



# Discretionary Trust Streaming Amendments

## What I need to know about...

### Discretionary Trust Streaming Amendments

Following the decision in Bamford's Case and the introduction of Subdivision 115-C of the Income Tax Assessment Act 1997 (Cth), trustees of discretionary trusts may need to consider the issue of streaming capital gains or franked dividends to specific beneficiaries. Trust deed amendment may be necessary. However it may be that no amendment is needed and that the trustee can achieve streaming simply by resolution.

Only trusts that wish to stream capital gains or franked dividends to specific beneficiaries, rather than allow beneficiaries to be assessed proportionally on all net income including capital gains and franked dividends, could perhaps require amendment.

The trustee should take three steps:

- Step 1            determine which beneficiaries (if any) the trustee wishes to stream to
- Step 2            determine how to give effect to that streaming
- Step 3            record the specific entitlement of the beneficiary "in its character".

#### Step 1

Who, if anyone, does the trustee want to stream to?

#### Step 2

Requires the trustee to specifically express the specific entitlement to be granted to the chosen beneficiaries. Paragraph 2.43 of the Explanatory Memorandum for the legislation introducing Subdivision 115-C gives examples of how the trustee could resolve to distribute to a beneficiary in such a way as to create the specific entitlement required by the law, including such entitlements as:

- a specific amount referable to a franked distribution
- a proportion of the 'trust gain' realised on the sale of an asset
- the amount of the franked distribution remaining after calculating directly relevant expenses and, say, an amount distributed to another beneficiary
- a percentage of a 'net dividends account' that includes all franked and unfranked distributions less directly relevant expenses charged against the account (so long as their entitlement to net franked distributions can be determined)
- the amount of (tax) capital gain included in the calculation of the trust's taxable income remaining after the application of the capital gains tax (CGT) discount. (In such a case the beneficiary would generally be specifically entitled to only half of the gain and that entitlement is taken to be made up equally of the taxable and discount parts of the gain.)

### Step 3

Requires the trustee to record the beneficiary's entitlement "in its character as such in the accounts or records of the trust". The Explanatory Memorandum again provides comment. It states that the phrase "the accounts or records of the trust" would include:

- the trust deed
- statements of resolution
- distribution statements

A record merely for tax purposes is not enough. This seems to mean that the record must effect the distribution or at the very least notify the beneficiary of it. A document created simply to provide evidence to the ATO and for no other purpose would seem to be insufficient.

The Explanatory Memorandum then states that the following resolution or trust entitlements would satisfy the requirements of being 'recorded in its character as referable to the capital gain or franked distribution':

- under the trust deed a beneficiary is entitled to all of the capital gains of the trust
- the trustee resolves to distribute all of the dividends of the trust to a beneficiary
- under the trust deed that includes capital gains as income (either by default or because the trustee exercises a power to re-characterise the amount as income) a beneficiary is entitled to all the profits made on or derived from an asset
- under the trust deed that does not include capital gains as income the trustee resolves to advance capital representing profits from the sale of a property equally to the beneficiaries.

For capital gains a beneficiary's specific entitlement must be recorded no later than two months after the end of the income year. For franked distributions a beneficiary's specific entitlement must be recorded by the end of the income year.

As the Explanatory Memorandum accepts that a trustee can stream by resolution, amendment to the trust deed should only be necessary where

- there is no power in the deed for the trustee to stream income or capital gain (the Memorandum states that a trustee must have a power to stream under the terms of the trust and that the tax law amendments do not in any way give trustees a power to stream where they do not already have the power to do so)
- there is no power in the deed for the trustee to characterise or distinguish between different sorts of income or capital gain

Such amendments would be unlikely to be necessary in relatively modern trust deeds. However each trust deed needs to be reviewed if streaming is desired.

## Townsend's Services

Our 2-stage service firstly establishes whether the trust deed needs amendment before moving to the more material step of amending the deed if necessary.

In order to commence we will require:

1. a completed instruction form
2. a copy of the signed original deed and any signed copies of any amendment deeds
3. copies of any documents changing the trustee of the trust.

**Disclaimer:** The information in this document is general information only and cannot be relied upon as a substitute for professional advice. No action should be taken until (and we will not be liable to anyone unless) we have provided specific advice relevant to the particular circumstances