

5 August 2019

Mr Tim Dyce  
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Australian Taxation Office  
GPO Box 9990  
SYDNEY NSW 2000

Via email to: [Reportabletaxposition@ato.gov.au](mailto:Reportabletaxposition@ato.gov.au)  
Attention: Michael Drogaris

Dear Tim,

## Expansion of Reportable Tax Position schedule

Chartered Accountants Australia New Zealand (CA ANZ) appreciates the opportunity to provide feedback on the ATO's Consultation Paper, *Expansion of the Reportable Tax Position (RTP) Schedule to Large Private Companies and Corporate Groups (CP)*.

## Overall comments

The key submission points we wish to highlight are as follows:

- The interaction of the new self-determination rule for lodging the RTP Schedule and the proposed extension of the RTP Schedule to large private companies warrants a deferral of the 2020 start date.
- The extent to which the current RTP questions require investigation of prior arrangements should be eliminated or reduced. Consideration should be given to a more bespoke approach to the RTP for CPs.

Our sense is that the compliance costs associated with completing the RTP Schedule for those CPs with more complex tax affairs will result in criticism of the ATO.

Any decision to proceed should therefore be accompanied by a well-articulated ATO position on:

- Why the schedule is required (especially given increased levels of future engagement with this taxpayer segment as part of an extension of the justified trust initiative), and
- What will be done with the information.

## Detailed Comments on Consultation Questions

### 1. Does the proposed start time of the income year ended 30 June 2020 give sufficient time to prepare, considering the forms will be due in early 2021?

We acknowledge the points that the 2020 RTP Schedule does not need to be filed until 2021 and there is an existing 2019 RTP Schedule with instructions that taxpayer can use as a reference point.

However, CA ANZ also considers best tax administration practice would have been for the 2020 RTP changes to be sufficiently clear at the beginning of the income year. Clearly this has not occurred.

CA ANZ's observations with a 2020 implementation date are:

- We infer from the CP and our experience with previous RTP changes, that any early balancing large private companies would not be required to complete an RTP until 2021. Rather, the first RTP filers would be large private companies with years ending on 30 June 2020. A carve-out for 2020 early balancing companies is appropriate;
- The 2020 RTP Schedule is intended to replicate the new approach being adopted in 2019, namely, that large private companies will need to self-determine their RTP filing obligations. Appendix 1 of the CP provides the guidance on how large private companies test whether they will have 2020 RTP obligations and thus largely replicates the 2019 test. In this regard, the 2019 RTP instructions currently define an 'economic group' as being:

*"An economic group includes all entities (companies, trusts and partnerships etc.) that lodge an Australian tax return under a direct or indirect Australian or foreign ultimate holding company or other majority controlling interest.*

*This includes all entities under a single ultimate holding company or under the ownership of a single individual, trust or partnership.*

*See examples to help you in determining your economic group."*

To the best of our knowledge the RTP consultation group was not consulted on the 2019 RTP self-determination change (nor the 2019 RTP Instructions). We also understand that the ATO is now contemplating either expanded guidance (or actual changes to the reporting threshold test) for the 2019 that will not be released until later this year. Moreover, when it comes to now introducing large private companies into the mix, we surmise there are new self-determination complications for later years.

- Some new questions that come to mind from the 2019 RTP Instructions and the CP's Appendix 1 definition are, inter alia:

- Is an associate test going to be introduced? What happens if ultimately a husband and wife each own 50% of a family entity? No single individual will hold a majority controlling interest.
  - Who is going to be viewed as owning or controlling any family discretionary test?
  - What do you assume with private companies (or other entities) that might have governing shares/interests, multiple classes of shares/interests, etc?
  - Is income of the controlling individual(s) included in the \$250m test?
  - Are an individual's interest in a SMSFs included in the economic group or not? What is the position with respect to superannuation income earned in retail or industry super funds or even family company, employer sponsored super funds?
- In short, we see some impediments to a 2020 start date. We consider the CP under-estimates some of the challenges (for possibly a significant group of large private businesses) in just working out if they will need to file an RTP or not.

More fundamentally, we observe the RTP economic group definition is not leveraging off an existing control/ownership rule, but rather, is creating new compliance costs purely to work out if a tax return schedule is needed. The earlier CA ANZ submission on the draft CP also noted issues about companies/groups near the \$25m / \$250m thresholds; individual taxpayers being dependent on information collated outside their direct control; the economic group definition unfortunately covers a current year test (so RTP obligations not always known until ITR preparation time). These issues still exist.

In our view, greater simplicity is required for the reporting threshold test, including whether or not the ATO should revert to notifying those taxpayers it wants to fill out an RTP Schedule.

