Question 5</i>	<i>NewCo is tax resident of a specified country, therefore satisfying the definition of ‘Specified jurisdiction’ for the purposes of the risk assessment framework (paragraph 55 of this Guideline).</i>	<i>10</i>
<i>Tax outcomes – Question 6</i>	<i>Had the New Arrangement not occurred AusCo would have continued to own and derive income from the exploitation of the Existing Intangibles, including the bifurcated Offshore Intangibles.</i>	<i>10</i>

100. *The total risk score in relation to the New Arrangement is 40. The New Arrangement would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.*

101. *There is a risk that the New Arrangement has artificially bifurcated the Existing Intangibles into Australian Intangibles and Offshore Intangibles such that the New Arrangement is not arm’s length in nature or is structured to avoid tax obligations. The risk in this regard is emphasised where AusCo is not able to provide evidence substantiating its decision-making for entering into this arrangement or does not recognise or provide evidence referring to anticipated or potential Australian tax impacts that were considered in making the decision to enter into the arrangement.*

102. *AusCo continued to manage and control the DEMPE activities of the Offshore Intangibles, which in economic substance was inconsistent with the form of the New Arrangement. We may take the view that an independent entity dealing wholly independently in circumstances comparable to AusCo would not have entered into the New Arrangement with NewCo, as it involved AusCo disposing of the Offshore Intangibles and associated income streams under non-arm’s length conditions.*

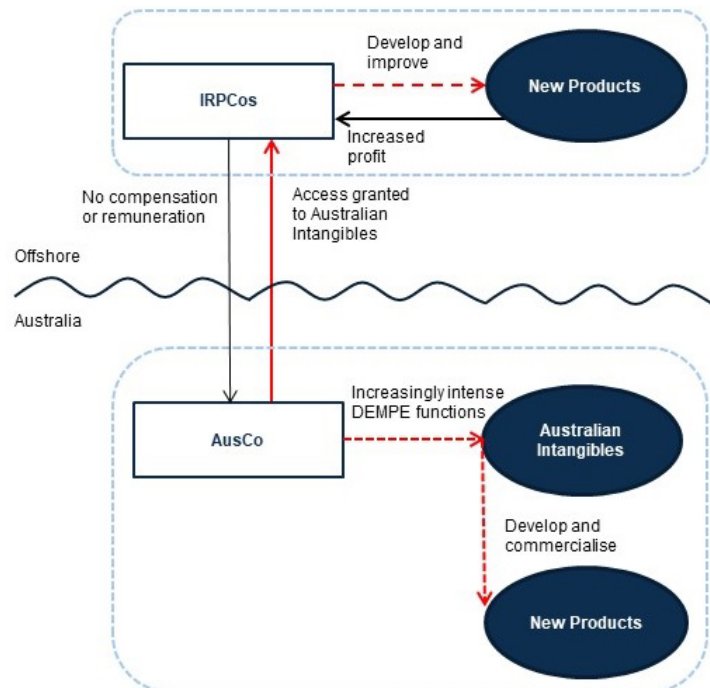
103. *We may also take the view that the distinction between the Australian Intangibles and the Offshore Intangibles and the separation of DEMPE activities in relation to these assets lacks commercial rationale and economic substance.*

104. *We will consider the potential application of the transfer pricing provisions, including the exceptions to the basic rule within Subdivision 815-B, the CGT provisions and the capital allowances provisions. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant or principal purpose of obtaining a tax benefit.*

This may attract the operation of the GAAR in Part IVA of the ITAA 1936, the application of the DPT, or both.

Example 3 – non-recognition of Australian intangible assets and DEMPE activities – red zone

Diagram 6: Example 3 – overview of arrangement



105. AusCo is part of a global group that manufactures and sells goods and provides associated services. AusCo and its international related parties have historically recognised the use of minimal valuable intangible assets in undertaking their operations, aside from certain trade marks and intangible assets associated with the global group's brand and product lines. A number of these trade marks are owned by AusCo and connected with products and services exclusively distributed in Australia. AusCo manages, performs and controls DEMPE activities connected with its Australian trade marks and assumes associated risks.

106. Over a number of years, AusCo's DEMPE activities increase in intensity, resulting in the development and commercialisation of a number of new and improved products and services. Several new identifiable intangible assets are developed from these activities. AusCo does not account for any additional intangible assets in its financial statements or register the relevant intangible assets for legal protection. The relevant intangible assets include patentable products and processes, know-how, copyright and other intangible assets or rights. These intangible assets and the Australian trade marks are developed, maintained, enhanced and owned by AusCo (Australian Intangibles).

107. AusCo does not formally recognise any Australian Intangibles or engage in annual review or analysis of its processes and activities associated with the Australian Intangibles. Likewise, AusCo's global group does not maintain a comprehensive contemporaneous R&D or intellectual property policy or other relevant processes or guidelines.

108. In the following years, a number of AusCo's international related parties (IRPCos) are granted access to the Australian Intangibles and use these assets to develop and improve equivalent products and services in offshore jurisdictions. AusCo does not enter into any legal agreements for the transfer or licensing of these assets with its international

related parties or update its transfer pricing policy or documentation in connection with these dealings.

109. *The profitability of AusCo's international related parties increases as a result of accessing and exploiting the Australian Intangibles and the functions performed, assets used, and risks assumed by AusCo in connection with the DEMPE of the Australian Intangibles. AusCo does not receive compensation or remuneration from its international related parties in connection with their access to, and use of, the Australian Intangibles.*

Risk assessment

110. *This is a Migration of intangible assets. According to RAF Table 1 of this Guideline, the risk assessment is as follows.*

Table 6: Example 3 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>AusCo has made the Australian Intangibles available to IRPCos, which are the Relevant Intangible Assets for the purposes of RAF Table 1. AusCo continues to be involved in the DEMPE of Australian Intangibles.</i>	<i>5</i>
<i>Circumstances of the Relevant Entity</i>	<i>IRPCos do not perform, manage or control the DEMPE activities associated with Australian Intangibles, which are performed by AusCo, along with the assumption of the associated risks in respect of the Australian Intangibles, IRPCos are best described to be Category 1.</i>	<i>15</i>
<i>Undocumented or unrecognised dealings</i>	<i>AusCo receives no compensation or remuneration as a result of this arrangement. AusCo and the global group do not have documentation that identify the intangible assets that are relevant to the Intangibles Migration Arrangement or evidences the processes and activities associated with the relevant intangible assets.</i>	<i>15</i>

111. *The total risk score for this arrangement is 35. This arrangement would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.*

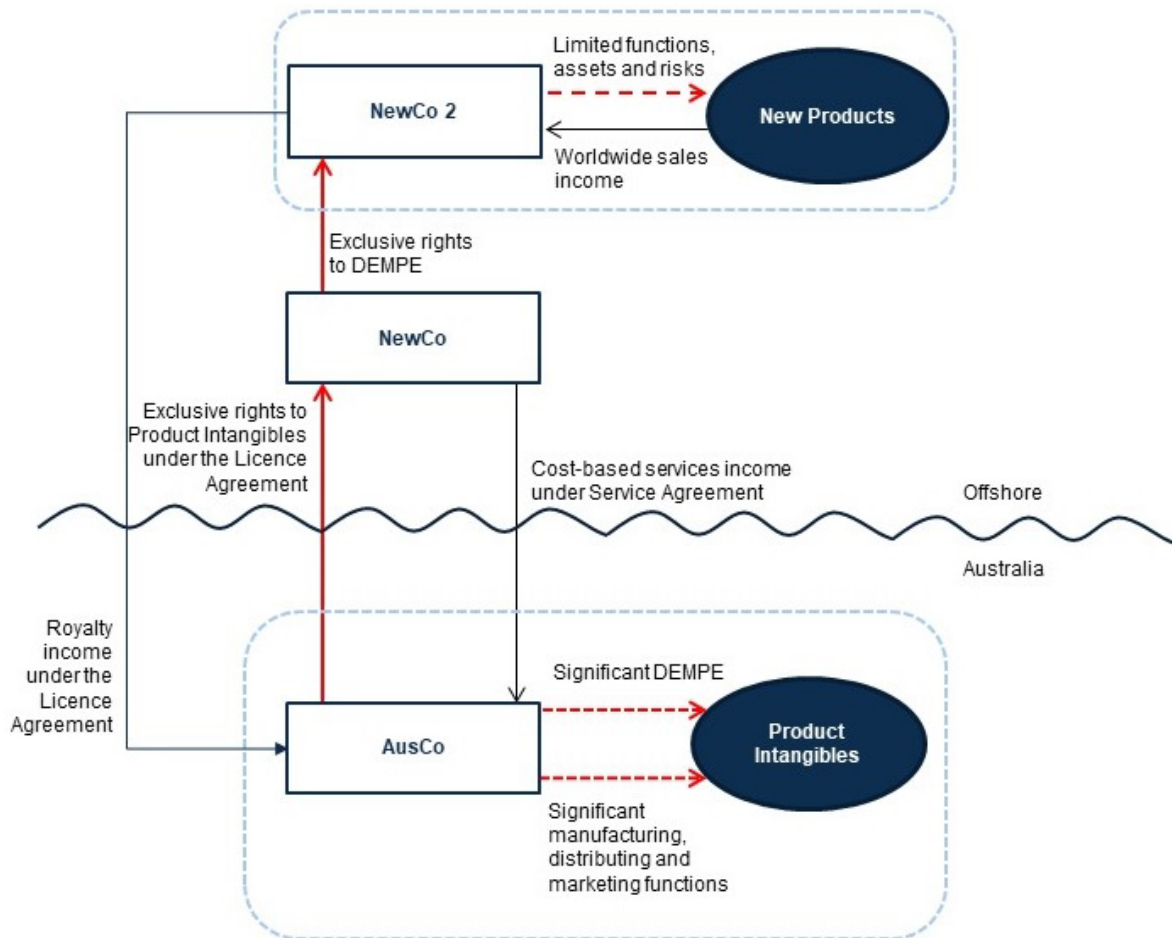
112. *There is a risk that the dealings entered into by AusCo may not be consistent with AusCo's best economic interests having regard to the commercial options realistically available to AusCo. AusCo granted access to and use of the Australian Intangibles to its international related parties where no agreements or form of remuneration were considered or recognised.*

113. *The effect of the arrangement is that AusCo has allowed its international related parties to exploit and derive benefits in connection with the Australian Intangibles for nil consideration. The arrangement fails to appropriately recognise DEMPE activities managed, performed and controlled by AusCo, development of Australian Intangibles from AusCo's activities and exploitation of assets developed by AusCo by AusCo's international related parties. The risk is heightened where the DEMPE activities undertaken by AusCo are extensive, or where the intangible assets are of particular commercial value and substantially used by IRPCos, such that it can be reasonably expected that the use of, or access to them would give rise to remuneration to AusCo.*

114. *We will consider the potential application of the transfer pricing provisions, including the exceptions to the basic rule within Subdivision 815-B. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant or principal purpose of obtaining a tax benefit. This may attract the operation of the GAAR in Part IVA of the ITAA 1936, the application of the DPT, or both.*

Example 4 – Migration of pre-commercialised intangible assets – red zone

Diagram 7: Example 4 – overview of arrangement



115. AusCo is part of a global group that develops, manufactures, markets and sells products globally. AusCo and its international related parties engage in the DEMPE of valuable intangible assets in undertaking their operations. These intangible assets include patents, know-how, trade marks, copyright and other intangible assets or rights. In the global group's internal systems, such intangible assets are grouped together by product line.

116. AusCo spent a number of years undertaking R&D in Australia to develop a new product range, which resulted in the development of pre-commercialised intangible assets (Product Intangibles). AusCo owns the Product Intangibles. AusCo considers the Product Intangibles to be strategically important to their business.

117. Prior to the Product Intangibles being commercialised, AusCo and the global group decide to incorporate a new entity in an offshore jurisdiction (which is a specified country), NewCo, for the stated purpose of further developing, manufacturing and commercialising the new products associated with the Product Intangibles (New Products). While AusCo has the capability and capacity to develop, manufacture and commercialise the New Products, the global group decides that NewCo should instead own the rights to the Product Intangibles.

118. In addition, at the time of this decision, the global group decides that NewCo 2, another new entity incorporated in the offshore jurisdiction, should ultimately own the rights to the Product Intangibles. The plan for the Product Intangibles to be transferred from NewCo to NewCo 2 is set out in a step plan for the restructure.

