


PCG 2024/3EC - Compendium

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Public advice and guidance compendium – PCG 2024/3

📌 Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Practical Compliance Guideline PCG 2024/D1 *Section 99B of the Income Tax Assessment Act 1936 – ATO compliance approach*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO’s general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

All legislative references in this Compendium are to the *Income Tax Assessment Act 1936*, unless otherwise indicated.

Issue number	Issue raised	ATO response
1	Guidance is needed in the final Guideline on whether the Commissioner will seek to apply section 99B to wholly domestic arrangements.	<p>Section 99B was introduced in 1979 as part of a suite of amendments made to Division 6. The provision (at that time) was drafted broadly, such that from time to time, there are interpretive issues which may arise or be questioned when considering the application of section 99B to current circumstances.</p> <p>With increasing globalisation and migration flows into and out of Australia, we have observed an increase in resident taxpayers who receive an amount of trust property (being a payment or a benefit) from non-resident trusts and therefore an increased need for ATO guidance.</p> <p>This Guideline is intended to provide guidance and certainty as to the scope of our current focus when considering the application of section 99B. That is, per paragraphs 6 and 7 of the Guideline, we are focused in this guidance on trust property accumulated by a trust during any period that it was a non-resident of Australia for tax purposes. By releasing this Guideline, we do not intend to alter our historical or existing approach.</p>
2	The final Guideline should outline the historical context and purpose of section 99B and include the ATO view regarding whether section 99B should be read down to align with its original purpose.	See our response to Issue 1 of this Compendium.

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3	The final Guideline should make it clear that section 99B does not apply if the beneficiary is a temporary resident.	No change has been made in the final Guideline. We note that there are special rules for temporary residents in Subdivision 768-R of the <i>Income Tax Assessment Act 1997</i> (ITAA 997) and will consider whether guidance on our website is required. See Receiving payments or assets from foreign trusts .
4	<p>The final Guideline should explain how the ATO might engage with taxpayers with respect to section 99B where the taxpayer is unsure whether section 99B applies. For example:</p> <ul style="list-style-type: none"> • whether the beneficiary should include income as assessable in their tax return, then self-object • if the trustee should obtain a private ruling • how compliance activities will arise. 	<p>Where the resident beneficiary wants to determine if section 99B or one of the reductions in subsection 99B(2) applies, as with any guidance or application of a provision in relation to a specific arrangement, we encourage taxpayers to:</p> <ul style="list-style-type: none"> • seek advice through a private ruling • seek independent professional advice, or • if they have already lodged their tax return, make a voluntary disclosure to reduce penalties that may apply. <p>As part of our general compliance activities, if a section 99B risk is identified, taxpayers can expect:</p> <ul style="list-style-type: none"> • where they have relied on a compliance approach, we will not have cause to dedicate compliance resources to consider the application of section 99B, other than to confirm that the low-risk features of the relevant arrangement are present • clear guidance on the types of records that may be expected to be provided to substantiate that a reduction in subsection 99B(2) applies, or that the compliance approach criteria is met.
5	The final Guideline should highlight the ATO's expectations that recipients of funds from overseas enquire as to the source of the funds.	Understanding the source and nature of an amount received is not specific to the application of section 99B. Taxpayers should generally make these enquiries when in receipt of any funds or benefits to determine whether the amount or benefit is assessable. Further guidance on receiving amounts from overseas entities has previously been provided in Taxpayer Alert TA 2021/2 <i>Disguising undeclared foreign income as gifts or loans from related overseas entities</i> .

