TDP 2011/1 - Securitisation and TOFA

Australian Government
Australian Taxation Office

Technical Discussion Paper

Securitisation and TOFA

Purpose and status of this discussion paper

The purpose of this paper is to facilitate consultation between the Australian Taxation Office (ATO) and the community as part of the process of developing a potential ATO view on the application of the law.

This paper is prepared solely for the purpose of obtaining comments from interested parties. All views in this paper are therefore preliminary in nature and should not be taken as representing either a precedential ATO view or that the ATO will take a particular view.

This paper is not a publication that has been approved to allow you to rely on it for any Purpose. It is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this paper does not provide protection from primary tax, statement penalty or interest for any taxpayer that purports to rely on any views expressed in it.

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Contact officer *(for comments or further information)*	The contact officer details have been removed following the withdrawal of this Technical Discussion Paper.
Comments close	28 October 2011

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Introduction

1. Members of the Securitisation Working Group of the NTLG Finance and Investment Sub-group TOFA Working Group supplied to the Australian Taxation Office (ATO) certain sanitised documents (the transaction documents) in relation to a bank-originated securitisation transaction (the subject transaction) involving a bank Originator (the Originator) and a special purpose entity (SPE) trust as the securitisation vehicle. A diagram of the subject transaction is at Attachment A to this discussion paper.

2. This paper discusses that transaction. The focus of the paper is the application of Division 230 of the *Income Tax Assessment Act 1997* (ITAA 1997)[1] and the *Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009* (TOFA Act).

3. There are many ways in which a securitisation transaction could be effected. This discussion paper does not attempt to discuss securitisation in general. To the extent that any transaction involves other or different steps and is effected by other or different documents, the discussion below may not be relevant to such a transaction, to the extent such difference changes how Division 230 and/or the TOFA Act apply to it.

4. The significant assistance provided by members of the Securitisation Working Group of the NTLG Finance and Investment Sub-group TOFA Working Group is acknowledged with gratitude.

Purpose

5. The purpose of this paper is to facilitate consultation between the Australian Taxation Office (ATO) and the NTLG Finance and Investment Sub-group TOFA Working Group as part of the process of developing a potential ATO view on the application of the law. The ATO seeks feedback on the interpretative positions explored, and on whether the potential outcomes are thought to be appropriate.

The transaction

6. Attachment A sets out the basic structure of a securitisation transaction covered by the documentation. The key features of the transaction are:

- Pursuant to the Trusts Master Trust Deed, a trust (the SPE) is constituted by the Issuer Trustee and the Trust Manager by lodging with the Issuer Trustee a Notice of Creation of Trust and a sum of money to constitute the initial assets of the trust. The trust is regulated by a Trust Supplemental Deed. The Trust Manager receives a fee.
- The Originator bank offers to sell, in equity only, to the Issuer Trustee its entire right title and interest in, to and under (broadly):
  - residential mortgage loans
  - mortgages on such loans
  - related property insurance
  - monetary rights in relation to such loans[2]
  - relevant title documents

  which offer is capable of acceptance only by payment of the Purchase Price (the outstanding principal balance on the loans, including any unpaid capitalised interest).
- The Originator retains its obligations under the loans, mortgages etc.

[1] All legislative references in this discussion paper are to the ITAA 1997 unless otherwise indicated.

[2] In the transaction documents, 'Monetary Rights' is defined as: 'with respect to any Housing Loan, all moneys, present and future, actual or contingent, owing at any time in respect of or in connection with such Housing Loans, including all principal, interest, reimbursable costs and expenses and any other amounts incurred by or payable by the Seller ... irrespective of whether ... (a) such amounts become due and payable before or after the date of assignment for such Housing Loans; and (b) such amounts relate to advances made or other financial accommodation provided by the Seller to the Debtor before or after the date of assignment for such Housing Loans.'

