

TD 2019/14EC - Compendium



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Public advice and guidance compendium – TD 2019/14

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2018/D3 *Income tax: will a trust split arrangement of the type described in this draft Determination cause a new trust to be settled over some but not all assets of the original trust with the result that CGT event E1 in subsection 104-55(1) of the Income Tax Assessment Act 1997 happens?* 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

Issue number	Issue raised	ATO response
1	The Commissioner should not object to the principle of trust splitting or treat it like a tax mischief.	The Determination is not concerned with whether trust splitting arrangements are, or are not, mischievous as a matter of policy. Rather the Determination sets out the Commissioner's view on the way the tax law applies to the arrangements described in the Determination.
2	The draft Determination's identification of what constitutes a 'trust split' and the examples which are given are more likely to cause confusion than provide certainty as to what is the intended application of the law. The draft Determination does not provide any meaningful precedential ATO view.	The purpose of the Determination is to make clear that the Commissioner does not accept the correctness of the view expressed by some that no CGT event arises as a matter of law when a trust splitting arrangement is entered into, and that this is so regardless of the nature of the steps undertaken to effect the split. The explanation of the Commissioner's view has been expanded upon in the final Determination. Example 2 has also been included to provide a scenario where some degree of functional separation of parts of a trust is achieved without creation of a new trust.
3	The draft Determination is correct but only in relation to the specific factors set out in paragraph 2 of the draft Determination. Is it intended to produce a Determination based on a narrow factual matrix or is the Commissioner more focused on the outcomes following a reorganisation of the trust estate's affairs?	The Determination expresses the Commissioner's view on how the law applies to a particular scenario. In that way the Determination makes clear that depending on the facts of the case, there becomes a point where the steps implemented have the result of settling assets of a trust on the terms of a new trust.

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		The Commissioner welcomes suggestions of ways in which further guidance might be given to assist in distinguishing between arrangements that cause a new trust to arise and those that do not.
4	Example 1 of the draft Determination is too specific. More examples are required to cover the spectrum of what will and will not be a trust split.	The purpose of Example 1 of the Determination is to illustrate a scenario where the implementation of a trust split causes a new trust to be created and a CGT event to occur. In response to comments received, Example 2 has been included in the final Determination to canvass an arrangement which the Commissioner concludes does not cause a CGT event to occur. The Commissioner welcomes suggestions of ways in which further guidance might be given to assist in distinguishing between arrangements that cause a new trust to arise and those that do not.
5	The reasoning in the draft Determination could be applied more widely as it can be applied to any appointment of a new trustee who may exercise discretions in a different manner to the previous trustee. It is unclear what arrangements would be covered by the draft Determination if the trust split arrangements are not on all fours with the description in the draft Determination.	The Determination considers an arrangement seeking to secure the separation of the practical control of different assets held on trust where the result of the arrangement is that some assets come to be held on a new charter of rights and obligations consistent with the assets being settled on terms of a new trust. The scenarios discussed in the Determination are distinguishable from a situation where all that has occurred is a new trustee is appointed and that new trustee exercises discretions in a different manner to that of the previous trustee (although, presumably, still consistently with the purpose for which the discretion exists). Example 2 has been included in the final Determination to demonstrate an arrangement where the Commissioner concludes that assets have not been settled on a new trust. Taxpayers whose circumstances differ materially from the examples in the final Determination can approach the Commissioner for advice on their specific circumstances.
6	Will the same outcome arise where only some of the features described are present? Further guidance should be provided in the final Determination as	Paragraph 2 of the Determination explains that a 'trust split', for the purposes of the Determination, will exhibit all or most of the listed features.