119. *As a result of this decision, AusCo and NewCo first enter into a licence agreement (Licence Agreement). The Licence Agreement grants NewCo the exclusive rights to develop, manufacture and commercialise the Product Intangibles, including the associated New Products. Under the Licence Agreement, NewCo pays ongoing royalties to AusCo in relation to worldwide sales of the New Products. As a result of the Licence Agreement, the effective control of the Product Intangibles is transferred from AusCo to NewCo and, as a consequence, all of the worldwide income that will be received from the global commercial sales of the New Products will be derived by NewCo.*

120. *At the time of entering into the Licence Agreement, NewCo does not have sufficient assets or employ sufficiently qualified staff to undertake the DEMPE activities which are undertaken by AusCo. NewCo subsequently enters into various service agreements (Service Agreements) with AusCo, under which AusCo agrees to provide services for the development, manufacture and distribution of the New Products. The Service Agreements remunerate AusCo with a cost-based service fee.*

Post-transfer of the rights to the Product Intangibles

121. *Following the transfer of the rights to the Product Intangibles to NewCo, the functions performed, assets used, and risks assumed by AusCo do not substantially change. AusCo continues to employ specialised staff and uses its expertise and assets to manage, perform and control DEMPE activities associated with the Product Intangibles. The functions performed, assets used, and risks assumed by AusCo in connection with activities covered by the Services Agreements with NewCo results in the commercialisation of the Product Intangibles. NewCo has limited relevantly qualified staff and manages and performs limited activities, owns limited assets and assumes limited risks in connection with the Product Intangibles.*

122. *Once the New Products are commercialised, under a novation agreement. NewCo transfers the exclusive rights to the Product Intangibles to NewCo 2, which also has limited relevantly qualified staff and capacity to manage and perform DEMPE activities related to the Product Intangibles. NewCo 2 owns limited assets and has limited capacity to assume risks in connection with the Product Intangibles. Intercompany agreements related to the New Products and Product Intangibles were also novated by NewCo to NewCo 2.*

123. *AusCo manufactures, distributes and markets the New Products on behalf of NewCo 2 under the Service Agreements. In undertaking these activities, AusCo employs specialised staff and uses its expertise and assets to manufacture and sell the New Products to the global market. However, AusCo only receives cost-based remuneration from NewCo 2 in accordance with the terms of the Service Agreements and royalties from the commercial sales of the New Products. NewCo 2 continues to have limited qualified staff, manages and performs limited activities, and assumes limited risks in connection with the manufacture, distribution and marketing of the New Products. NewCo 2 derives the worldwide income from the sale of the New Products. AusCo derives a royalty income under the Licence Agreement, now with NewCo 2.*

Risk assessment

124. *This is a Migration of intangible assets and not an Excluded Outbound Distribution Arrangement because NewCo has the exclusive rights to develop, manufacture and commercialise the Product Intangibles worldwide.*

125. *The Relevant Entity includes both NewCo and NewCo 2. NewCo 2 is a Relevant Entity because the Relevant Intangibles Assets were transferred to NewCo as part of a related arrangement to the initial transfer, as evidenced in a step plan for the overall restructure. In addition, NewCo 2 engages AusCo to undertake further development of the*

Product Intangibles as well as the distribution of New Products under the Service Agreements.

126. According to RAF Table 1 of this Guideline, the risk assessment is as follows.

Table 7: Example 4 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>AusCo and NewCo enter into a licence agreement in relation to the Product Intangibles. Afterwards, AusCo continues to provide development, manufacturing and distribution services in relation to New Products.</i>	<i>5</i>
<i>Circumstances of the Relevant Entity</i>	<i>At the time of entering into the Licence Agreement, NewCo does not have sufficient assets or employ sufficiently qualified staff to undertake the DEMPE activities which are undertaken by AusCo.</i>	<i>15</i>
<i>Tax outcomes – Question 5</i>	<i>Both NewCo and NewCo 2 are tax residents of a Specified jurisdiction.</i>	<i>10</i>
<i>Tax outcomes – Question 6</i>	<i>As a consequence of AusCo transferring the rights to control or use its Product Intangibles to NewCo, AusCo did not derive the worldwide income from the sale of the New Products, which was a strategically important product to AusCo.</i>	<i>10</i>

127. The total risk score for this arrangement is 40. This arrangement would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.

128. In subsequent years, RAF Table 2 of this Guideline will also be relevant in assessing the risks associated with mischaracterisation of Australian activities connected with DEMPE of the intangible assets. In summary, the risk score under this Table will also result in a red zone (higher-risk) rating – a total of 40 points, based on overall characterisation (20 points as AusCo continues to manufacture, market and perform other DEMP activities in connection with the New Products and Product Intangibles), circumstances of NewCo (or NewCo 2) – Category 1 (15 points) and tax outcomes – NewCo and New Co2 are tax residents of a Specified jurisdiction according to the definition in paragraph 55 of this Guideline (5 points).

129. There is a risk that AusCo's entry into the Licence Agreement and Service Agreements with NewCo (and NewCo 2) lacks commercial and economic substance, is structured to avoid tax, or may not be an arrangement that independent entities dealing wholly independently in comparable circumstances to that of AusCo and NewCo would have entered into. This risk is emphasised where AusCo is not able to evidence its decision-making for entering into these arrangements.

130. AusCo owned and developed the Product Intangibles and had the capability, expertise and capacity to continue to develop, manufacture and commercialise them for market. The Product Intangibles were strategically important to AusCo's business. AusCo did not require NewCo as a partner to develop or commercialise the Product Intangibles. NewCo did not have the capability or capacity to develop or commercialise the Product Intangibles at the time the arrangements were implemented.

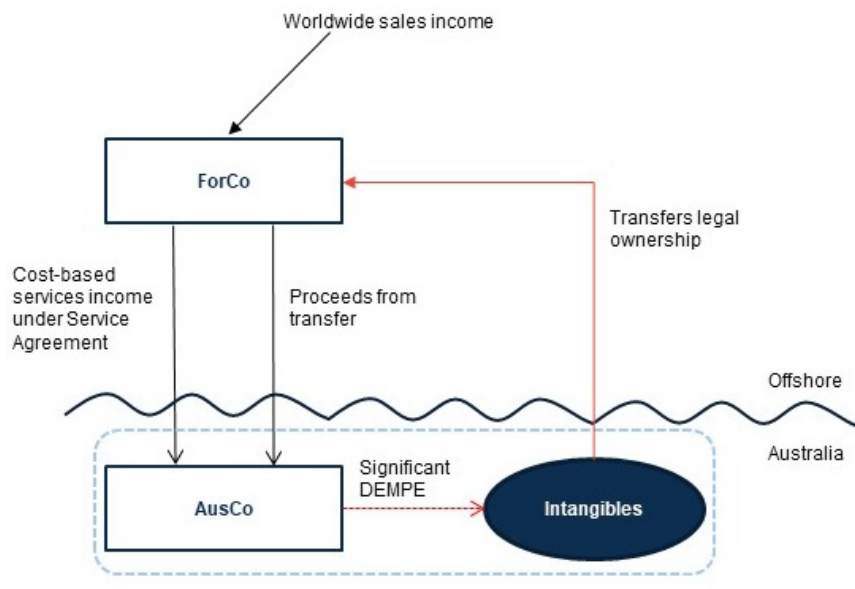
131. As a consequence of AusCo transferring the rights to control or use its Product Intangibles to NewCo, AusCo did not derive the worldwide income from the sale of the New Products.

132. We will consider the potential application of the transfer pricing provisions, including the exceptions to the basic rule within Subdivision 815-B. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant or principal

purpose of obtaining a tax benefit. This may attract the operation of the GAAR in Part IVA of the ITAA 1936, the application of the DPT, or both.

Example 5 – Migration of pre-commercialised intangible assets – red zone

Diagram 8: Example 5 – overview of arrangement



133. AusCo is an Australian company that was recently incorporated. AusCo's founder, an Australian tax resident, is a software designer and developer and is in the process of developing a source code for a new software application. AusCo employs a small team of software developers in Australia to assist the founder with developing the new software application. AusCo manages, performs and controls all DEMPE activities associated with the intangible assets and assumes associated risks. AusCo, however, has not valued the intangible assets and it has also not registered the intangible assets for legal protection.

134. As AusCo's business grows, the founder considers expanding AusCo overseas. AusCo opens an offshore office and incorporates ForCo in that foreign jurisdiction, which is a specified country. Prior to commercialisation, AusCo transfers the legal ownership of the intangible assets associated with the software application via a sale agreement to ForCo. At the time of the transfer of the intangible assets ForCo had no or limited qualified employees and no evidence around its business decision and commercial rationale to transfer the intangible assets.

135. Post transfer of the intangible assets, the founder frequently travelled to ForCo and changed their residency status for Australian tax purposes. ForCo also became the global headquarters for the business. The software application was subsequently commercialised and was available to download on global distribution platforms, generating income from in-application purchases and advertising which was derived by ForCo.

136. While the founder is involved in the development and enhancement of the software application including the ongoing maintenance and programming updates, AusCo, via its team of employees continue to manage and perform DEMPE activities under a Service Agreement with ForCo. In return, AusCo receives cost-based remuneration for the development activities under the Service Agreement.

Risk assessment

137. *This is a Migration of intangible assets. According to RAF Table 1 of this Guideline, the risk assessment is as follows.*

Table 8: Example 5 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<ul style="list-style-type: none"> • <i>AusCo transfers the legal ownership of the intangible assets associated with the software application via a sale agreement to ForCo.</i> • <i>AusCo, via its team of employees continue to manage and perform DEMPE activities under a Service Agreement with ForCo.</i> 	<i>5</i>
<i>Circumstances of the Relevant Entity</i>	<i>At the time of the transfer of the intangible assets ForCo had no or limited qualified employees and no evidence around its business decision and commercial rationale to transfer the intangible assets.</i>	<i>15</i>
<i>Tax outcomes – Question 5</i>	<i>ForCo is tax resident in a jurisdiction that is a specified country.</i>	<i>10</i>
<i>Tax outcomes – Question 6</i>	<i>As a consequence of the restructure, AusCo did not derive the sales and advertising income from the commercialisation of the software application.</i>	<i>10</i>

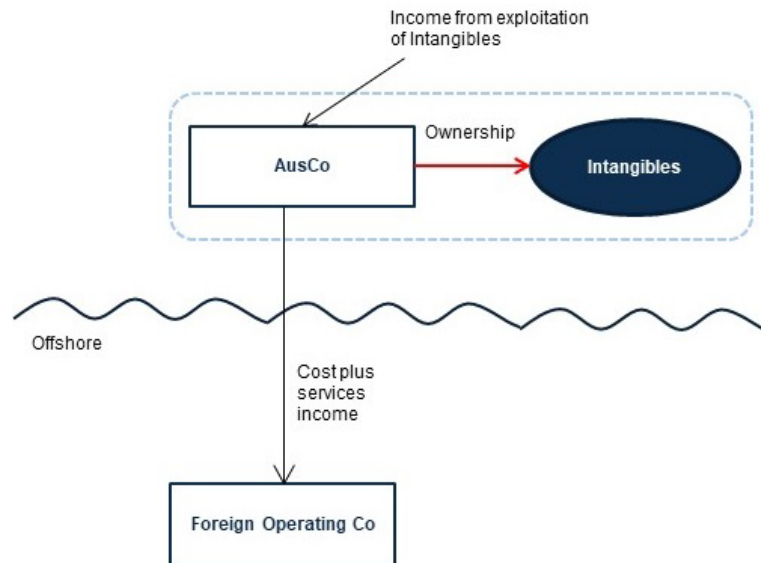
138. *The total risk score for this arrangement is 40. The arrangement between AusCo and ForCo would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.*

139. *In subsequent years, RAF Table 2 of this Guideline will also be relevant in assessing the risks associated with mischaracterisation of Australian activities. The risk rating under RAF Table 2 will not impact the risk rating under RAF Table 1 of this Guideline, which is in relation to the initial Migration.*

140. *There is a risk that AusCo’s decision to transfer the ownership of the intangible assets to ForCo, an entity with no employees at the time of transfer, and the subsequent entry into the Service Agreement with ForCo is not commercially realistic and is unlikely to be an arrangement that independent entities dealing wholly independently in comparable circumstances to that of AusCo and ForCo would have entered into.*

141. *AusCo also continued to manage and control DEMPE activities post transfer of the intangible assets and had the capacity to commercialise the software application. AusCo did not require ForCo to commercialise the intangible assets. Understanding the business rationale for transferring the ownership of the intangible assets to ForCo and ForCo’s capacity, including the founder’s role, to undertake the associated DEMPE activities will be essential to our risk assessment.*

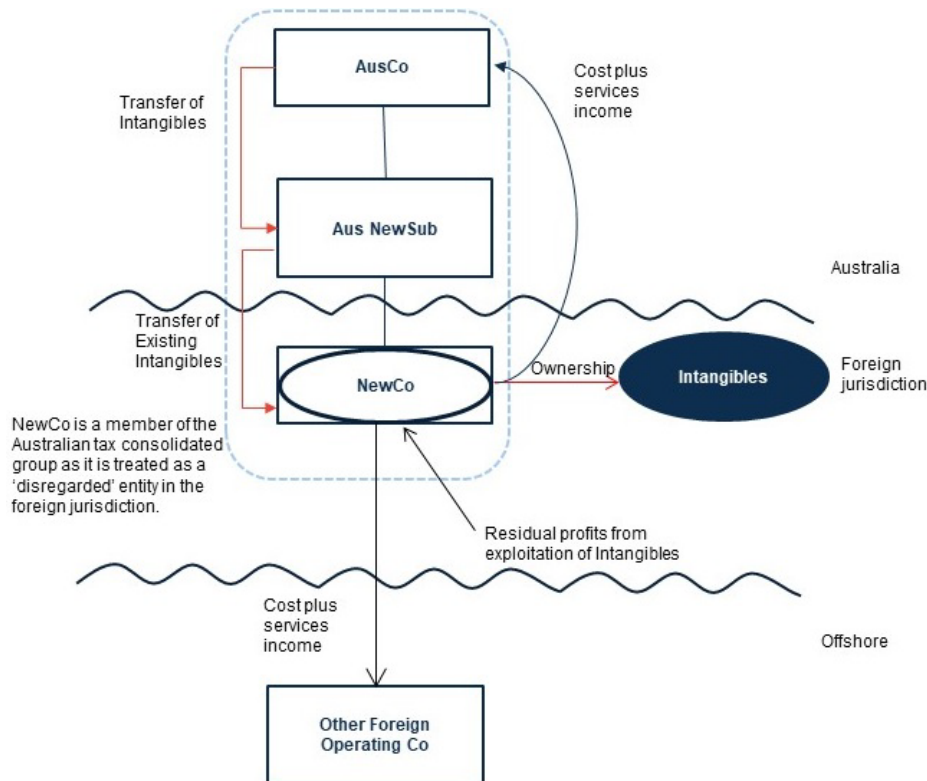
142. *We will consider the potential application of the transfer pricing provisions, including the exceptions to the basic rule within Subdivision 815-B, and the CGT or capital allowances provisions where relevant. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant purpose of obtaining a tax benefit. This may attract the operation of the GAAR in Part IVA of the ITAA 1936.*

Example 6 – transfer of intangible assets to a foreign hybrid entity – red zone*Diagram 9: Example 6 – overview of original arrangement**Original arrangement*