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6	The final Guideline should provide guidance on how to prevent or resolve situations where the same amount may be assessed to multiple beneficiaries. The ATO should consider an administrative approach that results in a 'first assessment' rule and provide examples.	No change has been made in the final Guideline regarding the issue of multiple assessments. This type of scenario is fact-specific and should be considered on a case-by-case basis.
7	The final Guideline should provide guidance on and awareness of section 102AAM interest.	In the final Guideline, footnote 2 has been included for awareness of the additional tax imposed by section 102AAM where an amount has been included in a taxpayer's assessable income under section 99B. Individual taxpayers are the most common taxpayers that consider section 99B and, pursuant to subsection 102AAM(12), it is the Commissioner who must make an assessment of the interest payable for a taxpayer who is not a full self-assessment taxpayer.
8	A 'safe harbour' for section 102AAM interest should be introduced for distributions received that are less than \$1 million.	The Commissioner has no discretion to remit or reduce the additional tax imposed by section 102AAM.
9	Why is there a distinction made between receiving a gift and receiving a distribution from a non-resident trust in Examples 2 and 3 of the draft Guideline?	Both scenarios have been raised with us by tax professionals as being 'common'. On that basis, we have included both to ensure we are giving as much awareness and guidance to all taxpayers that may be impacted by section 99B. In the final Guideline, Example 3 now clarifies that the recipient's expectation was that they had been in receipt of a gift but the amount was actually a distribution from a trust.
10	In the final Guideline, Example 3 should clarify whether Jack is a beneficiary of the trust, unless the Commissioner is expressing the view that a resident who is not a beneficiary can be caught by section 99B.	In the final Guideline, Example 3 has been clarified to indicate that Jack is a resident beneficiary of the non-resident trust.

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11	Example 7 of the draft Guideline needs clarification. Should section 99B be considered when the loan is given or forgiven?	<p>The purpose of setting out the 'common scenario' examples is to highlight common scenarios that should prompt a resident beneficiary to consider the application of section 99B. The examples at this stage of the Guideline are not intended to explain the potential operation of the provisions.</p> <p>In the final Guideline, Example 7 has been replaced with another common example provided during consultation. See our response to Issue 14 of this Compendium.</p>
12	Example 7 of the draft Guideline does not address double taxation or whether the ATO's view is that section 99B will apply at both points in time (that is, time of the loan and the forgiveness of the loan).	See our response to Issue 11 of this Compendium.
13	The final Guideline should adapt the facts of Example 1 of the draft Guideline so that the non-resident trust is wound up prior to the beneficiary migrating and therefore section 99B does not apply.	No change has been made in the final Guideline. The 'common scenarios' section of the Guideline only includes examples where section 99B may need to be considered. The purpose of this section is to raise awareness about where section 99B may apply.
14	The final Guideline should expand the facts of Example 1 of the draft Guideline so that the beneficiary is also the trustee of the non-resident trust and therefore the trust became a resident when the beneficiary migrated to Australia. The example should also include a payment over 2 income years to highlight that section 99B will need to be considered in both years.	In the final Guideline, Example 7 has been updated to include a scenario involving a change in residency of the beneficiary in the same income year. Based on the feedback provided, the example included in the Guideline reflects the scenario that was considered most common.
15	Examples in the final Guideline should address a scenario where an amount is paid to a beneficiary before they become an Australian resident but in the same year that they become a resident.	See our response to Issue 14 of this Compendium.
16	The final Guideline should include an example similar to Example 2 of the draft Guideline but remove the wording 'that the amount has been paid from the trust and sourced from accumulated profits', to highlight the need to ask regarding the source of funds received.	In the final Guideline, Example 2 has been refined to indicate that the beneficiary is not made aware whether the amount was paid from accumulated profits.