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	to what features are most important, or what weight should be given to particular features.	It is the arrangement as a whole which leads to the conclusion that assets have been settled on a new trust in the circumstances considered in the Determination. It is not possible to rank specific factors and combinations of factors which might in individual cases demand this conclusion. The outcome in any particular case will depend on the precise circumstances of that case. The Commissioner welcomes suggestions of ways in which further guidance might be given to assist in distinguishing between arrangements that cause a new trust to arise and those that do not.
7	Paragraph 2 of the draft Determination accurately reflects common features of a trust split, however in many cases separate appointors will not be appointed and the rights of indemnity are not always released over the transferred assets.	The Commissioner acknowledges this point. Paragraph 2 of the Determination explains that the features of the term 'trust split' for the purposes of the Determination will exhibit all or most of the listed features. Taxpayers whose circumstances differ materially from those discussed in the final Determination can approach the Commissioner for advice on their specific circumstances.
8	Paragraph 26 of the draft Determination contains an incorrect assumption. In many trust splits the intent is that there is to be no change in those who can benefit, the only change is in the identity of the person appointed as a separate trustee of part of the trust property who has power to exercise discretions as to who will benefit.	Paragraph 1 of the Determination explains that the term 'trust split' as used in the Determination refers to a situation where some of the assets commence to be held for the benefit of a subset of beneficiaries. The statement in paragraph 26 of the draft Determination is made in that context. Paragraph 47 of the final Determination has been modified to state this more explicitly. The Commissioner accepts that the conclusion as to how the tax law applies to any particular arrangement requires a careful examination of the facts specific to that arrangement.
9	The discussion of collaboration amongst trustees is not addressed clearly enough in the draft Determination. Many trust split arrangements operate with collaboration between the trustees such that a yearly set of accounts and a single tax return is prepared. The final Determination should include an example where a new trustee is appointed, practical control was delegated / transferred though an overarching control was retained,	The arrangement considered in the final Determination is one where the separate trustee has complete autonomous control and responsibility for the assets vested in it. However, Example 2 has been included in the final Determination which considers a situation where the trustees are required to work in unison in respect of various aspects of the trust. The conclusion reached in this example is that the implementation of the restructure does not

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	and a CGT event does not arise.	cause a CGT event to happen.
10	The draft Determination should be amended to state how CGT event E1 applies to Example 1. The final Determination should confirm the taxpayer who is liable to tax arising as a result of the trust split on the Commissioner's view.	Example 1 has been updated in the final Determination to confirm that CGT event E1 happens in respect to the transferred shares (refer to paragraph 12). The capital gain that arises will feed into the calculation of the trust's net capital gain and as a consequence its net income. The mechanics of how the gain ultimately then falls to be taxed per the rules in Subdivision 115-C of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) is beyond the scope of this Determination.
11	The final Determination should explain the outcome where the taxpayer is a non-resident.	The position of non-residents (be they the trustee or a beneficiary) is beyond the scope of this Determination. Taxpayers whose circumstances differ materially from those discussed in the final Determination can approach the Commissioner for advice on their specific circumstances.
12	The final Determination should specify when the CGT event takes place in situations where the change of appointor and the change to the deed happens decades after the new trustee is appointed. The draft Determination does not discuss the use of trustees holding assets through a bare trust for the original trustee. The Determination needs to consider the situation where a trust has multiple trustees for practical reasons (for example, when assets are held in different jurisdictions, or when particular assets have a risk profile that needs to be mitigated).	The matters raised are beyond the intended scope and focus of the subject matter of this Determination. Taxpayers whose circumstances differ materially from those discussed in the final Determination can approach the Commissioner for advice on their specific circumstances.
13	There should be a statement in the final Determination to say that the Determination does not apply to deceased estates or trusts set up under a deceased estate where assets are divided amongst the beneficiaries under a family arrangement (whether it is a deed of family arrangement or an agreed arrangement between the parties) or they are divided up amongst the beneficiaries in accordance with the terms of the will. A variety of provisions, including Division 128 of the ITAA 1997, would need to be considered which fall outside the scope of the Determination and this should be made clear.	The Determination applies to the arrangement described in paragraphs 1 to 3 of the final Determination. The reasoning applied in this Determination may provide guidance on how the Commissioner views similar arrangements. However each case would need to be considered in light of the specific facts and circumstances present. Taxpayers whose circumstances differ materially from those discussed in the final Determination can approach the Commissioner for advice on their specific circumstances.