- The Issuer Trustee issues securities to investors to raise funds. Payment of principal and interest on the securities is dependent on the cash flows arising from the underlying pool of assets. The Issuer Trustee receives a fee. The issue of Notes offshore involves a Note Trustee, which receives a fee; agents may also be appointed, and receive a fee.
- The Originator may invest in the lowest tranche of securities.
- The Issuer Trustee pays the Purchase Price to the Originator, thereby accepting the offer.
- The Issuer Trustee grants a charge over the Trustee's interest in the pool of mortgages to the Security Trustee. The Security Trustee receives a fee.
- The Issuer Trustee also enters into a Servicing Agreement with an appointed Servicer (it would be expected that this would be the Originator). Under the terms of the Agreement, the Servicer is responsible for servicing and administering the underlying mortgage pool and holding, as custodian on behalf of the Issuer Trustee, any mortgage title documents relating to those assets. The Servicer is also responsible for pursuing delinquent and defaulting accounts and collecting the payments associated with the mortgage pool and remitting them to the Issuer Trustee. The Servicer receives a fee.
- A Liquidity Facility is established to address any timing mismatches between the cash flows generated on the underlying mortgage pool and cash flows needed to be paid under the various classes of notes. In the event of a short-term liquidity shortfall, the Issuer Trustee can draw down on the Liquidity Facility. Interest is payable on drawn down funds; a fee is also payable on the unused available funds. (The Liquidity facility provider would commonly be the Originator.)
- The beneficial interest in the SPE is represented by one residual income unit, and 10 residual capital units, one of which is owned by a company owned by an unrelated charitable trust. This prevents the SPE from being tax consolidated with the Originator. The residual income unit and the other residual capital units are issued to the Originator. The residual income unit holder receives any excess funds after the noteholders and all fee recipients are paid.
- To the extent necessary to match cash flows from mortgages with cash flows on the notes, swaps are entered into, such as fixed/floating, basis, or cross currency swaps etc. Commonly, these swaps would be entered into with the Originator.[3]
- When the outstanding mortgage principal falls below 10% of the initial amount, the Issuer Trustee may offer to the Originator to extinguish its interest in the mortgages for their fair value. The Originator is under no obligation to accept this offer.

7. Terms of the Trust Sale Agreement include:

Offer

Once given, an Offer to Sell constitutes an offer by the Seller to assign to the Issuer Trustee in equity with effect from the relevant Acceptance Date the Seller's right, title and interest in and to:

(a) each Housing Loan comprising part of each Mortgage Loan identified in the Offer to Sell;

(b) each Mortgage and each Collateral Security in relation to each such Housing Loan;

(c) any Property Insurance in relation to the Land which is referable to each Housing Loan and Mortgage;

(d) each Other Secured Liability which is in existence from time to time in respect of each Mortgage and each Collateral Security specified in clause [];

[3] Industry advice is that sometimes cross currency swaps are entered into with a third party, not the Originator.

(e) the Monetary Rights from time to time in relation to each such Housing Loan; and

(f) any Mortgage Title Documents from time to time in relation to each such Housing Loan.

Acceptance of the Offer to Sell

The Issuer Trustee may only accept an Offer to Sell by paying the Purchase Price to the Seller, at the direction of the Trust Manager, in cleared funds by no later than 4.00 pm on the Acceptance Date.

Binding agreement

Acceptance of an Offer to Sell by the Issuer Trustee in accordance with this clause [] will constitute:

(a) a legal, valid and binding agreement between the Seller and the Issuer Trustee on the terms contained in this agreement and the relevant Offer to Sell; and

(b) without any further act or instrument by the parties, an immediate assignment in equity of the Seller's entire right, title and interest in each of the items referred to in clause[] with effect from the relevant Acceptance Date.

Transfer in equity only

Any sale, transfer or assignment to the Issuer Trustee of the items referred to in clause [] is equitable only. Unless and until the Issuer Trustee protects its title and interest in and to such items in accordance with this agreement, the Master Trust Deed and the relevant Master Supplemental Deed, the Issuer Trustee must not:

(a) take any steps to protect its title and interest in and to those items; or

(b) disclose any information in respect of any sale, transfer or assignment, or give any notice to, or communicate with, any Debtor or Security Provider,

except in accordance with this agreement. The Issuer Trustee must not lodge any Transfer in respect of a Mortgage with the land titles office of any State or Territory of Australia unless, and until, the Issuer Trustee declares that a Title Perfection Event has occurred. The Issuer Trustee may lodge a caveat if it has actual notice of the Seller taking action which will, or is likely to, adversely affect the Issuer Trustee's equitable ownership of the Housing Loan, the Mortgage and the Collateral Securities.