143. *AusCo is part of a global group that manufactures, markets and sells goods and provides services associated with those sales. AusCo and its international related parties exploit valuable intangible assets in undertaking their operations. The intangible assets include technology, customer relationships, brand, and other intangible assets or rights (Intangibles).*

144. *AusCo has historically owned, managed and controlled DEMPE activities associated with the Intangibles and assumes associated risks. AusCo derives the world-wide sales income from third parties for the exploitation of the Intangibles through direct sales and through licensing or distribution agreements entered into with international related parties. AusCo also has contract services agreements with international related parties to perform certain activities.*

Diagram 10: Example 6 – overview of new arrangement

**New arrangement**

145. *AusCo decides that the Intangibles should be centralised in a new entity, NewCo, in a foreign jurisdiction.*

146. *The transfer of the Intangibles to NewCo involves the following steps and features:*

- *A wholly owned subsidiary entity in Australia, Aus NewSub, is established. Aus NewSub owns 100% of NewCo, an entity in the foreign jurisdiction.*
- *Under the laws of the foreign jurisdiction, NewCo can be treated as a 'disregarded' entity. As a result, under the tax laws of the foreign jurisdiction, NewCo's immediate holding company, Aus NewSub, is considered to be a 'regarded' entity and NewCo is treated as a permanent establishment of Aus NewSub.*
- *For Australian tax purposes, NewCo satisfies the requirements of Division 830 and is considered to be a 'foreign hybrid company' and a partnership for Australian tax purposes. As all its membership interests are held by Aus NewSub, a wholly owned subsidiary of AusCo, NewCo is eligible to join the AusCo Tax consolidated group.*
- *AusCo, Aus NewSub and NewCo form a tax consolidated group (AusCo TCG).*
- *The Intangibles are assigned to NewCo. A market valuation is undertaken by AusCo to determine the value of the Intangibles.*
- *As the entities are all members of the AusCo TCG, under the single entity rule, there are no CGT consequences for the transfer of Intangibles from AusCo to NewCo.*

147. *Following the transfer of the Intangibles to NewCo, NewCo receives the worldwide sales income from the exploitation of the Intangibles. The existing contracts and*

agreements with the international related parties associated with the Intangibles are novated from AusCo to NewCo. NewCo also enters into a contract service agreement with AusCo, with AusCo now performing sales distribution, R&D, and other services on behalf of NewCo. Other international related parties previously undertaking certain activities for AusCo continue to perform the same activities, under new agreements entered into with NewCo. AusCo and other entities in the global group receive a routine return for their activities, while NewCo now retains all of the residual profits.

148. As NewCo is a member of the AusCo TCG operating in a foreign jurisdiction, its operations and presence are considered to be a foreign branch of the AusCo TCG and the income attributable to NewCo is returned as non-assessable non-exempt income under section 23AH of the ITAA 1936.

149. Under specific tax rules in the foreign jurisdiction, Aus NewSub, as the 'regarded' entity, is eligible to claim amortisation deductions in that foreign jurisdiction for the value of the Intangibles over a period of time.

Risk assessment

150. This is a Migration of intangible assets. The Intangibles Migration Arrangement identified includes all dealings and arrangements associated with the same group of intangible assets – therefore, the Intangibles Migration Arrangement which needs to be reviewed in RAF Table 1 includes the transfer of Intangibles, the novation of existing contracts, and new service agreements between NewCo and AusCo.

151. According to RAF Table 1 of this Guideline, the risk assessment is as follows.

Table 9: Example 6 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
Restructure or change	AusCo assigns intangible assets to NewCo and subsequently enters into a service agreement with NewCo in relation to the intangible assets.	5
Tax outcomes – Question 5	NewCo satisfies the requirements of Division 830 of the ITAA 1997 and is considered to be a 'foreign hybrid company' and a partnership for Australian tax purposes. Amortisation is available in the foreign jurisdiction to substantially offset the income in relation to the intangible assets. While the intangible assets are recognised as being acquired in the foreign jurisdiction, no CGT gains were recognised in Australia.	20
Tax outcomes – Question 6	Had the New Arrangement not occurred, AusCo would have continued to own and derive income from the exploitation of the Intangibles, as opposed to a routine service return.	10

152. The total risk score for the New Arrangement is 35.⁴¹ It would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.

153. There is a risk that AusCo's entry into the New Arrangement is not commercially rational and may not be consistent with the substance of the group's arrangement or is structured to achieve particular tax outcomes in Australia or the foreign jurisdiction. The tax outcomes include the avoidance of CGT on the transfer of the Intangibles and the non-inclusion of the worldwide sales income in AusCo. There is also a tax risk that the profits

⁴¹ To the extent that AusCo continues to perform DEMPE activities without close oversight or supervision from NewCo, the categorisation for the substance of NewCo may be Category 1 or 2, resulting in a higher risk score.

associated with the Intangibles have not been appropriately attributed between AusCo and its foreign branch under Australia’s transfer pricing rules.

154. This risk is emphasised where AusCo does not maintain documentation meeting the evidence expectations, set out in Part 3 and Appendix 2 to this Guideline.

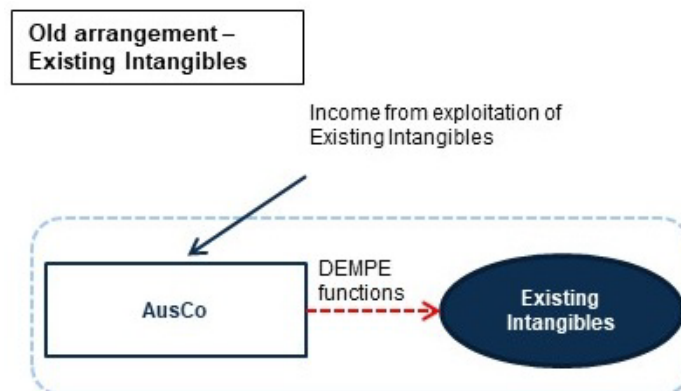
155. The New Arrangement does not materially change the way DEMPE activities are performed within the global group, other than resulting in additional deductions available in the foreign jurisdiction and shifting the worldwide sales income (residual profit) from AusCo to the foreign jurisdiction. Other international related entities continue to perform the same activities pre- and post-restructure, with the only change being the counterparty of their intercompany agreements.

156. Had the New Arrangement not occurred, AusCo would have continued to own and derive income from the exploitation of the Intangibles, as opposed to a routine service return.

157. We will consider the potential application of the transfer pricing provisions, specifically Subdivision 815-C, in relation to the attribution of profit between AusCo and its foreign branch. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant or principal purpose of obtaining a tax benefit. This may attract the operation of the GAAR in Part IVA of the ITAA 1936, the application of the DPT, or both.

Example 7 – bifurcation of intangible assets – red zone

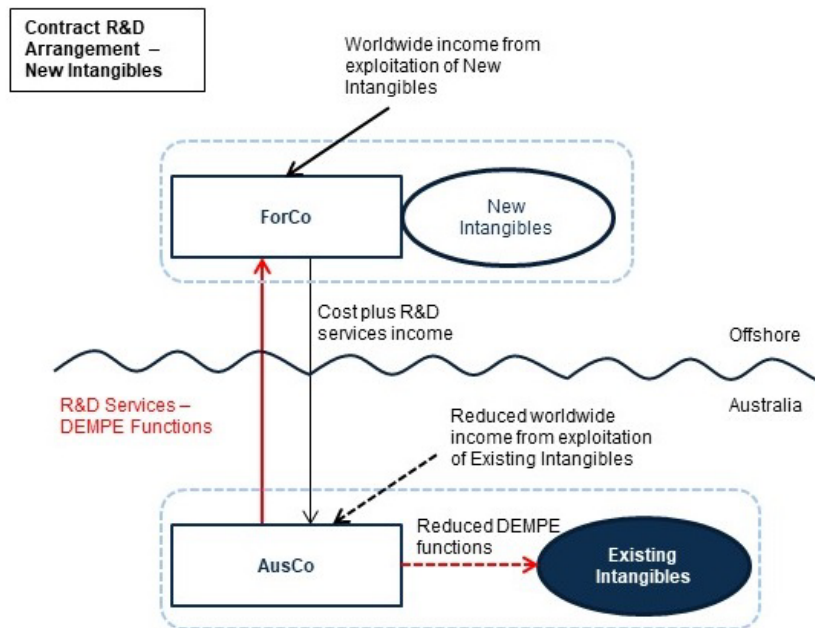
Diagram 11 – Example 7 – overview of old arrangement



Old arrangement

158. An Australian company (AusCo) managed, performed and controlled activities and risks associated with the DEMPE of valuable patents, trade marks, know-how, copyright and like assets (Existing Intangibles). AusCo owned the Existing Intangibles and derives income from their exploitation.

Diagram 12 – Example 7 – overview of current arrangement

**Current Arrangement**

159. AusCo enters into a contract R&D arrangement with a foreign related company (ForCo). Pursuant to this arrangement, AusCo provides services to ForCo associated with the DEMPE of potentially new or future intangible assets (New Intangibles). AusCo is remunerated by ForCo on a cost-plus basis. All New Intangibles produced under the arrangement are owned by ForCo. ForCo derives all income generated from the exploitation of the New Intangibles.

160. AusCo continues to receive income derived from the exploitation of the Existing Intangibles but reduces or ceases its DEMPE activities associated with the Existing Intangibles.

161. The New Intangibles are intrinsically linked to AusCo's Existing Intangibles comprising updated versions and enhancements of the patents, trade marks, know-how, copyright and like assets, which form part of, and are connected to, AusCo's Existing Intangibles.

162. The functions performed, assets used and risks assumed by AusCo do not materially change in substance following the execution of the contract R&D arrangement. AusCo continues to employ the same specialised staff and use its expertise and assets associated with the Existing Intangibles to manage, perform and control DEMPE activities associated with the New Intangibles.

163. ForCo manages and performs limited activities and assumes limited risks in connection with the New Intangibles. At the time the contract R&D arrangement commences, ForCo does not have sufficient assets or employ sufficient suitably qualified staff to properly or primarily manage, perform or control the DEMPE of the New Intangibles. AusCo continues to be best placed to manage, perform and control DEMPE activities given the functions performed, assets used and risks assumed by AusCo.

164. The value of the Existing Intangibles and income derived by AusCo from their exploitation declines due to the reduction in or cessation of DEMPE activities in connection with the Existing Intangibles. The value of the New Intangibles and associated income streams derived by ForCo increases as a result of the DEMPE activities performed by AusCo.

Risk assessment

165. *The Current Arrangement is considered to be an Intangibles Migration Arrangement because the arrangement involves AusCo carrying out DEMPE activities in connection with New Intangibles held by ForCo.*

166. *According to RAF Table 2 of this Guideline, the risk assessment is as follows.*

Table 10: Example 7 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
Overall characterisation	<p><i>The facts suggest that 3 or more DEMP activities are undertaken by AusCo, including contract R&D services for ForCo.</i></p> <p><i>The functions performed, assets used and risks assumed by AusCo do not materially change in substance following the restructure or change. AusCo continues to employ the same specialised staff and use its expertise and assets associated with the Existing Intangibles to manage, perform and control DEMPE activities associated with the New Intangibles.</i></p>	20
Circumstances of the Relevant Entity	<i>AusCo is best placed to manage, perform and control DEMPE activities, while ForCo does not have sufficient assets or suitably qualified staff to do so.</i>	15
Tax outcomes	<i>If one of the tax outcomes apply, another 5 points will be added.</i>	5

167. *The total risk score in relation to the New Arrangement is 35 (or 40 if a tax outcome applies). The arrangement would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.*

Application of Risk Assessment Framework Table 1 – the change from Old Arrangement to Current Arrangement

168. *While there might not have been a written intercompany agreement for the transfer (or grant of rights) of intangible assets from AusCo to ForCo, the change in the overall arrangement is a Migration to which RAF Table 1 would apply under Question 1(d), which covers situations where AusCo has ceased or discontinued development, enhancement or maintenance activities in relation to Existing Intangibles and the intangible assets are made available to another entity.*

169. *In this example, since New Intangibles are intrinsically connected to Existing Intangibles or are updated versions of Existing Intangibles, it is reasonable to conclude that rights or know-how related to Existing Intangibles were made available to ForCo. We note that this would also fall within Question 1(b) of RAF Table 1, notwithstanding that there might not have been a written agreement.*

170. *Where there is a connection to a past Migration, a risk assessment under RAF Table 1 should also be done in relation to the past restructure or change. The higher of the 2 risk ratings under RAF Table 1 or 2 will apply as the overall risk rating of this arrangement.*

171. *Applying RAF Table 1 to the restructure or change identified in paragraph 168:*

Table 11: Example 7 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>There is a restructure or change and AusCo continues to perform R&D and other DEMPE activities for ForCo in relation to a closely related intangible asset, New Intangibles.</i>	5
<i>Circumstances of the Relevant Entity</i>	<i>ForCo is best described as Category 1 for the same reasons discussed above.</i>	15
<i>Tax outcomes – Question 5</i>	<i>If one of the tax outcomes in Question 5 apply, 10 points will apply.</i>	10
<i>Tax outcomes – Question 6</i>	<i>Without the restructure or change, the return to AusCo in relation to Existing Intangibles would not diminish. Instead of earning a return as a service provider, AusCo may also derive income in relation to updated versions of Existing Intangibles had its previous arrangements in connection with Existing Intangibles not changed.</i>	10
<i>Undocumented or unrecognised dealings</i>	<i>To the extent that parts of Existing Intangibles were made available to ForCo without compensation or remuneration to AusCo, this may also fall under Question 7, as ForCo derives worldwide income from New Intangibles.</i>	15

172. *As can be seen in Table 11 of this Guideline, the change from the past arrangement to the current arrangement will be in the higher-risk (red) zone if one of the tax outcomes in Question 5 apply, or if Question 7 applies.*

