

# TAX EVENT WRAP UP

## TP MINDS Australia 2018

BDO sponsored TP Minds Australia 2018, Australia's largest gathering of Australian Transfer Pricing professionals in Sydney from 29–30 May 2018

BDO was proud to have been the Lead Sponsor of the TP Minds Australia 2018 Transfer Pricing Conference, which attracted a large number of distinguished international and local speakers including Melinda Brown, Senior Transfer Pricing Adviser at the OECD and Mark Konza, ATO Deputy Commissioner, and was chaired by BDO Global Transfer Pricing Leader Zara Ritchie. Key topics of interest covered transfer pricing risk and controversy, US tax reform, permanent establishments, intangibles and diverted profits tax. BDO Australia also conducted a survey to gauge CbC reporting readiness and other issues facing the multinational corporate community. This Event Wrap Up contains the results of our survey and key insights from the conference.

### ATO FOCUS

The keynote address by the ATO's Deputy Commissioner Mark Konza is available on the [ATO website](#) and focuses on the trends which are shaping the future of transfer pricing. Some of these are outlined below.

#### Substance:

- ▶ The ATO expects real substance and commercial drivers to be key drivers when MNEs are making their pricing decisions
- ▶ Since the ATO's view on 'reconstruction' powers outlined in TR 2014/6 there has been an increased focus on the importance of actual conditions
- ▶ Taxpayers must ensure policies with international affiliates reflect the underlying substance of the parties' commercial relations, and that these are consistent with those that would have been entered into by independent entities in comparable circumstances.

#### The ATO's focus on taxpayer behaviour

- ▶ The ATO will work co-operatively with taxpayers who voluntarily comply and take a hard line approach with those who do not to ensure minimal intervention from the ATO.

#### Risk

- ▶ The ATO emphasised the updated OECD guidelines in relation to risk allocation meant that MNEs cannot contractually allocate or re-allocate risk without requisite substance/control or the ability to finance such risk.



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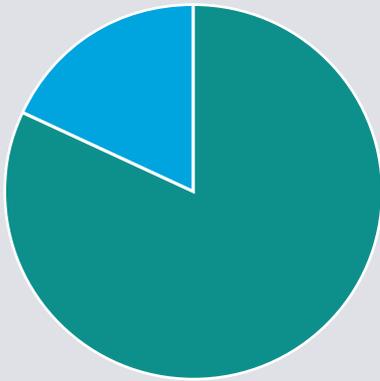
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### Financing and Chevron:

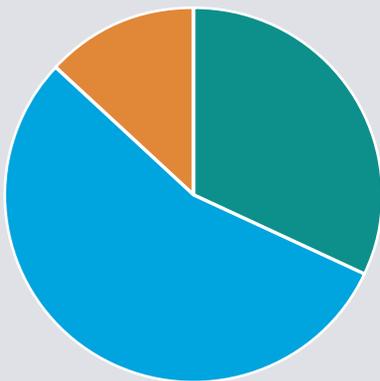
- ▶ The amount of rigour in any Transfer Pricing analysis for intragroup financing has increased as a result of the 2017 Chevron Australia decision and subsequent PCG 2017/4 which outlines the ATO's risk assessment framework for related party financing arrangements
- ▶ Guidance is expected shortly on non-interest bearing loans (including what in past years were commonly referred to as 'quasi equity') which will be expected to differ from TR 92/11 on loan arrangements.

Has your organisation reviewed its compliance with the ATO's Practical Compliance Guideline PCG 2017/4 on cross border related party financing arrangements?



■ YES ■ NO

Does your organisation intend on changing its funding structure as a result of the ATO's position outlined in PCG 2017/4?



■ YES ■ NO ■ N/A

### AUSTRALIAN JUDICIARY

The honourable Tony Pagone, former Federal Court Judge who presided over the 2017 landmark Transfer Pricing case of Chevron Australia, highlighted how the courts will generally address transfer pricing cases, the role of evidence and how the lack of tax and transfer pricing expertise can impact the judiciary.

The volume of analysis and evidence presented in transfer pricing cases can make them overly complicated and difficult for the courts to consider, and as such he suggested that tax payers may wish to settle their cases prior to any court intervention.