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17	The final Guideline should expand the facts of Example 6 of the draft Guideline so that the deceased was a resident but the executor appointed is a non-resident, which changes the residency of the trust.	No change has been made in the final Guideline. Based on the feedback provided, the suggested example is not considered to be common.
18	The final Guideline should expand the facts of Example 6 of the draft Guideline to include that the deceased and executor are non-resident. However, the executor is also the sole beneficiary of the deceased estate and, upon receiving funds from the estate, the beneficiary gifts the funds to his resident daughter as he does not have a need for it. As the resident is not a beneficiary of the trust, section 99B will not apply.	See our response to Issue 13 of this Compendium.
19	The final Guideline should include an example where a non-resident trust became a resident trust and the trust assets are deemed to have been acquired at market value pursuant to section 855-50. The example should address the application of section 99B to amounts later flowing from the trust.	No change has been made in the final Guideline. Refer to new Example 7 in Taxation Determination TD 2024/9 <i>Income tax: factors taken into account in applying paragraphs 99B(2)(a) and (b) of the Income Tax Assessment Act 1936</i> , which has been included to illustrate how section 99B operates in this scenario.
20	The final Guideline should include an example where a non-resident trustee distributes to a resident trustee beneficiary, rather than just individual beneficiaries.	In the final Guideline, Example 2 has been refined to include a resident trustee beneficiary. In this scenario, an amount assessable pursuant to section 99B would be included in the net income of the trust and dealt with in accordance with the trust deed and any relevant trustee resolutions appointing trust income.
21	The final Guideline should include an example for an in specie distribution where the underlying asset had increased in value but purchased with trust settlement funds.	No change has been made in the final Guideline. The final Guideline includes 27 examples. We have considered the most useful and typical scenarios on which we receive requests for advice or which we identify as a risk in compliance cases. While this scenario has been raised during consultation, the most common scenario that arises involves Australian beneficiaries receiving cash or use of property (rather than the transfer of trust assets).
22	The final Guideline should include an example for an in specie distribution where an original asset is sold for a profit and some of the funds are used to acquire a new asset that is later distributed to a beneficiary.	See our response to Issue 21 of this Compendium.

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23	The final Guideline should include an example that expands on the facts of Example 13 of the draft Guideline to include an in specie transfer from a deceased estate.	See our response to Issue 21 of this Compendium.
24	Advancing trust property (as in Examples 4 and 5 of the draft Guideline) is not the application of trust property for the purposes of sections 99B or 99C. If it is accepted that lending trust property such as artworks is considered to be the application of trust property for the purposes of sections 99B or 99C, guidance should be provided around what the amount of the benefit would be. It is submitted that the value of the benefit should differ for short-term advances of property compared to scenarios where the property is given to the beneficiary permanently.	<p>Subsection 99C(1) provides that in determining whether an amount has been applied for the benefit of a beneficiary, regard shall be had to all the benefits that have accrued to the beneficiary, irrespective of the nature or form of the benefits and it is not necessary to consider whether or not the beneficiary had rights at law or in equity in or to those benefits. Subsection 99C(2) outlines when an amount is taken for the purposes of section 99B, to have been applied for the benefit of a beneficiary.</p> <p>We are of the view that pursuant to paragraph 99C(2)(c), a beneficiary who lends or otherwise has use of the property of a non-resident trust should consider the application of section 99B.</p> <p>However, providing guidance on how to quantify or value a benefit is outside the scope of this Guideline, which is to provide guidance on:</p> <ul style="list-style-type: none"> • common scenarios when section 99B may need to be considered • practical aspects of record keeping to evidence that subsection 99B(2) applies to reduce the amount that section 99B would otherwise include in assessable income • our compliance approach to distributions and benefits which we consider to be low risk.
25	What is the benefit when the use of trust property is not on commercial terms? It is suggested that the benefit should be the difference between the market value and the actual payments made to the trustee (if any).	<p>Providing guidance on how to quantify or value a benefit is outside the scope of this Guideline. The scope of the Guideline is to provide guidance on:</p> <ul style="list-style-type: none"> • common scenarios when section 99B may need to be considered • practical aspects of record keeping to evidence that subsection 99B(2) applies to reduce the amount that section 99B would otherwise include in assessable income • our compliance approach to distributions and benefits which we consider to be low risk.
26	The final Guideline should provide guidance on:	See our response to issue 24 of this Compendium Also, while out of scope of this Guideline, we have not provided a <i>de minimis</i> threshold for minor or