We also note the CP flags that “public advice and guidance relevant to companies in large private groups” might find its way into new category C disclosures for 2020. It is difficult to provide any informed feedback about whether this proposes any further impediments to a 2020 start date, when we do not know what changes are proposed for Category C. However, what we would recommend, is that no new RTP questions are introduced in the changeover year when large private businesses are brought into any RTP filing regime.

#### CA ANZ recommends that:

- That the current self-determination rule for RTP filing should be reconsidered for public/foreign owned groups, and particularly for its use in the context of large private businesses. Consequently, we consider a 2020 start date for large private business RTP filings should be deferred.
- Ultimately, whatever becomes the first RTP filing year for large private businesses, that year's RTP Schedule should have no new questions so they have greater certainty as to their obligations as soon as possible.

**2. Do you have any concerns with the proposed thresholds that determine who in the large private market will be required to lodge the RTP schedule?**

Yes. Refer Question 1 feedback.

**3. Are there any concerns with applying the income tests during the year of lodgement?**

Yes. Refer Question 1 feedback

**4. Under what circumstances should the ATO provide an exemption for the lodgment of an RTP schedule or the disclosure for certain types of disclosures specific to large private groups?**

Reference should also be made to Question 6 feedback.

However, the basic premise is if a large private company has a disclosable RTP position, but this position has already been the subject to past or current ATO risk reviews/audits, or the private company is already involved in any ongoing ATO compliance program (e.g. Top 320 program), then RTP disclosure exemption(s) for matters already made known to the ATO appears appropriate (in the same way that there is a carve-out for positions taken that are subject to private rulings).

We do accept that some caveat like the intent of Category C Question 19 may be required (i.e. there has been no material change in the circumstances known to the ATO). We also accept, consistent with comments elsewhere in this submission about limiting RTP look back rules, the concession should be on what the ATO already knows from more recent taxpayer engagement.

**CA ANZ recommends that:**

- RTP disclosure concession(s) be considered for private companies transitioning into RTP disclosures, where the ATO is already aware of the taxpayer's position due to other tax compliance activity and the circumstances have not changed.
- An RTP lodgement exemption be considered for a small group of private companies that are already subject to some close and ongoing ATO compliance program.
- In any event, whether the ATO chooses to provide any new RTP disclosure concessions or not, the ATO's tax assurance processes for large private groups need to be recalibrated to avoid a 'double-up' of information requests following the introduction of an RTP filing obligation.

**5. Do you see any challenges in applying RTP Category C questions to companies in large private groups such as areas of tax law that may not be suitable for an RTP Category C question?**

CA ANZ sees the challenges as follows:

- The problems tend to be more around how the Category C questions are worded, particularly when they oblige taxpayers to interpret the question broadly. This forces up compliance costs because it requires wider inquiries to be performed. We expect the shareholder \ directors of large private groups will be vocal in their opposition to these additional compliance costs;
- Areas of tax law which deem an associate connection to exist can still cause problems in answering RTP questions because they implicitly assume there is an unrestricted information flow between deemed associates, when this may not actually be the case;
- Whilst there are overlaps in tax issues between large public / foreign owned groups and private groups, there are also significant differences (e.g. the ATO's areas of concern are often different, particularly when it comes to private company and trust taxation issues). Accordingly, asking RTP questions that are really directed towards one type of taxpayer segment but requiring all large businesses to consider the questions can be frustrating. The problem tends to be compounded when the RTP questions are broadly drafted, which as noted above, will often require wider inquiries.

**CA ANZ recommends that:**

- The participants in the RTP consultation group should be reviewed to ensure there is enough large private business representation to properly assess the compliance cost aspects of both existing Category A, B and C questions as well as any new Category C questions.
- RTP consultation protocols for industry consultation prior to implementing changes to the RTP Schedule and instructions should be adhered to.
- The recent ATO approach to then flag any proposed income tax return schedule changes (including the RTP Schedule changes) well prior to the release of the final schedule should be continued.

**6. What are the difficulties in detecting and disclosing arrangements that were set up in earlier years?**

In providing feedback on this question, CA ANZ wishes to highlight at the outset the following 2019 RTP instructions which require taxpayers to investigate, and then consider their RTP disclosure obligations, in respect of arrangements set up in earlier years.