### OECD ACTIVITY

Melinda Brown, Senior Transfer Pricing Adviser at the OECD, presented a keynote speech on the OECD's perspective on the international Transfer Pricing landscape.

#### Profit splits

- ▶ There continues to be debate and difference of opinion on the role and application of profit splits
- ▶ Revised guidance is expected this year which will expand on profit splitting factors and case studies.

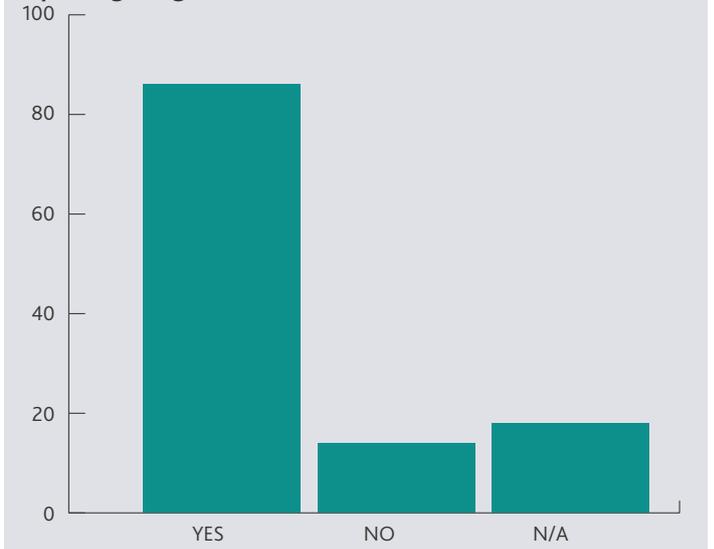
#### Peer Review

- ▶ The OECD continues to release batches (three to date) of peer review reports relating to the implementation of BEPS Action Item 14 which can be a game changer by making tax authorities accountable.

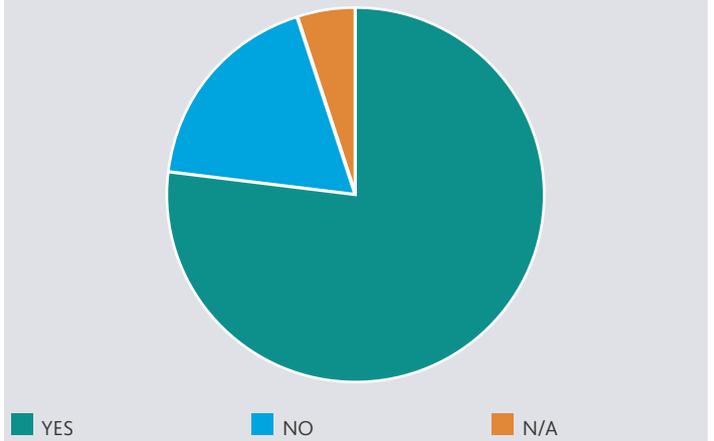
**COUNTRY BY COUNTRY REPORTING:**

- ▶ The ATO emphasised how Country by Country (CbC) reporting will assist their assessment of which entity in the group controls risk which in turn will assist them in identifying those taxpayers seeking to misalign outcomes with value creation
- ▶ Many corporates have found the collation of data required for CbC costly and resource intensive. Communications with overseas headquarters has been difficult due to the different CbC reporting requirements across jurisdictions
- ▶ Many corporates will be 'ready' to lodge Part A information in place of an IDS in year 2
- ▶ Concerns by MNEs that CbC reporting could become public has resulted in many including the bare minimum in Master Files which is generally already publicly available
- ▶ The expansion of the definition of a "significant global entity" in the 2018/19 Australian Federal Budget on 8 May 2018 is expected to capture a larger group of taxpayers and investment entities and therefore increased exposure to CbC reporting, larger penalties and anti-avoidance measures such as the diverted profits tax (DPT) and multinational anti-avoidance law (MAAL).