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	<ul style="list-style-type: none"> • whether the full amount or value or benefit is assessed • how to value the benefit, and • consider a <i>de minimis</i> threshold for minor or incidental benefits. 	incidental benefits as our compliance approach is limited to scenarios that are low risk based on a range of factors.
27	The final Guideline should provide a compliance approach to assist taxpayers where they cannot obtain complete records to satisfy the corpus exception.	No change has been made in the final Guideline. The onus is on the beneficiary to objectively evidence the source of an amount or benefit received, consistent with <i>Campbell and Commissioner of Taxation</i> [2019] AATA 2043. Without objective evidence, the beneficiary would be unable to establish that subsection 99B(2) applies to reduce the amount assessable under subsection 99B(1).
28	The final Guideline should include an example that calculates corpus when dealing with an asset originally valued in a foreign currency.	No change has been made in the final Guideline. With respect to corpus, the scope of the Guideline is focused on providing guidance on record keeping to objectively evidence that a reduction in subsection 99B(2) applies.
29	The final Guideline should clarify how the \$900,000 loan included in Example 8 of the draft Guideline was repaid.	In the final Guideline, Example 8 has been refined to remove the use of a loan to fund the property purchase. The purpose of the example is to demonstrate amounts removed by the hypothetical resident taxpayer test as context for the record-keeping requirements to substantiate that a reduction in subsection 99B(2) applies.
30	The final Guideline should include an example varying Example 8 of the draft Guideline by showing what the ATO's approach would be if the trustee distributed only \$100,000.	See our response to Issue 29 of this Compendium.
31	The final Guideline should outline the impact of the exceptions not applying in Examples 11 and 12 of the draft Guideline – that is, that the distribution would need to be included in the beneficiary's assessable income.	In the final Guideline, paragraph 43 and Examples 11 and 12 now reference how we will administer section 99B where a beneficiary has not been able to satisfy their evidentiary onus.
32	Example 12 of the draft Guideline states that financial statements 'which do not clearly identify the source of the payment' are not sufficient to discharge the resident beneficiary's onus of proof.	Example 12 is included to demonstrate that the information obtained by the resident beneficiary was not sufficient to discharge the onus as it did not objectively evidence the source of the payment received from the trustee of the non-resident trust.

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	In the final Guideline, the Commissioner should clearly state at paragraph 43 that the core documents include financial accounts of a trust which 'clearly identify the source of the payment' to the resident beneficiary.	<p>Example 4 in TD 2024/9 makes clear that merely debiting an account is not sufficient to establish that a distribution is of corpus or is attributable to amounts which would not be assessable income of a hypothetical resident taxpayer.</p> <p>For further clarity, in the final Guideline we have refined the wording of Example 12.</p>
33	The final Guideline should include an example showing tracing as per <i>Howard v Commissioner of Taxation</i> [2012] FCAFC 149 (<i>Howard</i>).	<p>No change has been made in the final Guideline.</p> <p>We consider that <i>Howard</i> makes it sufficiently clear that section 99B can apply in a situation where there is a chain of trusts and it was not necessary to duplicate that example in the Guideline.</p> <p>As that decision and paragraphs 35 to 36 of TD 2024/9 demonstrate, where a resident beneficiary receives a distribution from a non-resident trust who in turn received the property paid or applied in its capacity as a beneficiary of another trust, paragraphs 99B(2)(a) or (b) should be considered at each level of distribution in order to ultimately determine whether the resident beneficiary can reduce the amount included in their assessable income under subsection 99B(1).</p> <p>TD 2024/9 sets out the principles relevant in considering the application of the hypothetical resident taxpayer tests in paragraphs 99B(2)(a) and (b).</p>
34	What constitutes sufficient evidence to satisfy tracing requirements?	<p>What constitutes sufficient evidence to establish that an amount is not 'attributable to' or does not 'represent' an amount which would or would not be included in the hypothetical resident taxpayer's assessable income will be considered on a case-by-case basis.</p> <p>The Guideline is unable to include a definitive answer on this and, instead, both the final Guideline and TD 2024/9 clarify our expectations around record keeping and burden of proof.</p> <p>Paragraphs 32 to 61 of the final Guideline includes guidance on the record keeping requirements to evidence that a reduction applies.</p> <p>See also the responses to Issues 11 to 13 of the Compendium for TD 2024/9 for further guidance.</p>
35	The final Guideline should introduce a <i>de minimis</i> threshold below which detailed tracing would not be required.	See our response to Issue 27 of this Compendium.