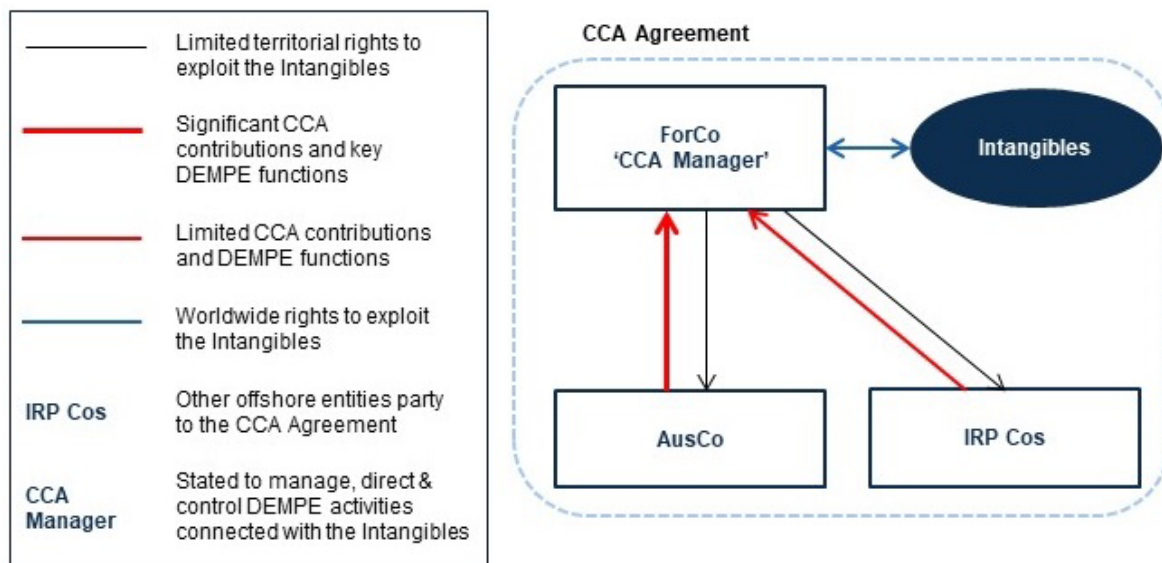
173. *AusCo’s remuneration under the contract R&D arrangement with ForCo does not reflect the extent or character of functions performed, assets used and risks assumed by AusCo in connection with the New Intangibles or the connection between the New Intangibles and AusCo’s Existing Intangibles, which are intrinsically linked. In these circumstances, the conditions operating in connection with the arrangement may not be consistent with its best economic interests having regard to the commercial options realistically available or may lack commercial rationale.*

174. *Additionally, AusCo may not have properly complied with Australian CGT and capital allowances obligations (or provisions regarding recognition of R&D results), including where intangible assets have been migrated to ForCo as a result of the arrangement.*

175. *We will consider the potential application of the transfer pricing provisions, including the exceptions to the basic rule within Subdivision 815-B, and the CGT or capital allowances provisions where relevant. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant or principal purpose of obtaining a tax benefit. This may attract the operation of the GAAR in Part IVA of the ITAA 1936, the application of the DPT, or both.*

Example 8 – cost contribution arrangement – red zone

Diagram 13: Example 8 – overview of arrangement



176. An Australian company (AusCo) is party to a cost contribution arrangement (CCA) with a number of related foreign companies. The CCA agreements (CCA Agreement) provide that the participants will contribute resources and perform activities associated with the DEMPE of intangible assets (CCA Contributions) for the mutual benefit of all participants.

177. The CCA Agreement states that one of the foreign related companies (ForCo), which is a tax resident of a specified country:

- manages, directs and controls activities associated with the DEMPE of intangible assets, including allocating R&D activities to the CCA participants, managing and directing such R&D activities and assuming associated risks
- determines and receives CCA Contributions from the participants according to an allocation key
- obtains the worldwide rights to exploit all intangible assets developed under, and associated with, the CCA, subject to rights granted to the other CCA participants in their respective jurisdictions
- registers and protects all intangible assets developed under, and associated with, the CCA.

178. In exchange for the CCA Contributions, the participants, including AusCo, each obtain from ForCo the right to exploit all intangible assets associated with the CCA in their respective jurisdictions. The intangible assets covered by the CCA Agreement include patents, trade marks, copyright, know-how, and like assets.

179. The form of the CCA Agreement states that AusCo:

- provides funds to, or receives funds from, ForCo (as CCA Contributions), or both
- contributes intangible assets developed by AusCo (as CCA Contributions)
- incurs costs in undertaking and managing R&D activities to develop, enhance or commercialise patents, trade marks, copyright, know-how, and like assets as directed by ForCo

- *uses intangible assets subject to the CCA to derive income in the Australian market.*

180. *In substance, AusCo undertakes and manages extensive R&D activities relative to the other participants in the CCA, assumes associated risks, and develops and commercialises new patents, trade marks, copyright, know-how and like assets. To do this, AusCo uses assets and employs specialised staff. AusCo applies its specialist expertise to manage risks and is subject to minimal direction and oversight from ForCo. This results in the development and enhancement of valuable intangible assets that are exploited by ForCo and the other related foreign companies party to the CCA Agreement (IRP Cos) in other jurisdictions to derive income.*

181. *ForCo employs limited staff and contributes limited funds or assets under the CCA arrangement. Limited contributions are also made by the IRP Cos to the DEMPE of intangible assets under the CCA.*

182. *The expected benefits received by AusCo under the CCA Agreement do not reflect the value of AusCo’s contributions to the CCA including the extent or character of functions performed, assets used and risks assumed by AusCo in connection with the intangible assets covered by the CCA. AusCo’s proportionate share of overall contributions to the CCA is not consistent with the expected benefits received. Specifically, AusCo does not obtain benefits proportionate with its contributions to the derivation of global income from the exploitation of the intangible assets covered by the CCA, where those intangible assets are used and exploited by ForCo and the IRP Cos in other jurisdictions.*

Risk assessment

183. *This is a Migration of intangible assets. The Migration involves entry into a CCA by AusCo, ForCo and IRP Cos whereby ForCo and IRP Cos obtain certain rights to AusCo’s intangible assets.*

184. *According to RAF Table 1 of this Guideline, the risk assessment is as follows.*

Table 12: Example 8 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>AusCo’s contribution of intangibles into a CCA is a restructure or change covered by Risk Assessment Framework Table 1. AusCo continues to develop and use the Relevant Intangible Assets, as well as related intangible assets subject to the CCA that are made available to AusCo under the CCA.</i>	5
<i>Circumstances of the Relevant Entity or Entities</i>	<i>Both ForCo and IRP Cos are Relevant Entities for the purposes of applying the risk assessment framework. Where there are multiple Relevant Entities, the highest risk score applies. ForCo employs limited staff, contributes limited funds or assets. There are also limited contributions made by IRP Cos to the DEMPE of intangible assets under the CCA. ForCo in particular appears to be best described as Category 1. By contrast, AusCo has specialist staff and undertakes and manages extensive DEMPE activities relative to other participants in the CCA.</i>	15
<i>Tax outcomes – Question 5</i>	<i>ForCo is a tax resident of a Specified jurisdiction.</i>	10
<i>Tax outcomes – Question 6</i>	<i>The benefits (or expected benefits) of AusCo under the CCA Agreement do not reflect the value of AusCo’s contribution.</i>	10

	<p>If AusCo did not enter into the CCA, it might reasonably be expected to have derived the worldwide income instead of ForCo (particularly since, in substance, ForCo and IRP Cos contributed little relative to AusCo). As such, It can be concluded that its taxable income might reasonably be less as a result of entering into the CCA.</p>	
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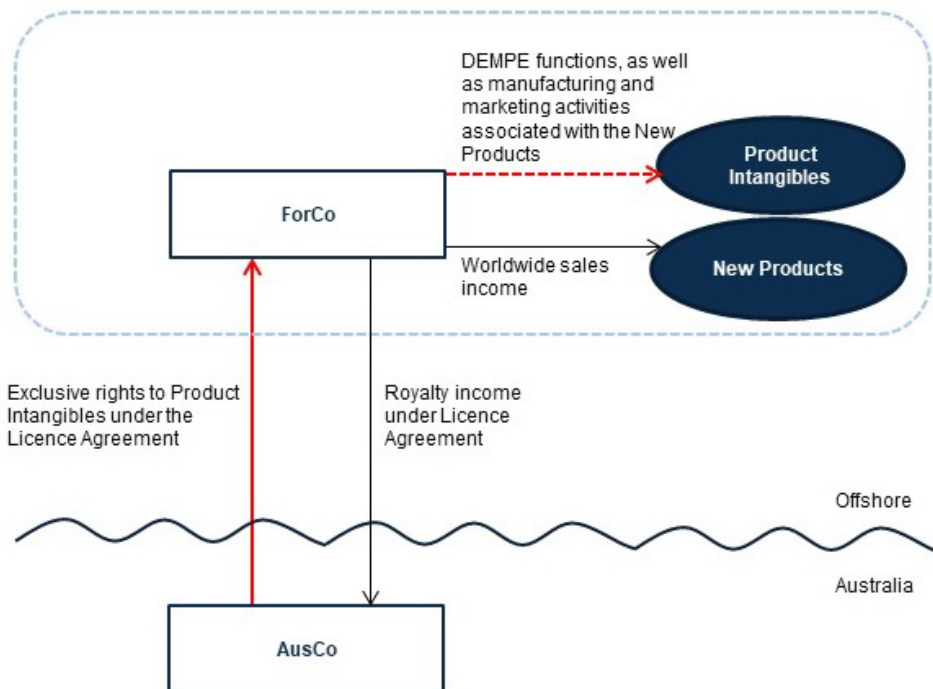
185. The total risk score in relation to this arrangement is 40. The CCA arrangement would be regarded as a red zone (higher-risk) Intangibles Migration Arrangement.

186. In these circumstances, AusCo’s entry into the CCA Agreement may not be commercially rational or consistent with its best economic interests having regard to the commercial options realistically available. The arrangement may therefore be inconsistent with that which might reasonably be expected to be agreed between independent parties dealing at arm’s length for the purposes of Australia’s transfer pricing laws.

187. We will consider the potential application of the transfer pricing provisions, including the exceptions to the basic rule within Subdivision 815-B, and the CGT or capital allowances provisions where relevant. Additionally, we will consider whether the arrangement was entered into or carried out for the dominant or principal purpose of obtaining a tax benefit. This may attract the operation of the GAAR in Part IVA of the ITAA 1936, the application of the DPT, or both.

Example 9 – transfer of rights to intangible assets under a licence agreement – amber zone

Diagram 14: Example 9 – overview of arrangement



188. Similarly to Example 4 of this Guideline, AusCo is part of a global group that develops, manufactures, markets and sells products globally. AusCo and its international related parties engage in the DEMPE of valuable intangible assets in undertaking their operations. These intangible assets include patents, know-how, trade marks, copyright and other intangible assets or rights.

189. *AusCo undertakes R&D activities to develop a new product range resulting in the development of early-stage intangible assets (Product Intangibles). AusCo owns the Product Intangibles.*

190. *AusCo's ability to further develop and commercialise the Product Intangibles, including the capability and capacity to manufacture and market the products that may be associated with the Product Intangibles (New Products), is limited. AusCo requires a partner to continue with the development of the Product Intangibles so that they can be commercialised into New Products that are able to be manufactured and marketed to customers.*

191. *ForCo, a related party located in a foreign jurisdiction, has the capability to further develop and commercialise the Product Intangibles including the capacity to manufacture the New Products. AusCo decides that it is in its best interest to partner with ForCo to further develop and commercialise the Product Intangibles, otherwise it may have to cease further development of the Product Intangibles given its limited expertise and capability.*

192. *As a result of this decision, AusCo and ForCo enter into a licence agreement (Licence Agreement). The Licence Agreement grants the exclusive rights of the Product Intangibles to ForCo for the development and commercialisation of the Product Intangibles and for the manufacturing and marketing of the associated New Products. Under the Licence Agreement, AusCo negotiates with ForCo to receive upfront, milestone and royalty payments based on an independent valuation of the Product Intangibles and associated New Products.*

193. *As a result of the Licence Agreement, ForCo assumes the risks associated with further developing and commercialising the Product Intangibles, including manufacturing and marketing the New Products. Any income generated from the commercial sales of the New Products will be derived by ForCo.*

Post-Licence Agreement

194. *ForCo, with its expertise and capability, manages, performs and controls the DEMPE activities connected with the Product Intangibles and assumes the associated risks. ForCo continues to develop the Product Intangibles and is able to commercialise them into New Products. Once commercialised, ForCo manufactures and markets the New Products to customers, derives the worldwide income from the sale of the associated Products and pays to AusCo the amounts payable under the Licence Agreement.*

195. *AusCo distributes the New Products in Australia under an agreement with ForCo.*

Risk assessment

196. *This is a Migration of intangible assets. This is not an Excluded Inbound Distribution Arrangement because the Product Intangibles were transferred by AusCo to ForCo.*

197. *According to RAF Table 1 of this Guideline, the risk assessment is as follows.*

Table 13: Example 9 – application of RAF Table 1

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>AusCo and ForCo enter into a licence agreement in relation to Product Intangibles. AusCo distributes New Products once Product Intangibles have been commercialised.</i>	<i>5</i>
<i>Circumstances of the Relevant Entity</i>	<i>ForCo, with its expertise and capability, manages, performs and controls all the DEMPE activities connected with the Product Intangibles and assumes the associated risks. However, if the substance of the Relevant Entity is inconsistent with the form of the arrangement, the risk score would be higher for this risk factor (as demonstrated in this table). For example, despite ForCo having specialised staff and capability, it does not wholly perform, manage and control the DEMPE activities involved in the commercialisation, manufacturing and marketing of the New Products, and AusCo continues to have some involvement.</i>	<i>10</i>
<i>Tax outcomes – Question 5</i>	<i>If one of the tax outcomes listed at Question 5 apply, 10 points would apply.</i>	<i>10</i>
<i>Tax outcomes – Question 6</i>	<i>AusCo would not have had the capacity to further develop the Product Intangibles without the partnership and would have to cease further development. In such circumstances, AusCo’s taxable income would not be less if the restructure or change did not occur. This would not be the conclusion if AusCo has the capacity to continue development while overseeing and outsourcing certain activities to other entities such as ForCo.</i>	<i>0</i>

198. *The total risk assessment score for this arrangement is 25. It would be regarded as an amber zone (medium-risk) Intangibles Migration Arrangement.*

199. *As demonstrated in the analysis in Table 13, , if either of the following factors applies, the arrangement between AusCo and ForCo would be regarded as a medium-risk Intangibles Migration Arrangement:*

- *one of the tax outcomes listed at Question 5 in RAF Table 1 of this Guideline apply to ForCo or the arrangement – for example, ForCo is a resident of a specified jurisdiction, or*
- *the circumstances of ForCo is inconsistent with the form of the arrangement, as explained in Table 13 of this Guideline.⁴²*

200. *A risk that may arise with respect to this arrangement is that the substance of the Licence Agreement may not align with the form of the arrangement. As shown in the application of the risk assessment framework in this Example, the level of substance in*

⁴² For completeness, it is noted that if there is a lack of substance consistent with a ‘Category 1’ categorisation under Question 3 of RAF Table 1 of this Guideline, this will result in a further increase of risk score and the arrangement.