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14	What would be the outcome if a separate trustee controlled by one side of the family is appointed to specific assets and the existing trustee remains in relation to the balance of the assets without there being an amendment to the trust deed? There is no change to the trust, only a change in the way it is administered.	The mere fact that the trust deed has or has not been amended is only one factor that might, when viewed together with other factors, be relevant to a conclusion that an implemented trust splitting arrangement gave rise to a CGT event. That said, amendment of the deed is often a step required to enable different trustees and appointers to be appointed in respect to different assets of a trust and so facilitate the splitting of the trust. Example 2 has been inserted in the final Determination to consider an arrangement which the Commissioner concludes does not cause a CGT event to occur. Taxpayers whose circumstances differ materially from those discussed in the final Determination can approach the Commissioner for advice on their specific circumstances.
15	The draft Determination only considers CGT event E1 and not other CGT events.	Subsection 102-25(1) of the ITAA 1997 provides that if more than one CGT can happen, you use the event that is most specific to the situation. For the arrangement set out in paragraphs 1 and 2 of the final Determination, the Commissioner concludes that CGT event E1 is the most specific to the situation. Consideration of other CGT events is therefore unnecessary in that context.
16	The use of the term 'trust split' is inaccurate. A trust is not an entity that can be split. What happens is some trust assets are held by a separate trustee on the same trusts as were established by the original trust deed; effectively the trust property is divided but remains subject to the same trusts.	The term 'trust split' is used in the final Determination because this term has been commonly used in published material to describe arrangements of this nature. Paragraph 2 of the final Determination describes the typical features of the arrangements which are referred to as a 'trust split' for the purposes of the Determination.
17	Trust deeds are drafted to be malleable. Beneficiaries come and go (new beneficiaries are born or marry into the family, others exit from divorce or death, etc). The class of beneficiaries and who can benefit is always elastic. No one has suggested that a new trust is created because of these expansions and contractions. If it does not happen naturally, it should not matter so long as a provision or power in the trust deed permits it.	The final Determination does not suggest changes to the class of beneficiaries over time, will of itself cause a new trust to be created. Rather, the final Determination considers whether assets in respect of which a separate trustee has been appointed in the circumstances described in paragraph 2 of the final Determination have been settled on a new trust that emerges from the original (and continuing) trust.

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18	The answer to the question posed in the draft Determination should be 'no'. The conclusion reached in Example 1 of the draft Determination is incorrect. There is not a 'declaration or settlement' at the time of the appointment of the new trustee (Moon Trustee) since the trust property (the 100 Sun Pty Ltd shares) is held on a trust that pre-exists the date of appointment of the new trustee. Thus, CGT event E1 cannot happen as there has not been the creation of 'a trust over a CGT asset by declaration or settlement' at the time the new trustee is appointed. Rather, the creation of a trust occurred 'over a CGT asset' at the time the initial trustee (Star Trustee) acquired the 300 Sun Pty Ltd shares.	In the Commissioner's view the combination of factors described in paragraph 2 of the final Determination will cause the assets transferred to the separate trustee to be settled on a new trust. Further detail of the Commissioner's basis for reaching this conclusion has been added to Appendix 1 in the final Determination.
19	There is a general lack of authority to support the ATO view.	We acknowledge that there is no case law specifically dealing directly with the income tax effect of a trust split. The analysis underlying the position set out in the final Determination therefore relies on basic principles of trust law. However, further explanation for the Commissioner's views has been added to the final Determination. This includes a discussion of the decision of the Supreme Court of South Australia in <i>Dyda P/L & Anor v Commissioner of State Taxation</i> [2013] SASC 156 (<i>Dyda</i>) which, although decided in a different statutory context, provides a useful case study for present purposes.
20	Control of the assets transferred to the new trustee will lie with a different group of family members. However, this will not trigger CGT event E1.	In the circumstances set out in the final Determination, the change of control is an important aspect of the totality of the changes that together forms the basis for the conclusion that a trust split of the type described in the final Determination will cause CGT event E1 to happen.
21	The concept of a trust fund is distinct from the concept of a trust estate. The existence of two trust funds does not mean there are two trust estates. The test for the purposes of CGT event E1 is whether a new trust is created over a CGT asset by declaration or settlement. The test is the creation of a new trust not the existence of more than one trust fund. Whether the actions of the trustee give effect to the creation of a new trust over the relevant assets or	Subsection 104-55(1) of the ITAA 1997 applies where a new trust is created over a CGT asset by declaration or settlement. In the circumstances described in the final Determination, the Commissioner's view is that a new trust is created, not merely the creation of a new sub-fund of what remains a single trust (compare the approach of the Full Federal Court in <i>Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation</i> [2018] FCAFC 122