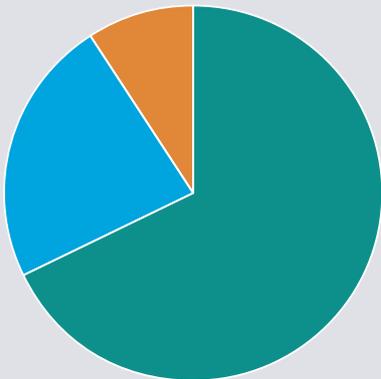
**If you are an SGE, did your organisation lodge a Master File/Local File with the ATO for FY16 as part of the CbC Reporting obligations?**



**Will you be required to lodge a Master File/Local File with the ATO for FY17, i.e. are you a SGE for FY17?**

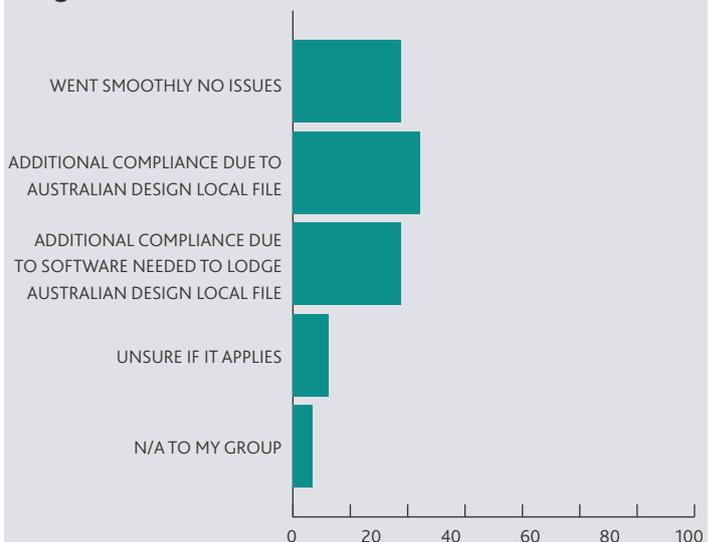


**Under what circumstances do you prepare transfer pricing documentation?**



■ FOR ALL INTERNATIONAL RELATED PARTY TRANSACTIONS  
■ FOR ALL MATERIAL OR HIGH RISK TRANSACTIONS  
■ NONE PREPARED UNLESS QUERIED