ForCo's operations following the transfer of the Product Intangibles will inform the level of risk associated with the arrangement.

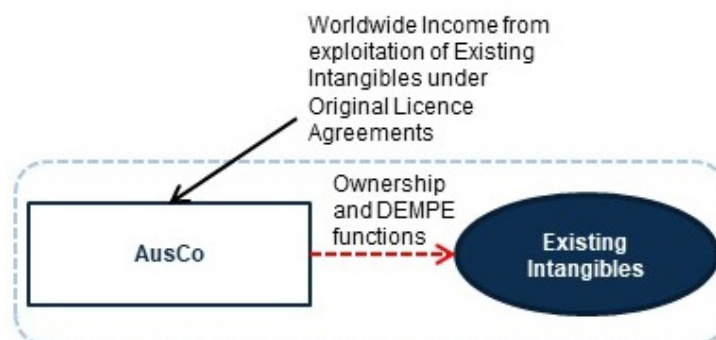
201. *The tax outcomes of the arrangements (including the tax attributes of ForCo) are also an indicator of the risk that the arrangement might have been driven by tax outcomes. This includes whether, excluding upfront gains, AusCo's taxable income would be less as a result of the restructure or change, which would inform our assessment of whether independent parties would have entered into the arrangement instead of other alternative options. In assessing this risk, we will consider any evidence demonstrating a genuine and substantiated (non-tax) commercial rationale to enter into the Licence Agreement with ForCo.*

202. *Another risk that may arise in relation to this arrangement relates to whether the payments made by ForCo and AusCo under any arrangements in connection with the restructure are arm's length, such as the pricing and terms of the Licence Agreement.*

203. *We may consider the potential application of the transfer pricing provisions, and where relevant, the CGT or capital allowance provisions. Where relevant, the potential application of Part IVA of the ITAA 1936 (including the DPT) may also be considered.*

Example 10 – centralisation of intangible assets – blue zone

Diagram 15: Example 10 – overview of original arrangement



Original arrangement

204. *Similarly to Example 1 of this Guideline, AusCo undertakes manufacturing, marketing and distribution functions and owns, manages and controls DEMPE activities associated with a suite of valuable intangible assets, including patents, know-how, trade marks, copyright and other intangible assets or rights (Intangible Assets).*

205. *The Intangible Assets are used in the business of the global group to which AusCo belongs and AusCo derives royalties from its international related parties from the global exploitation of the Intangible Assets under licence agreements between AusCo and the international related parties (Original Licence Agreements). Entities within the global group in other jurisdictions have also undertaken manufacturing, marketing and distribution functions and managed and controlled DEMPE activities associated with a suite of valuable intangible assets over a similar historical period. These other overseas entities also derive royalties from related parties within the global group, including Australia, from the exploitation of their intangible assets under licence agreements.*

Decision to centralise intangible assets

206. *AusCo and the global group determine that the Intangible Assets should be centralised in an entity (OneCo) to be located in a foreign jurisdiction. AusCo's transfer of the Intangible Assets to OneCo forms part of a broader global centralisation under which*

intangible assets held by other international related parties are also transferred and centralised in OneCo. OneCo is located in a jurisdiction which is the global group’s largest market in terms of product sales.

207. AusCo and the global group consider a number of commercial and legal factors in making the decision to centralise, including considering alternative options, and determine that centralising their intangible assets in one entity has a number of commercial benefits which have been quantified. AusCo maintains documentation to substantiate the commercial rationale underpinning its decision to centralise.

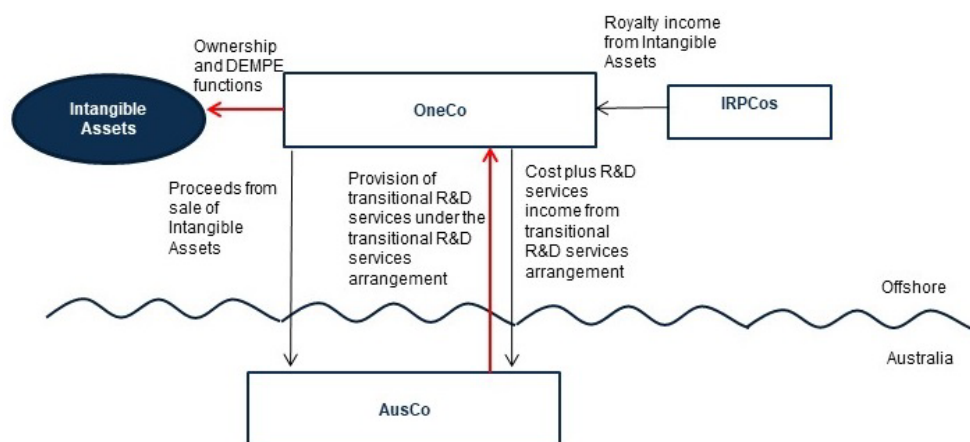
208. As a result of the decision to centralise, AusCo enters into a Sale Agreement with OneCo to transfer the Intangible Assets to OneCo. As part of the sale, the Original Licence Agreements between AusCo and its international related parties are novated to OneCo with OneCo as the licensor. AusCo undertakes an independent valuation to value the Intangible Assets prior to this sale and to ensure that the transfer is made on arm’s length terms. OneCo is located in a jurisdiction which has the largest market in terms of third-party customer revenue from the products.

209. As a result of the sale, OneCo receives worldwide income from the exploitation of the Intangible Assets. AusCo maintains some documentation to support the arm’s length nature of the pricing and terms of all arrangements in connection with the restructure, including, but not limited to, the Sale Agreement and the novation of the Original Licence Agreements.

210. As part of the decision to centralise, AusCo decided that it was no longer commercially viable for it to continue with its manufacturing and R&D functions. As a result, AusCo decided to cease these operations and continue with its distribution functions only.

211. AusCo enters into a transitional R&D Services Agreement with OneCo. Under this agreement, AusCo will provide R&D services to OneCo in relation to the Intangible Assets in return for a fee determined with regard to the costs incurred by AusCo in the provision of the R&D activities. This arrangement is intended to operate as a transitional feature of the centralisation to allow AusCo to assist OneCo with managing the Intangible Assets as OneCo builds up the necessary capability and expertise to undertake these functions. Any New Intangibles that are developed as a result of the R&D undertaken by AusCo under the R&D Services Agreement will be owned by OneCo.

Diagram 16: Example 10 – overview of new arrangement



New arrangement

212. In Year 1 following the decision to centralise, AusCo performs R&D activities under the R&D Services Agreement under the direction and oversight of OneCo, which employs

sufficiently skilled staff to manage DEMPE activities. AusCo receives remuneration for the functions it performs under the R&D Services Agreement.

213. By Year 2 following the decision to centralise, OneCo has employed additional staff and acquired additional assets to assist in the management of DEMPE activities for the Intangible Assets. These staff and assets are sufficient to allow OneCo to wholly manage, perform and control the DEMPE activities connected with the Intangible Assets and assume all associated risks. The R&D Services Agreement between AusCo and OneCo is terminated and AusCo ceases performing R&D services with respect to the Intangible Assets.

Risk assessment

214. This is a Migration of intangible assets. In assessing the Migration, the Sale Agreement, the novation of the Original Licence Agreement and the service agreements entered into by AusCo with OneCo are considered to be one Intangibles Migration Arrangement.

215. According to RAF Table 1 of this Guideline, the risk assessment in relation to the Migration is as follows.

Table 14: Example 10 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
Restructure or change	AusCo enters into a Sale Agreement with OneCo to transfer the Intangible Assets to OneCo and also novates Original Licence Agreements with international related parties to OneCo. Afterwards, AusCo enters into a transitional R&D service agreement with OneCo and continues to distribute products associated with the Intangible Assets.	5
Circumstances of the Relevant Entity	<ul style="list-style-type: none"> RAF Table 1 would be applied as at the time of the restructure or change. In Year 1, the circumstances of the Relevant Entity in relation to these intangible assets best fit 'Category 2', given ForCo has qualified staff to manage DEMPE activities, but AusCo has a continued involvement in intangible assets it has previously developed. OneCo is located in a jurisdiction which has the largest market in terms of customer revenue from the products. 	5 (10 – 5)
Tax outcomes – Question 6	As a result of the sale, OneCo, instead of AusCo, receives worldwide income from the exploitation of the Intangible Assets.	10

216. The total risk assessment score of the New Arrangement is 20. It would be regarded as a blue zone (lower- to medium-risk) Intangibles Migration Arrangement.

217. A risk that may arise with respect to this arrangement is that the substance of the New Arrangement may not align with the form of the arrangement. The level of substance in OneCo's operations following the decision to centralise and OneCo's ability to demonstrate that it has built up the additional capacity necessary to manage, perform and control DEMPE functions connected with the Intangible Assets will inform the level of risk associated with the arrangement.

218. In the year of the Migration, only RAF Table 1 needs to be applied. In subsequent years, RAF Table 2 of this Guideline should also be completed to assess the risks associated with the non-recognition of Australian DEMPE activities in the ongoing arrangement. Because the Intangibles Assets were previously held by AusCo, the ongoing

arrangement cannot be an Excluded Inbound Distribution Arrangement even when AusCo ceases all other activities other than distribution.

219. Under RAF Table 2 of this Guideline, the outcome can be summarised as follows:

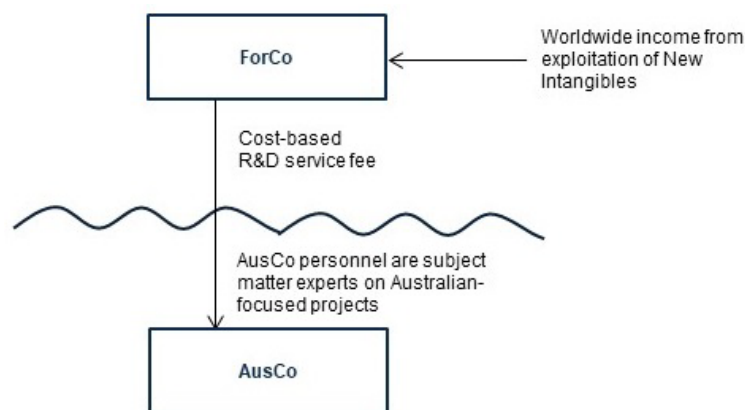
- overall characterisation – 10 points (New Intangibles are not owned by AusCo and it ceased activities other than distribution and transitional R&D services)
- circumstances of the Relevant Entity – 10 points (Category 2).

220. Based on these 2 risk factors, the Intangibles Migration Arrangement would be considered blue zone (lower- to medium-risk) (20 points) under RAF Table 2 of this Guideline. In subsequent years, once the transitional R&D activities cease, and the degree of OneCo's substance with respect to the Intangible Assets increase, the risk score assigned to Questions 2 and 3 of RAF Table 2 of this Guideline may be reduced, resulting in a lower risk rating with respect to the risk associated with non-recognition of Australian activities connected with intangible assets.

221. We may consider the potential application of the transfer pricing provisions, and where relevant, the CGT provisions or the capital allowance provisions. Where relevant, the potential application of Part IVA of the ITAA 1936 (including the DPT) may also be considered.

Example 11 – contract research and development arrangement – blue zone

Diagram 17: Example 9 – overview of arrangement



222. AusCo is part of a group which provides technical services globally. AusCo and its international related parties each employ technical experts who exploit valuable intangible assets of the group in performing services. The intangible assets include patents, know-how, trade marks, copyright and other intangible assets or rights (Existing Intangibles).

223. ForCo, a related party located in a foreign jurisdiction, is the entity that has always undertaken, managed and been responsible for the DEMPE activities associated with the Existing Intangibles. ForCo derives worldwide income from the services provided by the global group.

224. In connection with its services business, ForCo is responsible for managing the global group's operations, which consist of R&D centres, located both within and outside of ForCo's jurisdiction, that perform contract R&D services for or on behalf of ForCo.

225. ForCo employs specialised staff and has the expertise and capability to manage the various contract R&D centres. AusCo is an established R&D centre within the global group and employs experienced and specialised staff to perform R&D activities.