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36	The final Guideline should consider alternative approaches – a rebuttable presumption approach based on immediate source of the distribution or a reasonable endeavours standard for tracing, recognising practical limitations.	See our response to Issue 27 of this Compendium.
37	The final Guideline should include a variation to Example 10 (based on an edited version of private advice with the authorisation number of 1052252807039) where the Australian legal advisors receive amounts from the deceased estate but do not keep accounting records of the source of each amount and the funds are intermingled. It is imperative that the ATO highlights the need to account for funds separately in some cases.	No change has been made in the final Guideline. How the funds are held or managed in Australia subsequent to being distributed by the trustee of the non-resident deceased estate is beyond the scope of this Guideline.
38	The final Guideline should include a clearer warning about evidencing 'low-risk' scenarios and the need to evidence the exceptions to section 99B. Being low risk does not mean section 99B does not apply. A warning such as the warning in paragraph 6 of Practical Compliance Guideline PCG 2022/2 <i>Section 100A reimbursement agreements – ATO compliance approach</i> or paragraph 15 of Practical Compliance Guideline PCG 2023/2 <i>Classifying workers as employees or independent contractors – ATO compliance approach</i> should be included.	In the final Guideline, we have clarified paragraph 5 to state that the Guideline does not relieve a resident beneficiary of their obligation to comply with section 99B but is designed to give confidence on how we will have cause to dedicate our compliance resources to consider the application of section 99B where an arrangement is identified.
39	The final Guideline should explain how the safe harbour provided by the compliance approach operates in completing the tax return so as to ensure it is true and correct.	Our compliance approach provides a safe harbour as outlined in paragraph 11 of Practical Compliance Guideline PCG 2016/1 <i>Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance</i> . Safe harbours allow us to direct our compliance resources to higher-risk arrangements and provide additional certainty and compliance savings for taxpayers involved in low-risk arrangements, as they may otherwise have a heavy compliance cost in determining whether section 99B applies.
40	The final Guideline should provide an explanation for what paragraph 65 of the draft Guideline means. That is, if the ATO reviews a matter and determines that section 99B	In the final Guideline, paragraph 66 (which was paragraph 65 in the draft Guideline) provides guidance for arrangements that do not meet the criteria to be considered low risk under the compliance approach. It does not meet