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	merely the separation of trust funds is something that will, arguably, need to be determined on a case by case basis. The draft Determination does not explore this in sufficient detail. Paragraph 27 of the draft Determination draws the conclusion that there are two distinct trust funds. That is obviously so but is also irrelevant. Conflating a trust fund, or more accurately for tax purposes a trust estate, with a trust, borders on treating a trust as an entity by the implicit conclusion the existence of two trust funds must mean a new trust has been created.	(<i>Aussiegolfa</i>) details of which have been added to Appendix 1 in the final Determination). However, we agree that each case will need to be considered based on the facts of that case. Example 2 has been included in the final Determination to consider an arrangement which we conclude does not cause a CGT event to occur.
22	It is correct that the original trustee will have no fiduciary obligations in relation to the assets transferred to the separate trustee. Similarly, it is correct that the separate trustee will have no fiduciary obligation in relation to the assets retained by the original trustee. The crucial issue is that both the original trustee and the separate trustee will have precisely the same fiduciary obligations in respect of the trust property they respectively hold.	It is the Commissioner's view that the combination of the steps involved in the implementation of the trust split described in the final Determination leads to the conclusion that the assets transferred to the separate trustee have become subject to a new charter of rights and obligations consistent with having been settled on terms of a new trust for the exclusive benefit of a subset of the original class of beneficiaries. Further detail has been added to Appendix 1 in the final Determination of the basis for the Commissioner's conclusion that a trust split of the type described in the final Determination causes CGT event E1 to happen.
23	The references to rights of indemnity are not relevant. Those rights are personal to a trustee arising from the personal liability of that trustee. A trustee cannot have personal liability for the acts of another or arising from property held by another. It follows there is no right of indemnity in that case. If the original trustee waives its rights of indemnity over assets transferred to the separate trustee that is a personal matter.	The attempt to limit the assets to which each respective trustee can look to make good their right to be indemnified as part of the implementation of the trust split is, in conjunction with the other steps of the split, relevant to the conclusion that the split causes the assets transferred to the separate trustee, to be subject to a new charter of rights and obligations.
24	Paragraph 31 of the draft Determination states that the classes of beneficiaries remain constant 'as a matter of form'. It is not a matter of form, it is the legal and equitable effect of the terms of the trust.	The arrangement considered in the Determination is one where the trust deed is not amended to alter the class of potential beneficiaries entitled to benefit from the trust as a whole. However, the intention of the parties is that after the split, each trustee will administer the trust over the assets which it holds in a manner which effectively narrows the class of beneficiaries that can respectively benefit from the assets it holds.

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		The wording of paragraph 52 has been revised in the final Determination (paragraph 31 of the draft Determination) to better reflect this point.
25	The draft Determination appears to misunderstand the nature of discretionary trusts in that beneficiaries have a mere expectation that they will be considered by the trustee and do not have any interests or rights in respect of the assets of the trust.	We broadly agree with this description of the nature of the rights of a beneficiary of a discretionary trust. Paragraphs 51 to 55 of the final Determination discusses the fact that changes in control of the assets might be expected to be reflected in the manner in which the respective trustee's discretions are exercised and the consequent expectations of the beneficiaries.
26	The conclusion about the arrangement described in the draft Determination in reliance on an expected outcome of a challenge by an aggrieved beneficiary is unsupported by any reasoning and contradicted by the arrangement's terms (point 6 of paragraph 2, point 9 of paragraph 10) and an authority at paragraph 31 of the draft Determination. The draft Determination is based on an assumed 'expectation' of how a court is likely to handle a trust splitting case. If a court were to uphold a challenge to the exercise of a trustee's discretion, it would not be because it was inconsistent with the subjective intentions of the parties; it could only be that the powers had been exercised beyond the scope of the trust deed, for example, to confer a benefit on a non-beneficiary, or that the trustee had failed in its duty to give due consideration to the beneficiaries. See <i>Karger v Paul</i> [1984] VR 161 at [175] as to the duty of real and genuine consideration.	The observations about the expected outcome of a challenge by an aggrieved beneficiary are invoked as a convenient 'check' on the conclusion otherwise reached as to the effect of the arrangement (namely the creation of a new trust over assets transferred to the new trustee). Footnote 28 to paragraph 52 and footnote 29 to paragraph 53 of the final Determination (footnote 20 to paragraph 31 and footnote 21 to paragraph 32 of the draft Determination) have been adjusted to correct minor referencing errors.
27	The Determination discussion regarding disappointed and aggrieved beneficiaries seems to distract the analysis.	See the response to Issue number 26 of this Compendium.
28	The statement at paragraph 11 of the draft Determination that 'the separation of the estates is expected to be borne out by the exercise of the respective trustee's powers' is an alarming statement to make as being somehow supportive of CGT event E1 having occurred. Expectations of others (that is, the beneficiaries) and what transpires with the benefit of hindsight are not relevant to	The statement at paragraph 11 of the Determination needs to be read in the context of paragraphs 51 to 55 of the final Determination. The latter paragraphs explain that consideration of the result of a potential challenge by an aggrieved beneficiary to an exercise of a trustee discretion after the implementation of a trust split is invoked in the Determination as a 'useful check' on