226. *AusCo is party to an R&D services agreement with ForCo (R&D Services Agreement), under which it is remunerated with a service fee.*

227. *Under this arrangement:*

- *New intangible assets or improvements to the Existing Intangibles developed as a result of the R&D undertaken by AusCo will be owned by ForCo.*
- *As an established R&D centre within the global group, AusCo in fact controls certain DEMPE activities performed as part of the R&D Services Agreement. In substance, notwithstanding formal reporting lines to ForCo, AusCo personnel are considered subject matter experts for certain Australian-focused projects and often make key decisions in relation to these R&D projects without the input or oversight of ForCo personnel.*

Risk assessment

228. *This is not a restructure or change associated with intangible assets.*

229. *According to RAF Table 2 of this Guideline, the risk assessment is as follows.*

Table 15: Example 11 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Overall characterisation</i>	<i>AusCo performs R&D activities in relation to an intangible asset it does not own. The more DEMPE activities AusCo performs, the higher the risk score under this question may be.</i>	<i>10</i>
<i>Circumstances of the Relevant Entity</i>	<i>The category is Category 2 because ForCo has specialised staff and the capability, but AusCo in fact controls certain (though not all) R&D activities.</i>	<i>10</i>

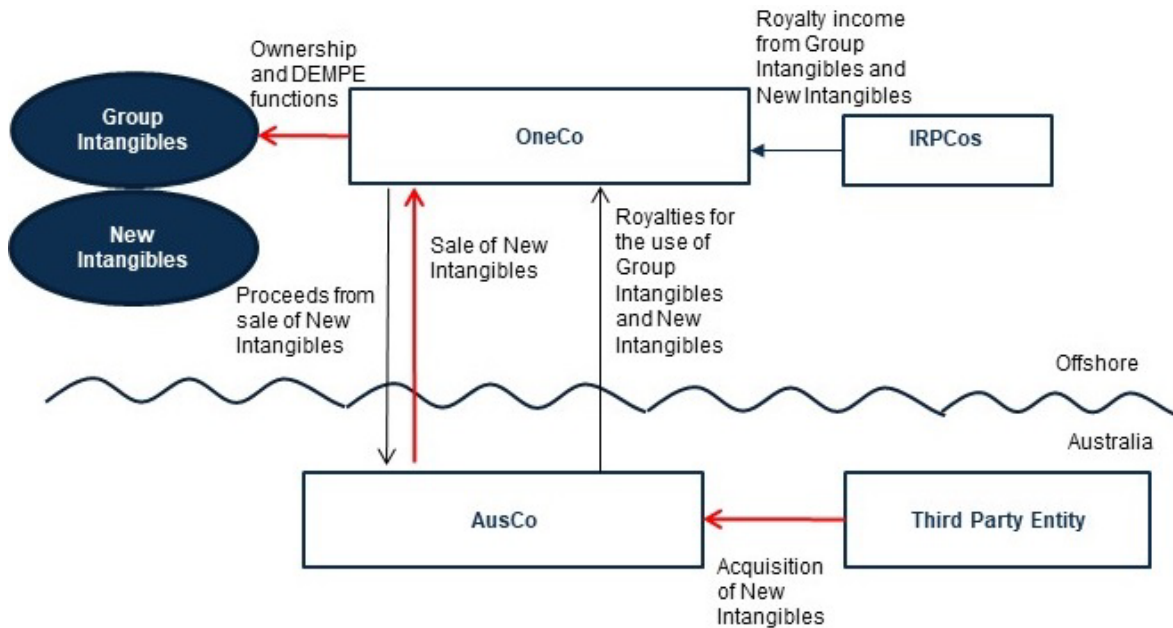
230. *The total risk assessment score for this arrangement is 20. The arrangement between AusCo and ForCo would therefore be regarded as a blue zone (lower- to medium-risk) Intangibles Migration Arrangement.*

231. *The risks that arise from this arrangement are that the substance of the arrangement may not align with its form (that is, AusCo may, in fact, control certain DEMPE activities such as R&D) and AusCo may not receive a return commensurate with its contributions to the Existing Intangibles or any new intangible assets developed under the arrangement, including under the R&D Services Agreement. The extent of AusCo's actual involvement in DEMPE activities will inform the level of risk associated with the arrangement.*

232. *We may consider the potential application of the transfer pricing provisions. Where relevant, the potential application of Part IVA of the ITAA 1936 (including the DPT) may also be considered.*

Example 12 – centralisation of intangible assets – green zone

Diagram 18: Example 12 – overview of arrangement



233. AusCo is part of a global group that develops, manufactures, markets and sells products globally. AusCo and its international related parties exploit valuable intangible assets in undertaking their operations. These intangible assets include patents, know-how, trade marks, copyright and other intangible assets or rights (Group Intangibles).

234. The Group Intangibles are centralised in a foreign related party, OneCo. OneCo has always owned, managed and controlled all DEMPE activities associated with the Group Intangibles. OneCo has material operations, including many specialised staff with the expertise and skill to manage, perform and control DEMPE activities with respect to the Group Intangibles.

235. AusCo does not perform DEMPE activities with respect to any of the Group Intangibles, including R&D activities. AusCo pays a royalty to OneCo under a Royalty Agreement for the right to licence and exploit the Group Intangibles in its ordinary business operations. The royalty paid under this agreement is determined as a percentage of sales. Both AusCo and OneCo comply with their Australian withholding tax obligations. AusCo maintains evidence that substantiates the arm's length nature of the royalty paid under this agreement.

Acquisition and transfer

236. AusCo acquires business assets from a third-party Australian entity. The acquired assets include intangible assets (New Intangibles). The New Intangibles are considered to complement the global group's existing Group Intangibles. The purchase price for the assets includes a value attributable to the New Intangibles, determined by an independent valuation of the New Intangibles, carried out just prior to the acquisition.

237. Shortly after AusCo acquires the New Intangibles, it transfers the New Intangibles to OneCo. The price at which OneCo purchases the New Intangibles from AusCo is not materially different to the independent value that was attributable as part of the purchase price when AusCo acquired the New Intangibles.

238. The decision to transfer the New Intangibles reflects the fact that OneCo has the appropriate expertise, staff and infrastructure to continue to own, manage and perform DEMPE functions with respect to the New Intangibles and that AusCo does not have the

appropriate expertise, staff and infrastructure to perform DEMPE functions with respect to the New Intangibles. Following the transfer, AusCo does not perform any control functions relating to the maintenance, development, enhancement or protection of the New Intangibles. AusCo does exploit the New Intangibles in its ordinary business operations following the transfer and AusCo and OneCo amend their existing Royalty Agreement to include and factor in the New Intangibles to the Group Intangibles licensed by AusCo under the Royalty Agreement.

Risk assessment

239. *This is a Migration of intangible assets. According to RAF Table 1 of this Guideline, the risk assessment is as follows.*

Table 16: Example 12 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>Shortly after AusCo acquires the New Intangibles, it transfers the New Intangibles to OneCo. AusCo exploits the New Intangibles in its ordinary business operations following the transfer.</i>	<i>5</i>
<i>Circumstances of the Relevant Entity</i>	<i>OneCo has always owned, managed and controlled all DEMPE activities associated with the Group Intangibles. OneCo has material operations, including many specialised staff with the expertise and skill to manage, perform and control DEMPE activities with respect to the Group Intangibles. AusCo is not involved in the DEMPE activities of Group Intangibles post-transfer.</i>	<i>0</i>
<i>Tax outcomes – Question 5</i>	<i>None of the tax attributes or outcomes in Question 5 apply.</i>	<i>0</i>
<i>Tax outcomes – Question 6</i>	<i>If AusCo does not transfer the New Intangibles to OneCo, AusCo can be entitled to the income from the exploitation of New Intangibles.</i>	<i>10</i>

240. *The total risk assessment score for this arrangement is 15. The arrangement between AusCo and OneCo would be regarded as a green zone (lower-risk) Intangibles Migration Arrangement.*

241. *It will be relevant to consider the valuation of the New Intangibles at the point at which AusCo acquired the New Intangibles and at the point at which the New Intangibles are transferred to OneCo. It will also be relevant to consider the pricing and terms of AusCo's Royalty Agreement, both pre- and post-transfer of the New Intangibles.*

242. *When assessing the risk, we would expect specific consideration be given to the transfer pricing provisions.*

243. *In subsequent years, in addition to RAF Table 1, RAF Table 2 will also need to be completed. Following the restructure or change, there is one agreement between AusCo and OneCo, the Royalty Agreement, for the right to licence and exploit both the Group Intangibles and the New Intangibles in Australia. This can be assessed as one Intangibles Migration Arrangement.*

244. *The Intangibles Migration Arrangement includes dealings with OneCo regarding New Intangibles, which was transferred by AusCo to OneCo. Therefore, this Intangibles Migration Arrangement does not satisfy the criteria for being an Excluded Inbound Distribution Arrangement and RAF Table 1 should be applied to assess the original transfer of New Intangibles. This is the case regardless of whether AusCo's functions in Australia are subsequently limited to the distribution of goods in Australia.*

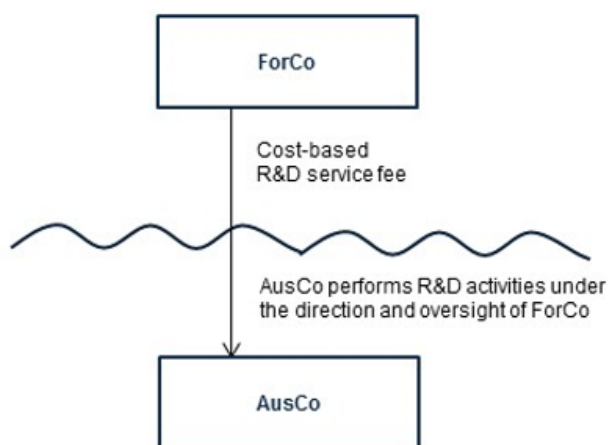
245. Under RAF Table 2 of this Guideline, the risk assessment will be as follows:

- overall characterisation – 0 or 10 points (AusCo only exploits the Group Intangibles and New Intangibles but otherwise has no further involvement in the DEMPE of New Intangibles, however we note that it may be possible that extensive marketing can enhance the value of New Intangibles)
- circumstances of the Relevant Entity (low risk) – 0 points given the degree of substance of OneCo, and
- tax outcomes – 0 points if none of the tax outcomes apply to either Group Intangibles or New Intangibles or OneCo.

The overall risk rating is low (0 or 10 points) under RAF Table 2 of this Guideline.

Example 13 – contract research and development arrangement – green zone

Diagram 19: Example 13 – overview of arrangement



246. AusCo is part of a global group that manufactures and sells goods and provides associated services globally. AusCo and its international related parties exploit valuable intangible assets in undertaking their operations. The intangible assets include patents, know-how, trade marks, copyright and other intangible assets or rights (Existing Intangibles).

247. ForCo, a related party located in a foreign jurisdiction, is the entity that has always undertaken, managed and been responsible for the DEMPE activities associated with the Existing Intangibles. ForCo derives worldwide income from the exploitation of the Existing Intangibles by the global group.

248. In connection with managing and controlling the DEMPE activities associated with the Existing Intangibles, ForCo is responsible for managing the global group's R&D operations. The R&D operations consist of primary R&D centres which are located within ForCo's jurisdiction and several secondary R&D centres located outside of ForCo's jurisdiction, which perform R&D services for or on behalf of ForCo.

249. AusCo is party to an R&D services agreement with ForCo (R&D Services Agreement), under which it is remunerated with a service fee. AusCo maintains evidence substantiating the arm's length nature of the service fee and the terms of the R&D Services Agreement.

250. Under the R&D Services Agreement:

- AusCo performs the R&D services under the direction and oversight of ForCo

- *provision of the R&D services requires knowledge and use of the Existing Intangibles, and*
- *new intangible assets or improvements to the Existing Intangibles developed as a result of the R&D undertaken by AusCo will be owned by ForCo.*

251. *ForCo employs specialised staff and holds the necessary expertise and capability to manage the various contract R&D centres and undertake DEMPE activities. AusCo does not manage and control the risks associated with the relevant DEMPE activities and performs R&D activities under the close supervision of ForCo. AusCo’s R&D staff conduct their R&D activities solely within scope of work orders received from ForCo and are monitored by relevant staff employed by ForCo, attending regular management and milestone reviews in connection with their project work.*

Risk assessment

252. *This is not a restructure or change of intangible arrangements. According to RAF Table 2 of this Guideline, the risk assessment is as follows.*

Table 17: Example 13 – application of risk assessment factors

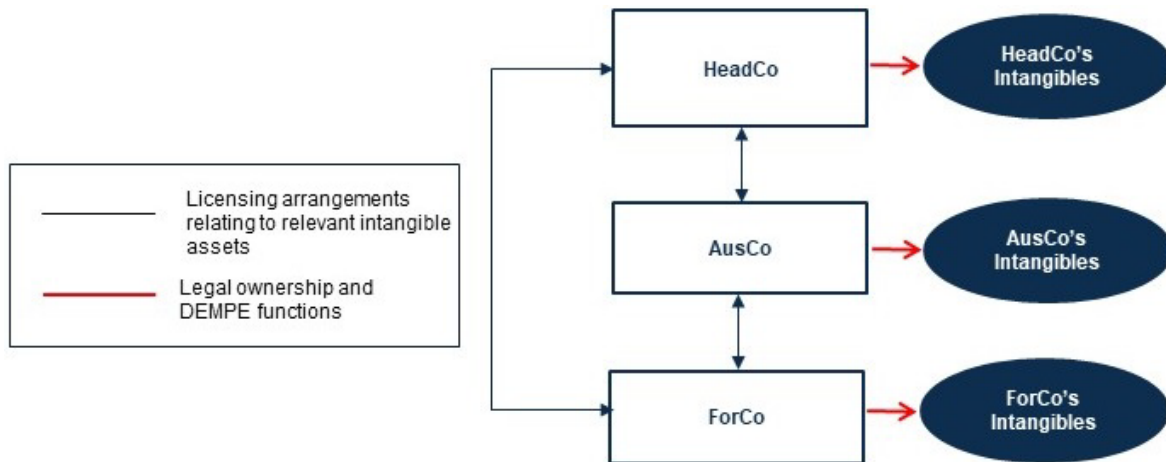
Risk assessment factor	Application of criteria	Score
<i>Characterisation – AusCo</i>	<i>AusCo performs R&D activities in relation to Intangible Assets not owned by AusCo and exploits the Intangible Assets in its operations (but does not otherwise enhance or add value to the Intangible Assets)</i>	<i>10</i>
<i>Circumstances of the Relevant Entity</i>	<i>In connection with managing and controlling the DEMPE activities associated with the Existing Intangibles, ForCo is responsible for managing the global group’s R&D operations. The R&D operations consist of primary R&D centres which are located within ForCo’s jurisdiction and several secondary R&D centres located outside of ForCo’s jurisdiction, which perform R&D services for or on behalf of ForCo</i>	<i>0</i>

