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## **Public advice and guidance compendium – TR 2018/6**

This is a compendium of responses to the issues raised by external parties to draft Taxation Ruling TR 2017/D10 *Income tax: trust vesting – amending the vesting date and consequences of a trust vesting*

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

### **Summary of issues raised and responses**

<b>Issue No.</b>	<b>Issue raised</b>	<b>ATO Response / Action taken</b>
1	Agree with the conclusions in the draft Ruling. The alternative views expressed in Appendix 1 (that continued behaviour by both the trustee and beneficiaries of a trust, in a way that is consistent with the terms of the trust as they existed prior to its vesting date, may be sufficient to extend the trust's vesting date) are without foundation.	Agreed. Appendix 1 has been deleted from the final Ruling and we have incorporated our views at paragraph 8.
2	<p>The administration and management power in the various State and Territory Trustee Acts does not authorise the court to vary or amend the terms of a trust (paragraph 100 of <i>Re Dion Investments Pty Ltd</i> [2014] NSWCA 123; 87 NSWLR 753). The court may only grant specific powers related to the management and administration of trust property and, to that extent, the legislative references in footnote 3 are incorrect.</p> <p>However, the grant of specific powers may permit the postponement of the vesting date (paragraph 34 of <i>Stein v. Sybmore Holdings</i> [2006] NSWSC 1004).</p> <p>Footnote 3 should also refer to another source of the court's power, in some jurisdictions, to approve variations of trusts on behalf of those unborn, unknown or incapable</p>	Footnote 1 of the Ruling (formerly footnote 3 in draft TR 2017/D10) has been modified accordingly.

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	of consenting – it has been held that these powers extend to postponing the vesting date.	
3	<p>The Ruling is silent on whether a valid extension of the vesting date through the courts, or under a trust deed by amendment or otherwise, creates a new trust and therefore triggers CGT event E1.</p> <p>The Ruling should also note that the extension of the vesting date by a court after the trust has vested may cause CGT event E1 to happen, analogously to agreement by all beneficiaries as noted in the Note to Example 4.</p>	<p>Paragraph 10 has been added to the final Ruling to clarify that a valid extension of the vesting date would not cause CGT event E1 to happen.</p> <p>It is the Commissioner's understanding that a court would refuse to amend a vesting date after the trust has vested where this would result in the creation of a new trust (see <i>Paloto Pty Ltd v. Herro</i> [2015] NSWSC 445 (Darke J) at par 15).</p>
4	The Ruling should explain what types of agreements and conduct after vesting could trigger CGT event E1.	<p>The types of agreements and conduct after vesting that could trigger CGT event E1 requires a proper consideration of all the circumstances and is beyond the scope of the Ruling. Taxpayers are encouraged to approach the Commissioner for <a href="#">advice</a> on their specific circumstances.</p>
5	Paragraphs 6 to 7 of the draft Ruling appear to be at odds with paragraph 8 (the former paragraphs provide it is not possible to change the trust's vesting date once it has passed but paragraph 8 refers to the Commissioner's understanding that a court would be unlikely to extend the vesting date after the vesting date).	Paragraphs 6 to 8 of the final Ruling have been expanded to assist understanding.
6	<p>It is inappropriate to rely on TR 2004/D25 <i>Income tax: capital gains: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997</i> prior to it being finalised in light of the cases which have emerged in the interim regarding absolute entitlement.</p> <p>Preferably more general observations about CGT event E5</p>	We have removed references to the Commissioner's views on the meaning of absolute entitlement from the final Ruling (including Examples 6 and 7 originally in draft TR 2017/D10).