**What is your experience of dealing with CbC compliance obligations in Australia?**



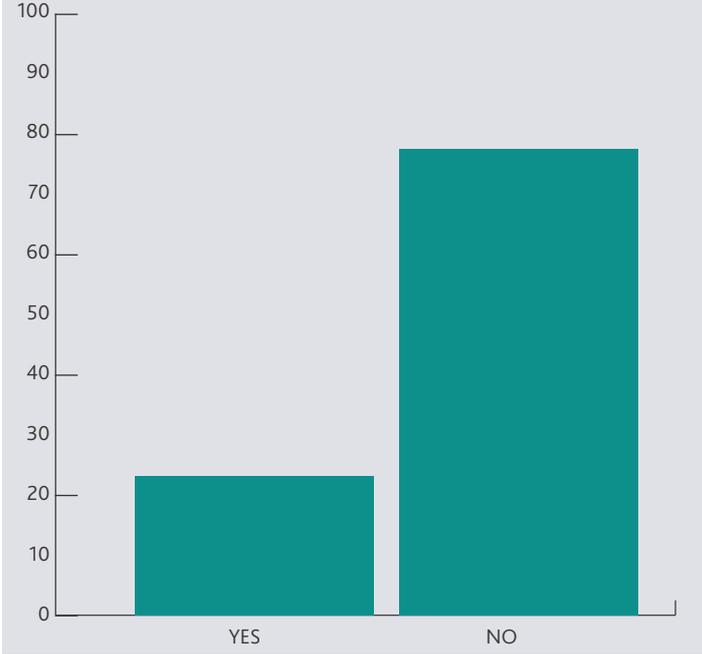


**DIVERTED PROFITS TAX AND TRANSFER PRICING DOCUMENTATION**

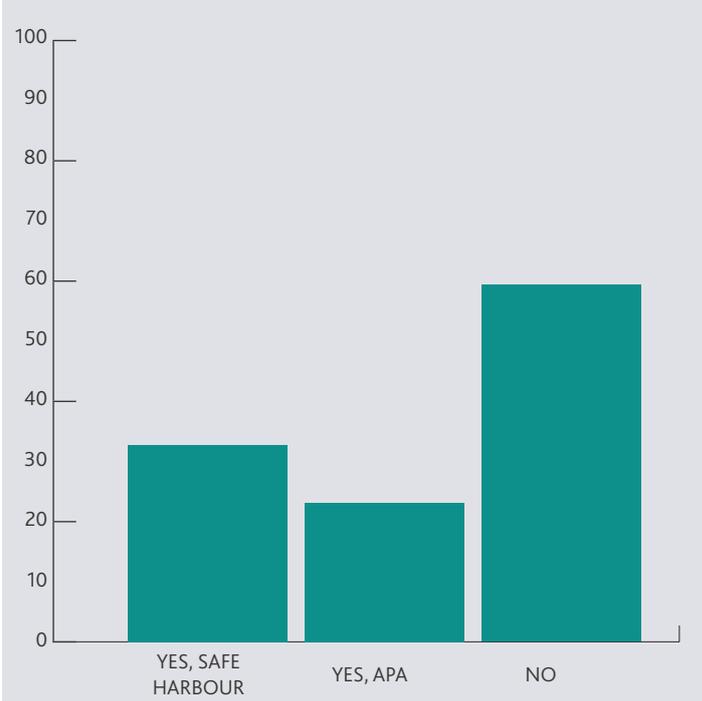
- ▶ The Australian Government introduced the DPT from 1 July 2017 to encourage MNE's to comply with transfer pricing rules. It only applies to a small group of taxpayers but nonetheless can be considered a collateral issue/risk to be considered as part of an APA application
- ▶ Value chain is key and documenting the functions, assets and risks of each entity within the value chain is important. Taxpayers need to demonstrate the substance in each entity which forms part of the value chain and this should ideally be documented as part of the company's transfer pricing analysis and documentation
- ▶ The ATO focus will be on entities based in jurisdiction with a much lower tax rate than 24% rather than at the margin
- ▶ The ATO takes its obligations under the DPT legislation very seriously and will undertake rigorous fact finding and internal assessment to evidence the presence of a DPT risk prior to any communication with a taxpayer.

- ▶ There is no list of taxpayers who may potentially have a DPT risk, rather, a DPT risk is brought to the attention of case teams as the result of risk review, audit or APA
- ▶ Taxpayers can expect to endure functional analysis interviews with management and operational staff as part of any ATO review
- ▶ There is increasing emphasis, reliance and expectation that two sided and multi sided analyses should be undertaken and this expectation is NOT limited to DPT cases.

**Has your organisation reviewed its compliance with the ATO's draft Practical Compliance Guideline PCG 2018/D2 on Diverted Profits Tax?**



**Has your organisation entered into any Advanced Pricing Agreements or used Safe harbours to increase certainty?**



## GLOBAL ISSUES

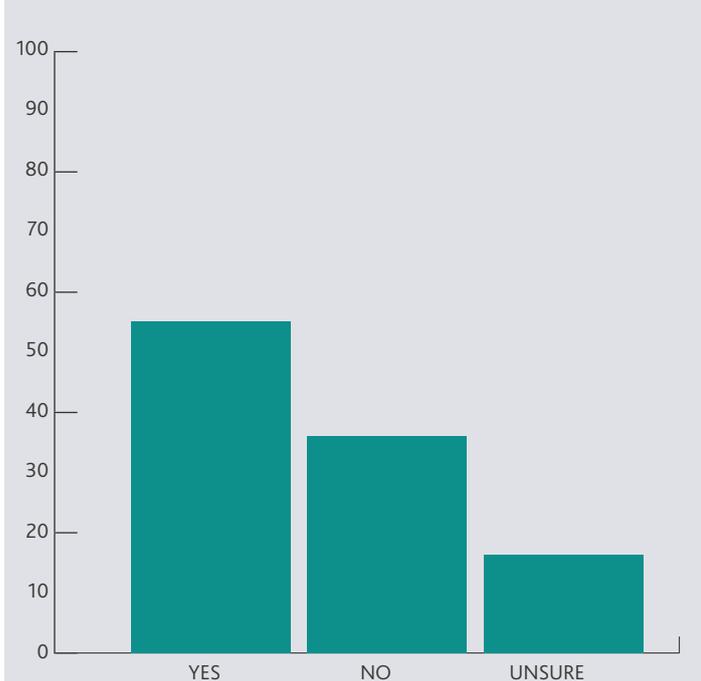
### US tax reform:

- ▶ The international tax law changes introduced by the Tax Cuts and Jobs Act in the US late last year will require both US companies and foreign multinationals with US operations to reconsider their transfer pricing structures and operations
- ▶ The international tax provisions that most affect transfer pricing are the new anti-deferral tax on global intangible low-taxed income (GILTI) and the new base erosion and anti-abuse tax (BEAT) on outbound related-party payments. There are also planning and global controversy implications of US tax reform on transfer pricing.