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	whether CGT event E1 happens.	the analysis leading to the conclusion that a trust split for the purposes of this Determination causes CGT event E1 to happen. See also the response to Issue number 26 of this compendium.
29	In the examples given in the draft Determination, the Court might give weight to the arrangement between the parties who are <i>sui juris</i> and find, if the terms of the trust were sufficient, that the trust had in some way been varied by what was done to have property held for particular groups of beneficiaries. However, if challenged by someone not directly party to the arrangement, say, in the ATO example, by Jane's children (or their tutor), it might be expected that the Court would seek to protect their interests and find that there is only one continuing trust.	The final Determination considers whether the totality of the arrangement described causes assets to be subject to a separate charter of rights and obligations such that they are settled on a new trust fund separated from the original trust fund. The context surrounding the arrangement and how that could be expected to affect rights of the beneficiaries only forms part of this analysis.
30	The four cases referred to in footnote 21 to paragraph 32 of the draft Determination establish that a court will have regard to the purposes for which the trust was established as manifested in its terms. The conclusions in paragraph 33 of the draft Determination do not follow; the purpose for which the trust is established may be summarised as enabling the trustee for the time being to exercise its discretion as to which beneficiaries are to benefit and to what degree. The fact that after taking into account the matters that the original and separate trustees are entitled or obliged to, those trustees may come to different decisions does not mean that the powers and discretions have different purposes. The purposes remain the same; the implementation of those purposes is what differs.	The scenarios discussed in the final Determination are distinguishable from a situation where all that has occurred is a new trustee having been appointed and that new trustee exercises discretions in a different manner to that of the previous trustee (although, presumably, still consistently with the purpose for which the discretion exists). The content of this footnote (now footnote 30 to paragraph 53) has been revised in the final Determination.
31	The draft Determination appears to be inconsistent with Taxation Determination TD 2012/21 <i>Income tax: does CGT event E1 or E2 in sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 happen if the terms of a trust are changed pursuant to a valid exercise of a power contained within the trust's constituent document, or varied with the approval of a relevant court?</i> , in that the mere amendment of a range of potential beneficiaries is highly	Paragraph 27 of TD 2012/21 notes that there may be instances where a pre-existing trust does not terminate but assets commence to be held on terms of a distinct trust. Consistent with this statement, this Determination considers one such arrangement where the Commissioner concludes that assets will be settled on a new distinct trust whilst the original trust continues.