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	applies, then a resident beneficiary may be subject to tax, penalties and interest charges.	<p>the evidentiary substantiation criteria as the resident beneficiary is unable to provide the required information documentation.</p> <p>In this scenario, section 99B will not automatically apply simply if the arrangement fails to meet the criteria outlined in the compliance approach.</p> <p>However, we may have cause to dedicate compliance resources to better understand the arrangement and determine if section 99B applies. This will include considering whether any of the reductions in subsection 99B(2) apply or whether another tax provision applies to the arrangement.</p>
41	In the final Guideline, the decision tree should make clear that a non-resident trust, also includes a trust that was previously a non-resident trust and the trust property includes amounts that was accumulated during the period it was a non-resident.	In the final Guideline, the first step of the decision tree has been updated to include a non-resident trust and a trust with trust property that was accumulated whilst the trust was a non-resident trust.
42	The final Guideline should elaborate on the examples in the compliance approach to more clearly state whether the amount in question would be assessed to the taxpayer or not.	<p>No change has been made in the final Guideline.</p> <p>The examples in the compliance approach section of the Guideline are included to provide further clarity and guidance to assist taxpayers in determining whether their arrangement is considered low risk. The scope of the Guideline does not extend to determining the application of section 99B.</p>
43	For deceased estates, the date of effect of the final Guideline should be prospective only.	Section 99B applies to amounts from non-resident deceased estates irrespective of the Guideline. The release of the Guideline has not altered the application of section 99B in years prior to its release, nor the record-keeping requirements. The Guideline merely provides certainty as to our compliance approach to beneficiaries of non-resident deceased estates. Therefore it is beneficial for these beneficiaries if the compliance approach is available both retrospectively and prospectively.
44	The ATO should clarify paragraph 70 of the draft Guideline to indicate that a beneficiary of a non-resident deceased estate that does not meet any of the criteria in order to be low risk may still meet the criteria for an exception to apply. Equally, even where the low-risk criteria is met, it does not mean section 99B does not apply and the amounts may still be taxable.	<p>No change has been made in the final Guideline.</p> <p>We agree that a beneficiary who does not meet the low-risk criteria may still be able to apply either paragraph 99B(2)(a) or (b). However, the purpose of the Guideline is to outline how the compliance approach operates for those taxpayers who do qualify.</p> <p>Paragraph 63 of the final Guideline provides that where an arrangement does not meet the low-risk criteria, we may engage with taxpayers to better</p>

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		<p>understand the arrangement, including whether a reduction to section 99B applies.</p> <p>Paragraph 64 of the final Guideline provides that where our compliance approach does apply, it means taxpayers can have certainty that we will not have cause to dedicate compliance resources to determining if section 99B applies. See also our response to Issue 39 of this Compendium.</p>
45	In the final Guideline, the ATO should outline at paragraph 71 that the compliance approach does not apply to a resident deceased where the executor is a non-resident.	No change has been made in the final Guideline. The decision tree and paragraphs 71 and 72 of the final Guideline make it clear that the deceased must be a non-resident at the time of death for the compliance approach to apply.
46	The compliance approach for deceased estates should apply to testamentary trusts.	No change has been made in the final Guideline. The final Guideline includes a compliance approach for deceased estates and provision of property on commercial terms. These are considered the 2 most common scenarios where section 99B may apply and where a safe harbour is appropriate. We do not consider that testamentary trusts have the same low-risk attributes as found in deceased estates.
47	The compliance approach for deceased estates should be expanded to include other tax provisions that may be applicable.	The scope of the Guideline is focused on providing guidance and clarity regarding how we will administer section 99B. The application of other tax provisions is outside the scope of this Guideline.
48	The ATO should extend the timeframe included in the criteria for the compliance approach for deceased estates to 3 years (36 months) after the date of death.	<p>No change has been made in the final Guideline.</p> <p>The compliance approach for deceased estates is appropriate where it is based on a low-risk scenario. In developing our approach as to what is 'low risk', we consider 2 aspects:</p> <ul style="list-style-type: none"> • the likelihood of the movement in asset value over a period of time • the risk relevant to the materiality or quantum of potential tax revenue. <p>These aspects are linked. From an ATO administration perspective, we can extend the time, however then the likelihood of the asset value changing increases and therefore the quantum of value that we can consider low risk subsequently reduces.</p> <p>Given the feedback on this issue, we undertook further targeted consultation to consider options that would provide the greatest certainty for the greatest</p>