253. *The total risk assessment score for this arrangement is 10. The arrangement between AusCo and ForCo would be regarded as a green zone (lower-risk) Intangibles Migration Arrangement.*

254. *We would expect specific consideration be given to the transfer pricing provisions.*

Example 14 – cost contribution arrangement – green zone

Diagram 20: Example 14 – overview of original arrangement



Original arrangement

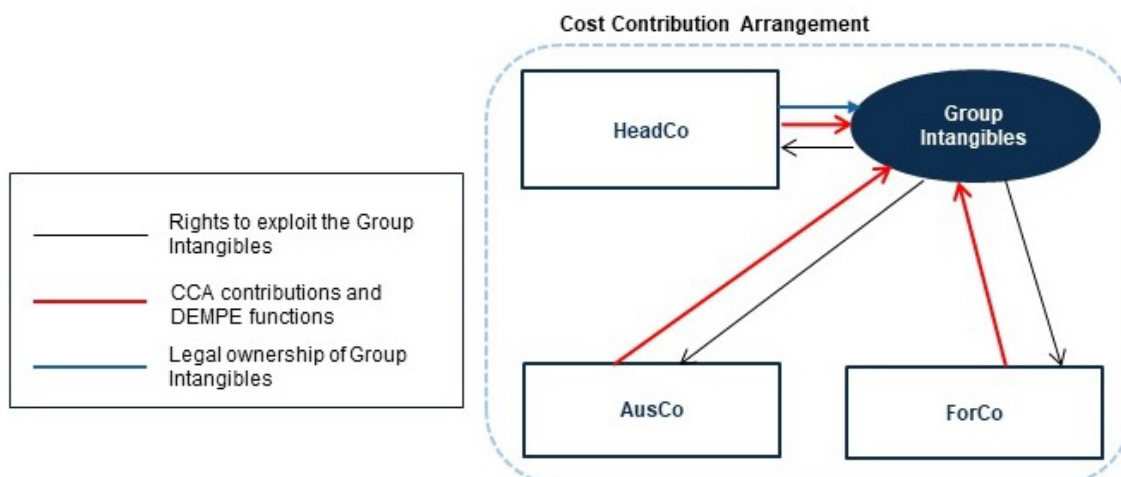
255. AusCo is part of a global group headed by HeadCo, located in a foreign jurisdiction. HeadCo's subsidiary, ForCo, is located in another foreign jurisdiction. AusCo, HeadCo and ForCo act as regional heads for the global group. The regional heads exploit a suite of valuable intangible assets comprising AusCo's Intangibles, HeadCo's Intangibles and ForCo's Intangibles in undertaking business operations in their respective regions.

256. AusCo manages and controls DEMPE functions associated with its Intangibles. AusCo derives royalties from its international related parties HeadCo and ForCo under licence agreements for the exploitation of its Intangibles in each of HeadCo's and ForCo's respective regions.

257. ForCo manages and controls DEMPE functions associated with its Intangibles. ForCo derives royalties from its international related parties HeadCo and AusCo under licence agreements for the exploitation of its Intangibles in each of HeadCo's and AusCo's respective regions.

258. HeadCo manages and controls DEMPE activities associated with its Intangibles, which comprise the majority of the global group's intangible assets. HeadCo derives royalties from AusCo and ForCo under licence agreements for the exploitation of its Intangibles in each of AusCo's and ForCo's respective regions.

Diagram 21: Example 14 – overview of cost contribution agreement



Cost contribution arrangement

259. *AusCo, HeadCo and ForCo decide to enter into a cost contribution arrangement (CCA) to pool their expertise and share the risks of improving each of their respective Intangibles for the mutual benefit of all participants.*

260. *Under the terms of the CCA:*

- *AusCo, HeadCo and ForCo each contribute their Intangibles to the CCA, with all 3 participants making adjustments to their contributions, as required, to align them with their share of expected benefits. An independent valuation was undertaken for each of AusCo’s, HeadCo’s and ForCo’s Intangibles.*
- *All R&D costs incurred globally are initially borne by HeadCo, and the costs are then allocated between the 3 regional heads based on the proportion of group sales each regional head makes in their respective region.*
- *At the end of the income year, a balancing adjustment, based on the allocation of costs, is made where necessary to align each of HeadCo’s, AusCo’s and ForCo’s share of costs with their share of expected benefits.*
- *All intangible assets developed under the CCA are to be legally owned by HeadCo, with AusCo and ForCo each having economic ownership of the developed intangibles in their respective regions.*

261. *Each of HeadCo, AusCo and ForCo employs specialised R&D staff, who use their expertise in performing their functions. The activities and risks borne by AusCo per the CCA accurately reflect the substance of its R&D contribution (based on an assessment of its functions, assets and risks). AusCo’s proportionate share of costs is consistent with the expected benefits to be received by AusCo under the CCA as compared to HeadCo and ForCo.*

262. *AusCo, HeadCo and ForCo terminate their pre-existing cross-licensing agreements as a result of entering into the CCA.*

Risk assessment

263. *This is a Migration of intangible assets. According to RAF Table 1 of this Guideline, the risk assessment is as follows.*

Table 18: Example 14 – application of risk assessment factors

Risk assessment factor	Application of criteria	Score
<i>Restructure or change</i>	<i>AusCo’s contribution of intangibles into a CCA is a restructure or change covered by RAF Table 1. AusCo continues to exploit or use the Relevant Intangible Assets (being AusCo’s Intangible Assets).</i>	<i>5</i>
<i>Circumstances of the Relevant Entity or Entities</i>	<i>Both HeadCo and ForCo are Relevant Entities for the purposes of applying the risk assessment framework. ForCo and HeadCo both have specialised staff who use their expertise in performing, managing and controlling the DEMPE activities they are responsible for.</i>	<i>0</i>
<i>Tax outcomes – Question 6</i>	<i>Given that AusCo’s proportionate share of costs is consistent with the expected benefits to be received by AusCo under the CCA as compared to HeadCo and ForCo, it does not appear that AusCo’s taxable income is, or might reasonably be expected to be, lesser than if the restructure or change has not been entered into.</i>	<i>0</i>

264. The total risk assessment score for this arrangement between AusCo, HeadCo and ForCo is 5. The arrangement would be regarded as a green zone (lower-risk) Intangibles Migration Arrangement.

265. If, under the CCA, the contribution by AusCo is extensive whereas the relative contribution by either HeadCo or ForCo is of limited value, this will impact the rating for the substance risk factor and the arrangement may be regarded as a high-risk Intangibles Migration Arrangement. These will include:

- situations where the parties to the CCA are not able to demonstrate that they have the necessary capability, financial capacity or assets to, in substance, manage and control the DEMPE activities and assume associated risks as agreed in the CCA, or where the intangible assets contributed by them are of limited value relative to the expected benefits to be received by them, especially when compared to AusCo’s contribution and expected benefits
- circumstances where independent parties dealing wholly independently would not have entered into a similar arrangement under such conditions.

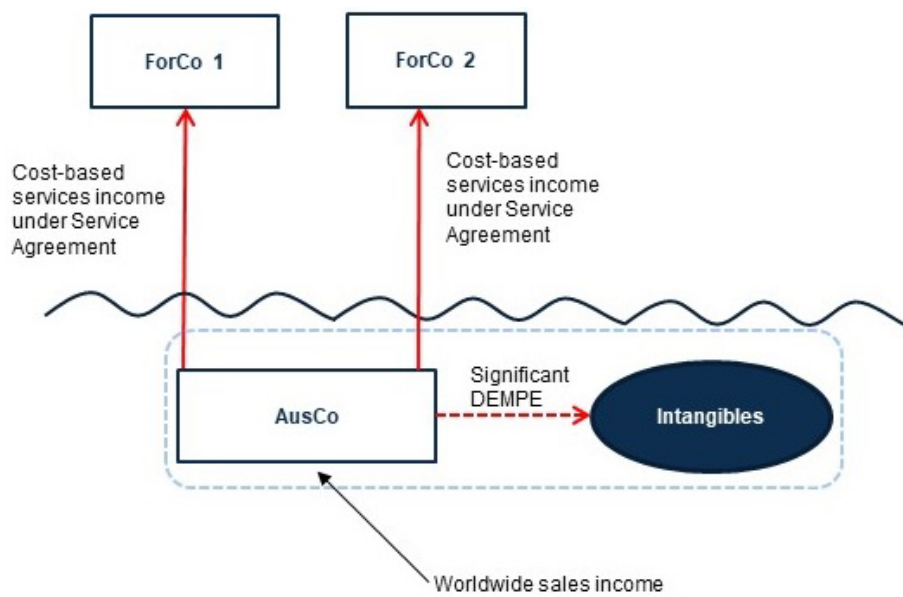
266. Example 8 in this Appendix is an example of a higher-risk CCA. We also refer to Taxation Ruling TR 2004/1 Income tax: international transfer pricing – cost contribution arrangements for more extensive discussions of compliance risks associated with cost contribution arrangements.

267. Additionally, the tax attributes of other cost sharing agreement participants are considered to be indicators that the restructure could be driven by the tax outcomes. In this example, no tax attributes or other tax outcomes in RAF Table 1 apply to either ForCo or HeadCo. Where such tax attributes are present, a CCA may result in a higher-risk rating.

268. Where relevant, we may consider the potential application of the transfer pricing provisions, and the CGT provisions in relation to AusCo’s entry into the CCA. For higher-risk CCA arrangements, the potential application of Part IVA of the ITAA 1936 (including the DPT) will also be considered.

Example 15 – service arrangement – out of scope

Diagram 22: Example 15 – overview of arrangement



269. *AusCo is an Australian-headquartered company with subsidiaries in offshore locations, ForCo 1 and ForCo 2. AusCo's founder, an Australian tax resident, developed a software product that has been commercialised and distributed globally. AusCo employs 15 staff, ForCo 1 employs 3 staff and ForCo 2 employs 2 staff.*

270. *AusCo owns the intangible assets associated with the software product and under the direction of the founder, AusCo manages, performs and controls all of the related DEMPE activities and assumes associated risks. Worldwide income from the distribution of the software products is derived by AusCo.*

271. *ForCo 1 and ForCo 2 provide support activities to assist AusCo. ForCo 1 and ForCo 2 receive cost-based remuneration from AusCo under Service Agreements. AusCo maintains evidence substantiating the arm's length nature of the pricing and terms of each of the Service Agreements.*

Risk assessment

272. *There is no Migration of intangible assets and the Australian DEMPE activities are not for the benefit of any other international related party who holds or has legal or economic ownership of the intangible assets (AusCo owns the intangible assets).*

273. *The arrangements between AusCo and its subsidiaries would be regarded as out of scope of this Guideline. Accordingly, the compliance approach in relation to this arrangement will not be affected by this Guideline, including the risk assessment framework.*

274. *In any potential review of this arrangement, we would consider the transfer pricing provisions.*

APPENDIX 2 – Evidence expectations

275. As a preliminary matter, we will typically review the following information in our possession, where relevant, including (and depending on) whether you have relevant international related party dealings, are a significant global entity or country-by-country reporting entity or have disclosed a relevant Category C reportable tax position⁴³:

- Australian tax returns, including International Dealings Schedules
- general purpose financial statements
- Country-by-country (CBC) reporting data exchanged automatically or by exchange of information request, including any available Master file, Local File Parts A and B or CBC report
- information obtained from foreign jurisdictions through exchange of information processes, and
- other information obtained previously by the ATO in connection with any engagement or review, and other relevant information from third parties, public sources or other government agencies.

276. The evidence expectations outlined in this Appendix focus on:

- evidencing the commercial considerations and your business decision-making
- evidencing the legal form and substance of your Intangibles Migration Arrangements
- identifying and evidencing the intangible assets and connected DEMPE activities, and
- evidencing the tax and profit outcomes of your Intangibles Migration Arrangements.

Evidencing the commercial considerations and your decision-making process

277. In circumstances where you have restructured or had a change associated with your Intangibles Migration Arrangements, we will typically require an understanding of the broader circumstances in which the restructure or change was entered into or carried out. We will typically require information, including contemporaneous documents, to:

- verify the market value of any intangibles acquired or sold
- evidence any other considerations connected with entering into the restructure or arrangement, including whether other or alternative arrangements were considered and the reasons why any alternative arrangements were not pursued
- evidence and verify any tax and non-tax or commercial objectives achieved under the arrangement.

This information is integral to our assessment of the commerciality of your Intangibles Migration Arrangements and potential compliance risks.