Sale not to amount to assumption of obligations

(a) any sale of Mortgage loans to the Issuer Trustee as contemplated by this agreement and an Offer to Sell does not constitute an assumption by the Issuer Trustee of any obligation or liability of the Seller or of any other person in relation to such Mortgage Loans or any other item referred to in clause []...

Future Receivables

Without limiting the effect of any assignment of the items referred to in clause [] occurring upon the Issuer Trustee accepting an Offer to Sell in accordance with this agreement, the Seller's right, title and interest in respect of any such items arising after the relevant Acceptance Date form part of the rights assigned to the Issuer Trustee and, immediately following the making of any additional financial accommodation under a Mortgage Loan, vest in the Issuer Trustee in accordance with the assignment of those items pursuant to this agreement.

Title Perfection Event

If a Title Perfection Event is subsisting, the Issuer Trustee may by notice in writing to the Seller declare that a Title Perfection Event has occurred.

Perfection of title

If, and only if, a declaration is made by the Issuer Trustee in accordance with clause [] in respect of the Trust, the Issuer Trustee, the Trust Manager and the Seller must as soon as practicable take all necessary steps to protect the Issuer Trustee's interest in, and title to, the Mortgage Loans forming part of the Assets of the Trust, including:

(a) the execution (where necessary, under a Power of Attorney) and lodgment of Transfers or caveats with the land titles office of the appropriate jurisdiction;

(b) *give notice to the relevant Debtors and Security Providers of the sale of the relevant Mortgage Loans;*

(c) *give notice of its interest in, and title to, the relevant Mortgage Loans to any other interested person; and*

(d) *require each relevant Debtor to make all payments in respect of the relevant Mortgage Loans to the Collections Account.*

Position at law and equity

8. In considering the effect of the subject transaction, it is convenient to notice that prior to the securitisation contract, under a mortgage loan contract,[4] the Originator had an existing legal interest – a chose in action.[5]

9. Section 12 of the *Conveyancing Act 1919 (NSW)*, as with corresponding provisions in other jurisdictions, provides that an assignment of a chose in action will be valid at law, subject to meeting the statutory criteria. Absent these provisions, the common law did not generally recognise the assignment of a legal chose in action.[6]

10. The section 12 statutory criteria are not met in the subject transaction, as notice is not given to the mortgagors. Therefore, the subject transaction does not result in a legal assignment of the Originator's interest in the mortgage loans.

11. Even though, absent the statutory provisions, common law did not recognise the assignment of a chose in action, equity did.[7]

12. One principle on which equity recognised an equitable assignment was that equity regards as done that which ought to be done.[8] On this basis, equity would recognise an assignment where there exists an immediate intention to legally assign a legal interest for value, but there has been some failure to comply with the statutory requirements.

13. Tolhurst comments that:

> However, the relevance of the maxim is not clear if it is proven that the intention was not merely an intention to assign, but an intention to assign in equity, there appears to be little point in applying the maxim when what ought to have been done is done.[9]

Where, as in the subject transaction, there is consideration for the assignment of a legal chose in action, he notes:

> However, where equity gives effect to the assignment of a legal chose in action, it is not simply attempting to give effect to the intention of the assignor; equitable doctrine is drawn to the transaction where it would be unconscionable for the assignor to deny the efficacy of the assignment.[10]

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[4] This discussion paper considers the assignment of the Originator's interest only in the mortgage loans. It is noted that other things are also assigned.

[5] Different considerations apply in relation to the assignment of an equitable interest, or of a legal interest which is not assignable at law.

[6] *Lampet's Case* (1612) 10 Co Rep 46b and 48a, 77 ER 994 at 997; *Picker v. London & County Banking Co Ltd* (1887) 18 QBD 515 (CA) at 519.

[7] *Master v. Miller* (1791) 4 TR 320 at 340; *Leveraged Equities Limited v. Goodridge [2011] FCAFC 3* at paragraphs 386 to 388.

[8] *Tailby v. Official Receiver* [1886 -90] All ER Rep 486 at paragraph 26 per Lord McNaghten and paragraph 28 per Lord Selborne.