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		number of resident beneficiaries. The feedback confirmed that the 24-month timeframe, with the cap of A\$2 million should be retained.
49	The ATO should provide flexibility in the timeframe included in the criteria for the compliance approach. The flexibility should be provided through a request for extension. The factors to consider in approving a request for extension should include complexity of the estate, legal disputes or challenges and regulatory delays.	No change has been made in the final Guideline. See our response to Issue 48 of this Compendium. On this basis, extension requests would not be appropriate.
50	Rather than limit the compliance approach to A\$2 million, it should be the first A\$2 million received that is within the compliance approach and anything in excess of it outside the compliance approach.	No change has been made in the final Guideline. For the compliance approach to be appropriate, it must be a low-risk scenario. We consider there to be a greater risk relevant to the materiality or quantum of potential tax revenue where beneficiaries are receiving amounts in excess of A\$2 million.
51	Examples 14,16 and 18 of the draft Guideline involve civil jurisdiction countries where succession rules may differ markedly from those that apply in Australia. It may therefore not result in a trust.	In the final Guideline, references to any specific overseas countries have been removed from Examples 14, 16 and 18 to avoid unintended jurisdictional considerations within the scenarios.
52	Example 15 of the draft Guideline is a stretch and reflects a section 100A mindset on the part of the ATO.	Example 15 has been included in the Guideline to demonstrate an example that would not be considered low risk for the purposes of the compliance approach due to having elements of a contrived nature to enable the arrangement to fall within the scope of the compliance approach.
53	The final Guideline should explain what Jason should do in Example 16.	Example 16 of the Guideline demonstrates that where the criteria of the compliance approach is not met, the arrangement is not considered low risk, and the compliance approach cannot be relied upon. As outlined in paragraph 63 of the final Guideline, a resident beneficiary should consider the application of section 99B to their arrangement.
54	Example 17 of the draft Guideline is unrealistic as it appears the ATO is aware of the date of death but the beneficiary has not been able to substantiate it.	In the final Guideline, Example 17 has been clarified to remove any confusion. Example 17 demonstrates that if a resident beneficiary cannot obtain the information and documentation to support that the criteria of the compliance approach has been met, the compliance approach will not apply.

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55	Following paragraph 107, it might be useful to explain in the final Guideline that the concession only applies to the transactions described and does not mean that section 99B would not be applied to a subsequent distribution by the trustee of an amount paid under a commercial agreement.	Both paragraph 67 and example 27 of the final Guideline reference that where there is a contrived element to an arrangement, the arrangement would not be considered low risk and the compliance approach will not apply.
56	In Example 21 of the draft Guideline, there is potentially an implication that a loan on commercial terms will not be taxable under section 99B, whereas no matter how much interest is paid, a loan is an amount that is 'applied' for the benefit of the beneficiary under the definition of that term in section 99C.	<p>Example 21 of the Guideline clarifies the safe harbour option provided under our compliance approach for monetary amounts loaned from the trustee of a non-resident trust.</p> <p>Where our compliance approach applies, it does not mean that section 99B does not apply to the arrangement. Rather, it provides taxpayers with certainty that we will not have cause to dedicate resources to determining if an amount is included in assessable income under subsection 99B(1) or whether a reduction in subsection 99B(2) applies. See also our response to Issue 39 of this Compendium.</p>
57	A trust is not a legal entity and can only act through the trustee. Therefore, in the final Guideline, the examples should reflect this.	In the final Guideline, we have updated the wording in the relevant examples to reflect that it is the trustee dealing with the trust property.
58	Example 21 of the draft Guideline includes a repayment schedule. The final Guideline should clarify what this means and expressly state whether repayments of principal are required throughout the loan term.	<p>In the final Guideline, Example 21 now clarifies the safe harbour option of the compliance approach.</p> <p>The final Guideline provides a safe harbour option to further reduce compliance costs in objectively evidencing that an agreement is on commercial terms. Under the safe harbour option, for the interest rate and loan term, the resident beneficiary and trustee of the non-resident trust can rely upon:</p> <ul style="list-style-type: none"> • the rate prescribed for Division 7A purposes in subsection 109N(2), and • the term prescribed for Division 7A purposes in subsection 109N(3). <p>As provided by paragraph 106 in the final Guideline, the use of the terms under the safe harbour option does not of itself result in the application of Division 7A to the arrangement.</p>
59	Would the ATO invoke the spirit of the section 109R integrity rule? That is, if a loan is repaid at the end of its term and a	See our response to Issue 58 of this Compendium.