278. The evidence we may require includes:

- internal or independent reviews, cost/benefit analyses, forecasts, projections, modelling, reports or advice commissioned or obtained in

⁴³ We refer to the self-assessment obligations referenced in paragraphs 26 to 28 of this Guideline.

relation to your Intangibles Migration Arrangements and associated commercial objectives – this could include quantifiable productivity gains, cost savings, synergistic benefits, location or jurisdiction specific benefits, reduction of non-tax costs, provision of connected government incentives and any other relevant costs and benefits associated with your Intangibles Migration Arrangements

- the documents created or provided by tax personnel or tax advisers disclosing anticipated or potential Australian and foreign tax effects of the Intangibles Migration Arrangements, including financial models disclosing projected or potential tax impacts and slides or step plans in connection with developing arrangements
- briefing materials, analysis and data produced in connection with the documents outlined in the first dot point of this paragraph, including those produced by or for internal and independent specialists
- presentations and other papers prepared in relation to your Intangibles Migration Arrangements and associated commercial objectives, including papers provided to your management team, board of directors or any other group or subgroup responsible for considering or making recommendations on the arrangements
- minutes of board and other meetings at which all Intangibles Migration Arrangements, including alternative arrangements not pursued, were considered and any correspondence with tax advisers or tax personnel in relation to preparing or revising the minutes
- commercial, regulatory and tax advice obtained in connection with your Intangibles Migration Arrangements
- details of any changes to the transfer pricing policy in the relevant period, including the rationale for any such changes and the pricing and profit outcomes before and after the change event for all parties connected to your Intangibles Migration Arrangements (for example, reports documenting functional analyses undertaken for relevant entities, correspondence exchanged between key decision-makers regarding the benefits of certain structures, and actuarial reports of cost modelling), and
- details of any changes to inter-company agreements and company policies in the relevant period.

Evidencing the legal form and substance of your Intangibles Migration Arrangements

279. To assess the compliance risks presented by your Intangibles Migration Arrangements, we must understand the specific transactions entered into as part of your Intangibles Migration Arrangements. We will require information and documents that evidence the detailed legal form of your Intangibles Migration Arrangements to assist us in understanding your Intangibles Migration Arrangements in totality.

280. The evidence we may require to understand the legal form of your Intangibles Migration Arrangements includes:

- legal agreements, memorandums and like documents associated with your Intangibles Migration Arrangements, including any amendments to, or restatements of, such documents

- details of ownership of intangible assets, including where ownership rights in the intangible asset may have been diluted
- where a restructure has occurred, details of the planning in connection with setting up new legal arrangements or entering into new legal documentation, for example, planning the choice of employees or officers to be appointed as directors of new entities and policies to protect intangible assets
- guidelines, manuals, policies, procedures, specifications and like documents relevant to your Intangibles Migration Arrangements that are developed or maintained by you, your global group, a related party or a third party under the direction of you, your global group or a related party. This includes any such documents that instruct and detail conduct of parties with any connection to the Intangibles Migration Arrangements, the relevant intangible assets and the connected DEMPE activities, and
- transfer pricing documentation including any specific or supplementary analysis or valuation or other reports produced for transactions which form part of your Intangibles Migration Arrangements.

Legal agreements

281. Obtaining the legal agreements, memorandums and other documents associated with your Intangibles Migration Arrangements allows us to form a preliminary view of your Intangibles Migration Arrangements, which includes all relevant intangible assets, associated activities and entities involved in the arrangements. This includes, for example, relevant asset purchase agreements, sale agreements, royalty or licensing agreements, associated contract R&D service agreements with international related parties, including any amendments to, or restatements of, such agreements.

282. Where legal agreements are not yet drafted or are subject to change, we may require available draft or interim agreements, memorandums or like documents. If relevant agreements and documents are subject to change, this will impact our ability to determine the level of risk presented by your Intangibles Migration Arrangements.

283. We may also request relevant agreements or other documents between other international related parties and, in certain circumstances, third parties to allow us to obtain a holistic understanding of your global group's Intangibles Migration Arrangements. For example, where international related parties with which the Australian entity has entered into agreements have similar or dissimilar arrangements with other international related parties in connection with intangible assets.

Guidelines, manuals, policies and governance-like documents

284. Obtaining your internal guidelines, manuals, policies, procedures, specifications, governance and like documents relevant to your Intangibles Migration Arrangements allows us to establish whether you and your associates have policies and work processes in place that are relevant to your arrangements. This includes relevant group intellectual property management policies evidencing whether intangible assets are managed by a central team, R&D policies or other policies concerning the development, management and commercialisation of your intangible assets.

285. These facts and documents enable us to understand the broader circumstances surrounding your Intangibles Migration Arrangements and inform our assessment of risk. For example, we may have concerns where your group intellectual property management

and R&D policies appear to be inconsistent with your legal agreements or your actual conduct or dealings with other parties in relation to the intangible assets.

Transfer pricing documentation

286. Obtaining your transfer pricing documentation allows us to gain an overall understanding of the operation of your Intangibles Migration Arrangements, including the identification of all relevant intangible assets, entities, activities and associated transfer pricing outcomes. This documentation allows us to assess the degree to which your transfer pricing analysis supports the arm's length nature of your Intangibles Migration Arrangements, which would inform our risk assessment.

287. We may also compare your transfer pricing documentation with your group intellectual property management and R&D policies, legal agreements with international related parties or your actual conduct or dealings with other parties in relation to the intangible assets to better understand your Intangibles Migration Arrangements.

Country-by-country reporting documentation

288. If you are a significant global entity or country-by-country reporting entity, we will also consider information provided as a part of any available CBC reporting documentation, such as agreements provided in Part B of your local file and Master file documentation. We may request further information, such as the underlying data and records that you used to prepare your CBC reporting.

Identifying and evidencing the intangible assets and connected DEMPE activities

289. The identification of relevant intangible assets and connected DEMPE activities is critical to assessing the level of compliance risks presented by your Intangibles Migration Arrangements. As such, in addition to obtaining an understanding of the legal form of your Intangibles Migration Arrangements, we will seek to identify or clarify relevant intangible assets and connected DEMPE activities in more specific detail. We will do so to clarify how your Intangibles Migration Arrangements operate in substance and mitigate any uncertainty arising from documents and evidence establishing the legal form of your arrangements (legal form documents).

290. We may also require specific documents and evidence to identify and clarify your intangible assets and DEMPE activities due to the:

- difficulties you may encounter in identifying and tracking intangible assets through the various stages of development, commercialisation and exploitation
- fact that certain intangible assets may be intrinsically connected or linked to certain other assets or DEMPE activities
- ease with which certain intangible assets and DEMPE activities may be altered or moved, and
- complex nature of a multinational group's value chains connected with intangible assets and DEMPE activities.

291. These issues may require discussions or interviews of relevant personnel or the review of specific documentation to inform our risk assessment.

Identifying intangible assets

292. The evidence we may require you to maintain to identify and clarify intangible assets relevant to your Intangibles Migration Arrangements include documents which detail the names or identifiers and functions of relevant intangible assets and the products, processes or other relevant commercial activities they are associated with. We will also seek to obtain evidence of the nature of relevant assets (for example, copyright, patent, design or model, plan, know-how, secret formula or process, trade mark or other like property or right) and whether such assets have been registered. Our document and evidence expectations extend to know-how assets relating to business processes, interpretation of data, a valuable concept or business innovation not able to be registered.

293. The evidence we may require includes:

- intangible asset registers
- AASB 138-compliant⁴⁴ financial statements and associated records or documents relevant to the recognition of intangible assets
- registration documents, such as those required by and produced for IP Australia
- internal or external database extracts or other relevant digital or physical records
- relevant reports, specifications or R&D stage gate documents, particularly where intangible assets are in development or in a pre-commercialised state
- guidelines, manuals, policies, procedures and like documents relevant to the identification and recognition of relevant intangible assets of you or of members of your global group, including governance documents over approval of business plans where know-how is reflected in decision-making accountability, and
- any additional or like documents that may assist us in identifying and understanding relevant assets.

Identifying DEMPE activities

294. We may require contemporaneous documentation and evidence to clarify the DEMPE activities connected with your Intangibles Migration Arrangements in more specific detail. We expect that the functions performed, assets used and risks assumed by relevant entities in connection with the DEMPE of intangible assets will be detailed in your transfer pricing documentation. We may seek to clarify this information, for example, by obtaining correspondence of persons involved in DEMPE activities or by identifying and interviewing personnel involved in DEMPE activities, relevant decision-makers and approval points and any activities outsourced to third or related parties.

295. The evidence we may require includes:

- organisational charts, including descriptions of roles and responsibilities of individuals involved in DEMPE activities
- correspondence of persons identified as involved in DEMPE activities

⁴⁴ Australian Accounting Standards Board AASB 138 *Intangible Assets* as applicable to the reporting period in question. The current standard is available at [Current standards](#). AASB 138 as applicable to earlier reporting periods can be found at [Search by reporting period](#).

- guidelines, manuals, policies, procedures and like documents relevant to your, your global group's or your international related parties DEMPE activities
- internal or external database extracts or other relevant digital or physical records relating to DEMPE activities
- relevant reports, specifications or R&D stage-gate documents associated with DEMPE activities
- documents associated with any R&D tax incentive claims lodged with the Department of Industry, Science and Resources, and
- any additional or like documents that may assist us in identifying and understanding your DEMPE activities.

Evidencing intangible assets and DEMPE activities

296. We may also seek to obtain evidence to substantiate aspects of your legal form documents, the nature of relevant intangible assets and aspects of DEMPE activities. We will request this information to obtain assurance that the substance of your Intangibles Migration Arrangements aligns with the legal form of the arrangement and consider whether there are any associated compliance risks.

297. We may require documents to ensure that the obligations outlined in your legal form documents are consistent with what is occurring in practice. We may analyse the functions performed by relevant entities in connection with the Intangibles Migration Arrangements with reference to specific clauses in legal agreements, group policies, correspondence or transfer pricing documentation. We may also require information and documents, including email correspondence, which demonstrate that entities held out to be managing, controlling or performing DEMPE activities and assuming associated risks, have the capability, financial capacity and assets to do so in substance.

298. The evidence we may require includes:

- approvals, authorisations, correspondence and meeting minutes which demonstrate that the DEMPE activities undertaken by relevant entities are consistent with those specified in your legal form agreements, for example, directions and approvals received from entities that manage and control risks associated with DEMPE activities
- meeting minutes, reports, scopes of work, internal or external database extracts or other relevant digital or physical records which demonstrate functions performed, assets used and risks assumed in connection with DEMPE activities
- documents detailing the assets and capabilities of relevant entities, including relevant employment contracts and key performance indicators, employee head count and qualifications, and planning documents
- documents detailing the financial position of relevant entities and profit outcomes associated with your Intangibles Migration Arrangements, including general purpose financial statements, accounts and annual reports
- contemporaneous valuation reports, working papers and associated documentation where intangible assets and relevant functions have been transferred offshore, and
- any additional or like documents that may assist us in identifying and understanding your DEMPE activities.

Evidencing the tax and profit outcomes of your Intangibles Migration Arrangements

299. We may require documents to assess the appropriateness of the tax and profit outcomes resulting from your arrangements, including the transfer pricing method and comparability studies applied, where relevant.

300. The evidence we may require includes:

- comparability studies, valuations, projections and other analyses which have been obtained or applied to determine the nature and quantum of transactions executed under the arrangement, including any connected advice obtained from internal or independent specialists
- any financial modelling or projections, including models of anticipated tax impacts of options or arrangements prepared by tax personnel or tax advisers
- analyses, data and briefing materials underlying any valuations, projections, other analyses and connected advice obtained from internal or independent specialists that have been applied to determine the nature and quantum of transactions executed under the arrangement
- evidence of actual cash flows in connection with the arrangement
- financial, transactional and tax information for relevant domestic and offshore entities, including general purpose financial statements, accounts, annual reports, general ledger entries and other accounting or reporting documentation where relevant, and
- tax information for relevant domestic and offshore entities including foreign tax returns, foreign notices of assessment (or equivalent), foreign tax receipts and notices of refund (or equivalent), foreign tax instalment notices and running balance accounts (or equivalent), any advice or valuations obtained in relation to the potential tax consequences of proposed structures or transactions, any approvals of tax holidays or other reductions in tax and relevant correspondence from foreign revenue agencies.

Simplified record keeping

301. If you are eligible to apply any of the simplified transfer pricing record-keeping options under PCG 2017/2, we will have regard to the record-keeping obligations outlined, where relevant.

302. PCG 2017/2 is not available to small taxpayers and distributors in relation to international-related party dealings involving royalties, licence fees or R&D arrangements. We note:

- The performance of DEMPE functions that materially contribute to the value of intangible assets, which are in scope of this Guideline, will not fall within the definition of 'low value adding intragroup services' for the purposes of PCG 2017/2⁴⁵ or 'Excluded Low Value Services Arrangements' for the purpose of this Guideline.

⁴⁵ Such activities will fall within 'specified services' which are not eligible to be included as 'low value adding intragroup services'. See paragraph 86 of PCG 2017/2.

- Technical services considered under PCG 2017/2 also exclude the use of intellectual property, know-how, processes, systems or other like intangible assets or rights.

303. Some dealings for which the 'low value adding intragroup services' option has been applied under PCG 2017/2 may fall within the definition of 'Excluded Low Value Services Arrangement' and be out of scope for this Guideline.

Commissioner of Taxation

17 January 2024

References

Previous draft:

PCG 2021/D4; PCG 2023/D2

Related Rulings/Determinations:

TR 2004/1; TR 2014/6; TR 2014/8

Legislative references:

- ITAA 1997 Div 40
- ITAA 1997 SubDiv 815-B
- ITAA 1997 SubDiv 815-C
- ITAA 1997 815-20(2)(a)
- ITAA 1997 815-130
- ITAA 1997 815-130(2)
- ITAA 1997 815-130(3)
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- ITAA 1997 815-135(2)(a)
- ITAA 1997 Div 830
- ITAA 1936 Pt IVA
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- TAA 1953 Sch 1 Subdiv 284-E

- Australian Accounting Standards Board Standard 138 *Intangible Assets*
- OECD (2017) *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD Publishing, Paris
- OECD (2022) *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, OECD Publishing, Paris
- ATO ID 2015/4
- ATO ID 2015/5
- PCG 2017/2
- PCG 2018/5
- PS LA 2005/24
- PS LA 2017/2
- TA 2018/2
- TA 2022/2

Other references:

- Australian Accounting Standards Board Standard 10 *Consolidated Financial Statements*
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ATO references

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