[9] Tolhurst, G., *The Assignment of Contractual Rights* Hart Publishing, 2006, p.335.

[10] ibid p.337.

14. Once consideration has been paid to the assignor Originator, the legal chose in action is held on trust for the assignee SPE.[11] [12] [13]

15. This trust is probably best characterised as a constructive trust. It is not an express trust as there is no express declaration of trust. It is not an implied trust, as this is not a situation where a Court can infer from the commercial circumstances an intention to create a trust. Rather, the assignor Originator has clearly expressed the intention to assign in equity only its interest in the mortgage loans for consideration. The assignor Originator retains the legal interest. Impressed on that legal interest is the equitable interest the assignor Originator has created in the assignee SPE. The mortgage loans are property. The assignor Originator having the legal interest, the assignee SPE having the equitable estate and there being trust property, equity recognises a trust because, having received consideration for the assignment, it would be unconscionable for the assignor Originator not to hold the loans for the benefit of the assignee SPE.

16. There are similarities and differences with what would be the position under an express trust. In both cases there is a trustee, a beneficiary and trust property, which is no more than to say that both are species of trust. Under an express trust, the beneficiary only has rights against the trustee in relation to the subject property. Under an equitable assignment giving rise to a constructive trust, the assignee SPE has rights in relation to the subject property.[14]

17. This notion of rights being created in relation to the assigned property raises the longstanding tension in the case law as to whether an equitable assignment is a true assignment. One view is expressed by Roskill LJ in *Warner Bros Records Inc v. Rollgreen Ltd*:[15]

> ... the only rights that an equitable assignment can create in the equitable assignee are rights against his assignor ....

On the other hand, Peter Gibson LJ in *Three Rivers District Council v. Bank of England*[16] (*Three Rivers*) stated:

> These authorities, in my judgment, clearly establish that the equitable assignee can be regarded realistically as the person entitled to the assigned chose who is able to sue the debtor on that chose, but that save in special circumstances the court will require him to join the assignor as a procedural requirement so that the assignor might be bound and the debtor protected.

18. *Three Rivers* appears to state the law in the UK. There are perhaps two separate issues. The first is whether the assignee can sue in its own name with joinder of the assignor being merely procedural. The second is whether the assignor must join the assignee as a party to the action.

19. In Australia, there is authority that an assignee can sue in its own name.[17]

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[11] *Palette Shoes Pty Ltd v. Krohn* [1937] HCA 37; (1937) 58 CLR 1 per Dixon J; *GE Crane Sales Pty Ltd v. FCT* (1971) 26 CLR 177 per Menzies J at 183; Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies,* 4th Ed, paragraph 6-050; *FCT v. Everett* 78 ATC 4595 per Fisher J at 4616; *FCT v. Everett* per Barwick CJ, Stephen, Mason and Wilson JJ 80 ATC 4076 at 4079-4080; *ABB Australia Pty Ltd v. FC of T* 2007 ATC 4765 at 4777 (paragraph 60).

[12] It is unclear whether there would arise one trust in relation to all the mortgage loans or whether a separate trust arises in relation to each loan.

[13] There is a question as to what exactly is the trust property - the mortgage loans are clearly trust property - but whether the income generated by such loans is trust property is discussed at paragraphs 118 to 132 of this discussion paper.

[14] *Palette Shoes Pty Ltd (In Liq) v. Krohn* (1937) 58 CLR 1 at 27 per Dixon J: 'Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights or ownership for the assignee. But, although the matter rests primarily in contract, the prospective right in property which the assignee obtains 'is a higher right than the right to have specific performance of a contract,' and it may survive the assignor's bankruptcy because it attaches without more *eo instanti* when the property arises and gives the assignee an equitable interest therein.' See also, *Three Rivers District Council v. Bank of England* [1995] 4 All ER 312 (*Three Rivers)*.

[15] [1976] 1 QB 430 (CA) at 443-4.

[16] [1995] 4 All ER 312 at 331.