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	new loan is advanced to the same borrower, would the ATO regard the initial or subsequent loan in the above situation as not being on commercial terms?	
60	The final Guideline should explain whether the Commissioner will not apply compliance resources to an agreement referred to in paragraph 104 of the draft Guideline for the purposes of any Australian taxation law or state that the compliance approach referred to in paragraph 104 only applies for section 99B purposes and cannot be relied upon for the purposes of any other Australian taxation law.	In the final Guideline, paragraph 106 has been included to confirm that the safe harbour option provided in paragraph 105 only applies for the purposes of the compliance approach with respect to section 99B.
61	The final Guideline should expressly state that a minimum of one payment of interest is required each income year.	No guidance has been provided in the Guideline regarding the timing or number of interest payments (each income year) to constitute a commercial agreement, as this will be dependent on the terms of the agreement and surrounding circumstances and facts.
62	The final Guideline should explain that a payment of interest, hire or use should include a payment at law (that is, a set-off against debts owing)	No change has been made in the final Guideline. Per paragraph 103 of the Guideline, to be considered low risk for the purposes of the compliance approach, a physical payment should be made to the trustee for the interest, hire or use of the trust property.
63	The final Guideline should expressly state that a comparable rate in the foreign jurisdiction to the Division 7A published rates would be accepted if the loan is provided from that foreign jurisdiction.	The use of the rate and term prescribed for Division 7A purposes is limited to the safe harbour option to further reduce compliance costs for resident beneficiaries. A comparable rate in a foreign jurisdiction would only be accepted under the compliance approach if it is commercial or consistent with market rates in the same or similar circumstances, and that can be appropriately evidenced.
64	The scope of the final Guideline should be expanded to include a compliance approach and examples for foreign super funds to assist taxpayers with transfers from foreign super funds and pension plans.	No change has been made in the final Guideline, which includes a compliance approach for deceased estates and provision of property on commercial terms. These are considered the 2 most common scenarios where section 99B may apply and where a safe harbour is appropriate. We understand that the underlying issue is regarding evidencing contributions to the fund or earnings, for the purposes of the reductions in subsection 99B(2).

Issue number	Issue raised	ATO response
		As provided at paragraph 43 of the final Guideline, the onus is on the resident beneficiary to provide information and documentation to us to evidence that a reduction is satisfied. Where the onus is not discharged, a reduction to the amount included in assessable income pursuant to subsection 99B(1) will not apply. This applies in general and is not specific to foreign super funds and pension plans.
65	The scope of the final Guideline should be expanded to provide guidance on indirect amounts under section 99C. Would payments, loans or benefits that are not provided or applied directly to or for the beneficiary also fall within the scope of the Guideline?	No change has been made in the final Guideline. While the Guideline deals with the most common scenarios that may attract the operation of section 99B, there is existing website guidance with respect to section 99C. See Receiving payments or assets from foreign trusts .
66	The final Guideline should provide guidance on how the foreign currency rules interact with section 99B, including a compliance approach or simplified method for situations where detailed forex tracking is impractical.	No change has been made in the final Guideline. Guidance on foreign currency rules and the interaction with section 99B is beyond the scope of this Guideline.
67	Pre-residency restructuring and tax planning examples should be included in the final Guideline, including: <ul style="list-style-type: none"> • examples of what the Commissioner considers acceptable versus problematic pre-residency planning strategies, including scenarios where existing trust arrangements are vested or terminated • guidance on how the Commissioner would apply Part IVA to pre-residency restructures in light of section 99B. 	The scope of the Guideline is focused on providing guidance and clarity regarding common scenarios and how we will administer section 99B in relation to record-keeping evidencing the application of subsection 99B(2) and low-risk scenarios. These other scenarios and tax provisions proposed to be covered are beyond the scope of this Guideline.