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	unlikely to cause a resettlement.	
32	The draft Determination does not apply the case law from <i>Commissioner of Taxation v Commercial Nominees of Australia Ltd</i> [1999] FCA 1455 (<i>Commercial Nominees</i>) and <i>Federal Commissioner of Taxation v Clark</i> [2011] FCAFC 5 (<i>Clark</i>). These authorities state that changing the terms of a trust pursuant to an existing power will not result in the termination or creation of a trust.	The decisions in <i>Commercial Nominees</i> and <i>Clark</i> considered whether a trust comes to an end and all of the assets of the pre-existing trust are settled on terms of a new trust. The question of whether a particular trust split arrangement causes a CGT event to happen in respect of the assets vested in the separate trustee is conceptually a different issue. As such, these decisions are of limited assistance in determining the tax implications of a trust split. Appendix 1 has been expanded in the final Determination to explain the basis of the Commissioner's view in more detail.
33	To determine the emergence of a new trust entity or estate is to observe some degree of severance in the continuity of the trust property or corpus. The case of <i>Clark</i> cited with approval the test applied <i>Commercial Nominees</i>. A break in the continuum of the trust will constitute a resettlement. However, no break in the continuum of the trust does not mean that there is no resettlement of the property. The South Australian Supreme Court case of <i>Dyda</i> provides an example of a situation where a new trust was held to arise. The Court did not consider <i>Commercial Nominees</i> to be inconsistent with this conclusion.	The Commissioner agrees that the decisions in <i>Clark</i> and <i>Commercial Nominees</i> do not stand for the proposition that there can only be a settlement of trust property on terms of a new trust where the original trust has come to an end. The final Determination has expanded the explanation of the Commissioner's view, including analysis of the Supreme Court of South Australia's decision in <i>Dyda</i> at paragraphs 40 to 44.
34	Every change in trustee will create a new trust. However, as a matter of policy, the creation of the new trust is generally ignored. If the ATO adopts the view that CGT is incurred upon a trust split, then there is no rationale for not applying CGT to every change in trustee. The only way to distinguish a 'trust split' and a mere change in trustee is for legislative amendment.	We do not agree that a mere change in trustee will create a new trust. In the Commissioner's view it is the combination of factors set out in the final Determination which causes assets vested in a separate trustee to be settled on a new trust distinct from the existing (and continuing) trust.
35	The draft Determination appears to be inconsistent with a previously issued private ruling (Authorisation number 1012921290075).	The edited version of a private ruling may not contain all the factual details relevant to the decision, in order to ensure that the taxpayers concerned cannot be identified. It is only the private ruling that is provided to the taxpayer (from which the edited version is created) that is binding on the

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		Commissioner, and only for the taxpayer to whom it applies.
36	The final Determination should be prospective. Retrospectivity undermines public confidence in the administration of the Australian tax system. It is irresponsible for the final Determination to apply on a retrospective basis given that there have been private rulings issued in which it is concluded similar arrangements do not trigger CGT events.	We consider it appropriate for the final Determination to apply both before and after its date of issue. We do not consider that the private rulings issued on this topic constitute a general administrative practice on such arrangements. However, it is recognised that the Commissioner's view of the potential CGT implications of the arrangement discussed in this Determination may have been subject to conjecture prior to the publication of the draft Determination on 11 July 2018. The Commissioner will not devote compliance resources to apply the view expressed in the final Determination to arrangements entered into before this date.
37	The draft Determination should explain the consequences for transferring Australian business numbers/Australian company numbers.	In the event that the appointment of a separate trustee causes a new trust to be created over assets, the consequences would be identical to that of any other newly created tax entity. Taxpayers may seek advice from us if they require certainty in relation to their specific circumstances as to obligations under the tax law.
38	Would the new trustee require a separate tax file number?	In the event that the appointment of a separate trustee causes a new trust to be created over assets, the consequences would be identical to that of any other newly created tax entity. Taxpayers may seek advice from us if they require certainty in relation to their specific circumstances as to obligations under the tax law.
39	If the trustee simply resolved to hold certain assets for specific beneficiaries (putting to one side the question of fettering a discretion or failing to properly exercise fiduciary duties) you could get a form of functional split without CGT event E1 occurring because no new rights and obligations are created.	If a trustee were to resolve to hold certain assets on trust for specific beneficiaries this may result in the assets being held on a new charter of rights and obligations as concluded in <i>Commissioner of State Revenue v Lam & Kym Pty Ltd</i> [2004] 10 VSCA 204 and <i>Oswal v Commissioner of Taxation</i> [2013] FCA 745. Consequently, CGT event E1 might be expected to occur.