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	and absolute entitlement should be made. It is important that the Ruling not be construed as providing de facto guidance as to when absolute entitlement arises.	
7	Additional examples should be provided of when the trust deed does, and does not, provide the trustee with the power to extend a vesting date.	The examples in the final Ruling assist in explaining the Commissioner's views on amending the trust's vesting date and the income tax consequences of the passing of a trust vesting date. Taxpayers whose circumstances differ materially from those examples are encouraged to approach the Commissioner for <a href="#">advice</a> on their specific circumstances. We also invite further examples to be provided that may be considered for any further public guidance.
8	The approach the Commissioner will take where a trust deed cannot be found and the terms as to vesting date are unknown should be explained.	This issue raises questions that go beyond tax law and is beyond the scope of this Ruling. Taxpayers who find themselves in this scenario are encouraged to approach the Commissioner for <a href="#">advice</a> on their specific circumstances.
9	The view in the draft Ruling that the vesting date cannot be extended retrospectively is based on the legal Opinion annexed to the Ruling that was provided in the context of a particular trust deed. Conceivably a different result might arise under a differently worded deed. Specific reference should be made to extending the vesting date under powers of variation that contemplate retrospective amendments: <i>Gra-Ham Australia Pty Ltd v. Perpetual Trustees WA Ltd</i> (1989) 1 WAR 65.	The views outlined in the final Ruling reflect the Commissioner's understanding of how the law applies. As stated in the Ruling, it is the Commissioner's view that, once a trust vests, the trustee will not retain any power (whether described in the deed or otherwise) to retrospectively extend the vesting date. <i>Gra-Ham</i> does not concern a scenario in which there is an attempt to change the vesting date post-vesting. Rather, it concerns whether a power of a particular type when properly construed was able to be exercised with retrospective effect. The case is not relevant to the questions dealt with in the Ruling.

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10	The Commissioner should explain the position if the takers on vesting are a class of beneficiaries or determined at the discretion of the trustee, and what happens if the power is not exercised. This should include confirmation that the power to determine the takers on vesting after the vesting date depends on the terms of the particular trust deed.	Example 6 has been added to the final Ruling to address the scenario whether the identity of the takers on vesting depends on the trustee exercising its discretion. The operation and effect of vesting clauses in trust deeds in determining the takers on vesting requires proper construction of the deed, including the duties imposed on the trustee in all the circumstances including as to the timing of the determinations. Taxpayers who find themselves in this scenario are encouraged to approach the Commissioner for <a href="#">advice</a> on their specific circumstances.
11	The Commissioner's comments that 'once the trust has vested, the interests in the trust property become fixed at law' implies that a taker in default would have an interest in each of the trust's CGT assets at the vesting date. The Ruling should confirm that Division 128 applies in relation to a taker in default's interests in each of the assets where the taker in default dies before the assets are transferred by the trustee.	Guidance in regard to the application of Division 128 of Part 3-3 for events after the vesting date is beyond the scope of the Ruling.
12	It is implicit from the views at paragraphs 15 and 26 of the draft Ruling that the Commissioner considers the trustee's power to distribute pre-vesting income ceases on the vesting date. If this is correct, it should be stated explicitly.	Taxpayers who find themselves in this scenario are encouraged to approach the Commissioner for <a href="#">advice</a> on their specific circumstances.
13	It would be helpful if the Ruling addressed what would be considered to be a 'fair and reasonable' allocation of income where there is an interim distribution but the amount cannot be calculated with precision until after the vesting date.	What is a fair and reasonable allocation of income is a fact specific exercise. Reasonable allocation does not require amounts to be calculated with precision. Taxpayers can approach the Commissioner for <a href="#">advice</a> on their specific circumstances.