The 2019 RTP Schedule requires disclosures that relate to prior periods in respect of the following matters:

- Category B disclosures

The RTP instructions state:

*“You will be required to disclose a Category B position where the provision and/or contingent liability (asset) in the financial statements for the current year:*

- *is raised in the current reporting period*
- ***was raised in a prior reporting period and has not been disclosed previously (because you were not required to lodge an RTP schedule)***
- ***was raised in prior reporting periods, the amount of the provision/contingent liability has increased in your or a related party's financial statements, and that increase has not been disclosed previously because it either increased in the current year or in a year you did not have to lodge an RTP schedule.***

*You only have to disclose a Category B RTP if it is material.*

*You are not required to disclose a Category B position where the same provision and/or contingent liability (asset) has been disclosed in a prior year RTP schedule and the amount has not increased since that disclosure.” [Emphasis added]*

Thus, CA ANZ observes for a private company that has never filed an RTP there appears to be the need to identify any material RTP Category B positions being carried forward into the first RTP filing season, even though they may not relate to any 2020 tax filing position.

- Category C disclosures

The RTP Schedule asks the following Category C questions:

Q4. Did you recognise **(in the current or last four years)** any internally generated intangible assets or revalue an intangible asset(s) for the purposes of your thin capitalisation calculations using an arrangement or variation of an arrangement described in Taxpayer Alert TA 2016/1?

Q10. Have you excluded from your thin capitalisation calculations of debt capital **(in the current or four prior years)** any value of a ‘debt interest’ that has been treated wholly or partly as equity under accounting standards? Refer to Taxpayer Alert TA 2016/9 for further guidance.

Q12. **In the current or four prior years**, were you party to an arrangement that fragments an integrated trading business where, as a result of the arrangement, trading income has been re-

characterised into more favourably taxed passive income? Refer to Taxpayer Alert TA 2017/1 for further guidance.

Q21. Are you aware of any unamended mistakes or omissions in any single tax return lodged by you **within four years of the lodgment date of this RTP schedule** where if all mistakes or omissions in that return are amended, it would give rise to either:

- more than \$1.5 million in tax being payable (or would have been payable had it not been offset, for example by losses from prior years)
- more than \$5 million in losses (including capital losses)

For the purposes of this calculation, only count mistakes and omissions that you have not previously notified to the ATO.

Q22. If you have restructured out of any arrangements in the current **or previous income year** to which the Hybrid Mismatch rules applied or would have applied had the arrangement remained in place, disclose the subcategory that describes your current position:

- Subcategory 1: All of your restructured arrangements qualify as low risk under Draft Practical Compliance Guideline PCG 2018/7
- Subcategory 2: One or more of your restructured arrangements does not qualify as low risk under Draft Practical Compliance Guideline PCG 2018/7

Note: In considering whether the Hybrid Mismatch Rules would apply you must disregard dual inclusion income.

CA ANZ again observes for a private company that has never filed an RTP there also appears to be the need to identify several prior year Category C positions (note that only Q21 has a materiality gauge, and this is lower than Category A or B materiality levels), even though these positions may not relate to any 2020 tax filing positions.

#### CA ANZ's overall observations are as follows:

- There are some notable exceptions to the proposition contained in the CP at paragraph 13 (i.e. the ATO will generally only ask RTP questions about current and future year arrangements);
- The RTP instructions require consideration of past filing positions going back several years even though they may not relate to any continuing 2020 filing position;
- Large private companies will not have pre-prepared tax return workpapers in the past that can immediately satisfy the retrospective elements of the RTP Schedule;

- Whilst the RTP Schedule itself only asks for summarised disclosures, the actual transitional tax compliance work to identify and confirm that even no disclosures are required is not insignificant based on experiences to date for other taxpayers required to complete RTP Schedules;

On top of this, of course, is the need to undertake a stock take of all 2020 filing positions, numerous cross-referenced Tax Alerts, PCGs, etc and consider if any category A, B or C disclosures are required.

Some further nuances for large private companies being asked to fill out their first RTP Schedule are as follows:

- Various RTP disclosures effectively ask for separate risk rating processes to be undertaken (or at the very least, they be considered);
- Taxpayers need to assess if they have any Reasonably Arguable Positions (RAP) that are only 'about as likely to be correct as incorrect' because these will be RTP Category A disclosures, even though they are still RAP positions;
- The 2019 RTP Instructions about "When a transfer pricing position is a reportable tax position" has proven to be challenging for public and foreign owned groups and this will now be the case for private groups as well;
- Consider, for example, the proposition in the 2019 RTP Instructions that:

*"The benchmarks used in preparing your section 284-255 compliant documentation need to be appropriate to your circumstances. Your documentation must include assurance, from an appropriately experienced professional, that the position taken is reasonably arguable."*