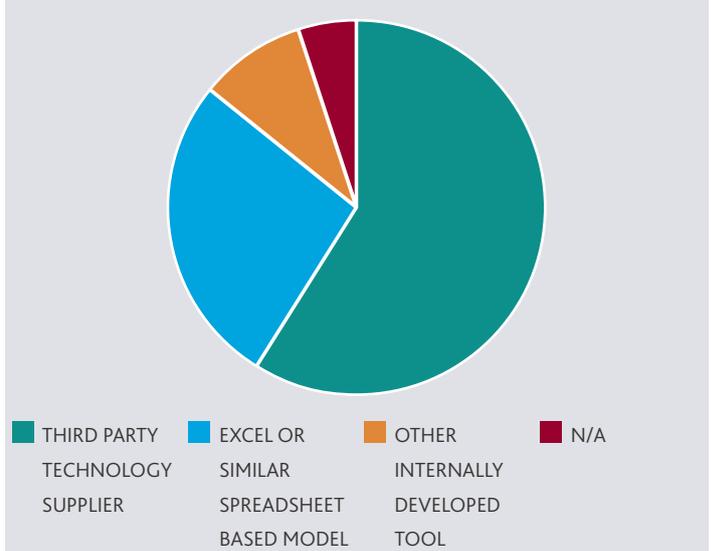
### Digital economy and technology:

- ▶ BDO Global Transfer Pricing Leader Zara Ritchie gave an opening address at TP Minds Australia 2018 on the convergence of information and technology and increasing information management issues
- ▶ Technology plays a more important role in light of CbC because of the volume of information/data required to be collected and compliance obligations varying across different jurisdictions
- ▶ Other countries are also moving ahead with proposals on taxing digital turnover with divergent views emerging regarding the need for special measures to accommodate a digital presence permanent establishment vs digital service tax and the risk of adverse consequences for MNEs
- ▶ As announced in the 2018/19 Australian Federal Budget a discussion paper on digital tax will be released and is keenly awaited to determine how it will interact with the existing Transfer Pricing laws.

### Does your organisation use technology to manage transfer pricing compliance or transfer pricing documentation?



### What tools will your organisation use to prepare its CbC report for FY17 and beyond?



### Globalisation

- ▶ Global trade has significantly increased creating an unprecedented amount of global business integration
- ▶ Globalisation and the rapid growth of international trade resulting in intercompany pricing becoming an everyday necessity combined with a focus on tax evasion and national Treasury deficits have left MNEs in the eye of a veritable perfect storm.



## BDO COMMENT

- ▶ BDO's TP Minds Australia 2018 survey confirms CbC reporting continues to create challenges for the many Australian multinationals required to report by the end of this financial year. Building on its success in the landmark Chevron Australia decision last year, the ATO also continues its scrutiny with guidance on cross border financing which sets out a framework to assess risk in relation to certain related party financing. The ATO is also shining a spotlight on the DPT which has been in effect for almost one year, with guidance for taxpayers in self assessing their level of DPT risk. BDO can assist with utilising the ATO's risk assessment framework to determine potential risk mitigation strategies as well as understand the ATO's multi-step process in formulating a DPT assessment.
- ▶ Key themes of discussion at TP Minds Australia 2018 including globalisation and technology were also a reminder that taxpayers can expect more questions on intra-group services, financing, intangibles and business restructurings as Government's information exchange channels deepen and Master File and CbC reporting become accessible globally. Tax administrations are also increasingly deploying technology for collection, collation and analysis of data, feeding into more targeted and well-designed tax policy. BDO can assist taxpayers with navigating the future of transfer pricing using deep understanding of value chains and investment structures in business, greater familiarity with data and IT and the ability to marry these two through optimal use of technology to create credible transfer pricing documentation, defend inter-company pricing policies and limit controversy.



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