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14	The Ruling should consider if a trust generates a capital gain but has no income, whether the taker on vesting is specifically entitled, or the trustee is assessed under section 99 or 99A.	The Ruling does not consider the circumstances in which a trust vesting may give rise to a specific entitlement. This issue is one which raises considerations that go beyond the scope of the Ruling. Taxpayers can approach the Commissioner for <a href="#">advice</a> based on their specific circumstances. We will make a further assessment of the risks and priorities of these issues, and whether they require further advice or guidance.
15	In relation to the tax treatment of overpaid or underpaid beneficiaries and past CGT events, the Commissioner should clarify his position with respect to incorrect assessments, in time and out of time amendments, and other associated issues.	See <a href="#">Trust Vesting</a> for information on the Commissioner's administrative approach to assist trustees and beneficiaries where they have identified the trust has been administered after it has vested in a way that is not consistent with the beneficiaries' vested interests as set out in the deed.
16	Because of the complexity associated with this matter, the final taxation ruling should apply prospectively from the date of issue.	The views in the Ruling apply before and after its date of issue. Recognising the complex issues that may arise for trustees and beneficiaries where a trust has already vested, information on our administrative approach in these cases can be found at <a href="#">Trust Vesting</a> .
17	The Ruling should clarify the Commissioner's view in relation to when CGT event E5 will or will not occur on the vesting of a trust in different circumstances and the impact of recent developments on the concepts of absolute entitlement.	The impact of recent developments on the concept of absolute entitlement is outside the scope of this Ruling. The Commissioner discusses the circumstances in which a beneficiary may become absolutely entitled in TR 2004/D25 Examples 6 and 7 in draft TR 2017/D10 have also been deleted from the final Ruling.
18	Can a trustee resolve to amend the jurisdiction of the trust to South Australia, and thus have any vesting date essentially abolished?	Whether a trustee can amend the jurisdiction of the trust to South Australia is beyond the scope of the Ruling. Relevant matters to consider in this context may include the nature of the assets of the trust (for example, whether those assets

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		consist of real property and where they are located).
19	The Commissioner should address the application or otherwise of section 99B as well as CGT events A1, C2 and D1.	The operation of these provisions is beyond the scope of the Ruling. We will make a further assessment of the risks and priorities of these issues, and whether they require further advice or guidance.
20	The Ruling would benefit from further guidance and examples of the taxation of net income where a trust has been administered as though its vesting date has not passed, particularly where certain beneficiaries are entitled to capital and not income.	Example 2 in the final Ruling has been amended to make clear that, as with income, a trustee's discretionary power to appoint capital among a class of beneficiaries ceases on vesting.
21	The Ruling should consider who is entitled to the trust property where the taker in default dies before the vesting date and the deed is silent.	The entitlements to trust property will depend on all of the facts and circumstances of the particular case. This issue is beyond the scope of the Ruling.
22	Guidance would be valuable on unwinding ineffective distributions.	These issues are beyond the scope of the Ruling and will be fact specific. See <a href="#">Trust Vesting</a> for information on the Commissioner's administrative approach to assist trustees and beneficiaries where they have identified the trust has been administered after it has vested in a way that is not consistent with the beneficiaries' vested interests as set out in the deed.
23	Guidance would be valuable on whether there are consequences for trading stock under Division 70; balancing adjustment events under Division 40; loss of accumulated losses under Schedule 2F; UPEs and Division 7A; commercial debt forgiveness; and debit and credit loan accounts in the trust.	The consideration of other parts of the income tax law is beyond the scope of the Ruling. We will make a further assessment of the risks and priorities of these issues, and whether they require further advice or guidance.
24	Guidance should be provided on whether the trust	Additional guidance has been provided at <a href="#">Trust Vesting</a>

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	continues to use the same TFN, ABN and GST registration or is required to apply for a new one if it continues past vesting date, and CGT events E1, E5 and E7 have not happened.	confirming that, if the vesting of the trust has not resulted in a CGT event happening or led to the creation of a new trust, the trust continues to use its current trust registrations (ABN / TFN / GST).
25	Preferable for the Ruling to emphasise that the relevant power under a particular deed to alter the vesting date is the matter that will determine if the alteration is effective.	An additional sentence has been added at the end of paragraph 6 in the final Ruling.
26	It should be made clear the opinion of Counsel deals with very particular circumstances and does not represent the general views in relation to vesting.	The link to the opinion of Counsel is in a head note to the Ruling that has a statement to that effect.