This 2019 RTP Instruction statement appears to mean all TP documentation covering significant TP positions needs to now have the requisite assurances otherwise the taxpayer must apply the less concessionary RTP materiality gauges for "Related party dealings not covered by section 284-255 compliant transfer pricing documentation" even though the taxpayer may feel such assurances are an unnecessary compliance cost;

- Even when the taxpayer falls within the more concessionary "Related party dealings covered by section 284-255 compliant transfer pricing documentation" it is still the case that:

*"If your related party dealings are covered by section 284-255 compliant transfer pricing documentation, your [material] transfer pricing position is only a Category A or B RTP if either:*

- *it falls within the high-risk zone of published ATO guidance that is not a Category C position*

- *the actual amount you receive or pay falls outside the arm's length range between the 25th quartile and 75th quartile in your documentation and the difference results in a transfer pricing benefit.”*

This RTP Instruction statement appears to mean various TP positions that the taxpayer may consider are RAPs are nevertheless disclosable in the RTP, thus now requiring the revisiting of TP RAP advice.

The feedback that CA ANZ has received from some members is that large public / foreign owned taxpayers and their tax advisers (particularly from 2018 onwards) have generally found the preparation of the RTP schedule to be a much more intricate, nuanced and *costly* tax compliance exercise (in a similar vein to the time expended on the IDS schedule vs the rest of the return), than might be first thought by a cursory glance of the short form RTP schedule itself.

There is also a growing feeling the RTP instructions need an update and / or that RTP Q&As need to be re-introduced to reduce RTP preparation costs.

Whilst some private groups (particularly perhaps, those with wholly domestic operations) might ultimately be less challenged by the RTP disclosure requirements, it is expected that many private groups will face similar challenges to those experienced by large public / foreign owned groups. Even those private groups with ultimately little or no RTP disclosures to report will still have to embark on a new tax return due diligence process to confidently reach those conclusions.

In summary, the tax compliance costs for large private businesses are set to increase by some considerable amount, particularly in the initial years of completing an RTP Schedule.

#### CA ANZ recommends that:

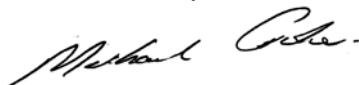
- Consideration should be given to limiting RTP disclosure obligations to actual arrangements impacting the current income tax return so that compliance work for the RTP Schedule does not involve re-reviewing past tax return filing positions;
- If contrary to the above, the ATO wants to retain some ability to ask 'look back' RTP questions then:
  - The retrospective Category C questions Q4, 10 and 12 appear to be less onerous in undertaking additional tax compliance investigations whilst the Category B instructions plus Category C questions Q21 and 22 appear more problematic; and
  - Any future questions proposed to be included in the RTP Schedule containing a 'look back' requirement should only be introduced in exceptional circumstances, warranting special consideration of the tax compliance costs to identify such transactions as well as attention given to the wording of the actual question;

- In any event, a RTP disclosure concession appears appropriate for some private companies transitioning into RTP disclosures (whether the position is either a current year position or the ATO retains various 'look back' requirements), where the ATO is already aware of the taxpayer's position due to other tax compliance activity (i.e. Question 4 recommendation);
- Whilst arrangements set up in earlier years present the more obvious tax compliance difficulties in completing an RTP Schedule, there is anecdotal evidence that the completion of RTP schedules is an emerging tax compliance cost issue. In addition, the RTP Schedule and its instructions may soon be attempting to cover off areas of concern in very different large business segments.
- We think it is timely for participants in the RTP consultation group to be revisited (to ensure large private groups are adequately represented, see also Question 5 recommendations) and for the RTP consultation group to revisit the existing processes and guidance accompanying the release of annual RTP updates (with the view to mitigate the RTP compliance costs, where feasible).

## Contact

To discuss this submission further, please contact me by telephone on (02) 9290 5609 or by email on [michael.croker@charteredaccountantsanz.com](mailto:michael.croker@charteredaccountantsanz.com)

Yours faithfully,



**Michael Croker**  
**Australian Tax Leader**

## Appendix A

### Chartered Accountants Australia and New Zealand

CA ANZ is made up of over 120,000 diverse, talented and financially astute professionals who utilise their skills every day to make a difference for businesses the world over.

Members of CA ANZ are known for professional integrity, principled judgment and financial discipline, and a forward-looking approach to business.

We focus on the education and lifelong learning of members and engage in advocacy and thought leadership in areas that impact the economy and domestic and international capital markets.

We are represented on the Board of the International Federation of Accountants and are connected globally through the 800,000-strong Global Accounting Alliance, and Chartered Accountants Worldwide, which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.