[17] *Zaknic Pty Limited v. Svelte Corporation Pty Limited, Harry Sialepis, Crypta Fuels Pty Limited and Robert Joseph Hagan Harry Sialepis (First Cross-Claimant) and Svelte Corporation Pty Limited (Second Cross-Claimant) v. Crypta Fuels Pty Limited (First Cross-Claimant) [1996] FCA 1704; Alma Hill Constructions Pty Ltd v. Onal* [2007] VSC 86.

20. There is also authority for the proposition that a requirement to join the assignor is a matter of procedure, not of substance.[18] However, it is not clear how, as a matter of principle, a common law remedy can be available to a person who does not hold the legal interest. *Meagher, Gummow and Lehane* comments:

> How a person not the legal owner can, the Judicature Act notwithstanding, prosecute what is, in effect, an action at common law for damages is not explained.[19]

Tolhurst comments:

> It is suggested that the insistence called for here that joinder be seen as a matter of substantive law when the assignee seeks a legal remedy is not inconsistent with those cases which have held that the commencement of an action by the assignee to enforce the legal right is not a nullity. Clearly the assignee can claim interim relief. However, and more fundamentally, the equitable assignee may rely on its equitable interest to commence an action to enforce the legal right. What the assignee cannot obtain is a legal remedy, and so the assignor must be joined prior to judgment and the making of such an order. The mere commencement of the action is not the enforcement. Moreover, the assignee cannot exercise a legal right.[20]

21. In relation to whether an assignor must join the assignee, in *APT Finance Pty Ltd v. Bajada*, the Western Australian Court of Appeal stated:

> Where … there has been an equitable assignment and the assignor subsequently sues the debtor, it appears to be unclear whether the assignor must join the assignee as a party to the action: see Three Rivers District Council v. Bank of England [1995] 4 All ER 312 at 331 (Peter Gibson LJ), but cf at 322 (Staughton LJ); *Jennings v. Credit Corporation Australia Pty Ltd* [2000] NSWSC 210 at [31]. In any event, even if the assignee is required to be joined, the failure to do so cannot, in our view, render the action a nullity, any more than the failure of an equitable assignee to join the assignor renders the action of the equitable assignee a nullity.[21]

22. Irrespective of whether the assignor must join the assignee in seeking to enforce its rights against the debtor in its own right, it seems well settled that it can sue as constructive trustee for the assignee.[22]

Question 1: Do you agree with this analysis?

Commercial context

23. In the following analysis, it is generally assumed that where, commonly, particular transactions are entered into with the Originator or a related entity, those transactions have been entered into with the Originator or a related entity in the subject transaction. It is generally assumed that the following transactions have been entered into with the Originator or a related entity:

- servicing agreement
- liquidity agreement
- swaps
- management agreement, and
- issue of lowest tranche of securities.

[18] Alma Hill Constructions Pty Ltd v. Onal [2007] VSC 86; *Thomas v. National Australia Bank Limited* [2000] 2 Qd R 448, [1999] QCA 525.
[19] *Equity: Doctrines and Remedies 4th Ed. 2002* Paragraph 6-520; see also Smith, Marcus *The Law of Assignment - The Creation and Transfer of Choses in Action* OUP 2007 at paragraph 6.27 ff and Tolhurst, Greg *The Assignment of Contractual Rights* Hart Publishing Oregon 2006 at paragraph 4.25.
[20] ibid at paragraph 4.25; see also the dissenting judgment of Staughton LJ in *Three Rivers.*
[21] [2008] WASCA 73 at [30] per Pullin JA.
[22] *Three Rivers* [1995] 4 All ER 312 at 326 per Peter Gibson LJ.

24. Further, it is assumed that all contracts are entered into at a price at which an arms length party would contract.[23]

25. Securitisation enables the originator to diversify its funding.[24] Also, as the general credit risk is passed to noteholders and regulatory capital only has to be held against specific exposures, more business can be done per amount of regulatory capital held.

26. There will be a spread between the interest payable on the mortgages and the interest payable on the notes. If the securitisation were not done, all of the spread between the interest payable on the mortgages and the cost of the capital used to fund them would belong to the Originator. If the mortgages are securitised, all of that spread, except for amounts that are paid to entities outside the Originator's economic group, would come back to the Originator, albeit at a changed time. An example of an amount that would not come back to Originator would be fees for the trustee of the SPE.

27. In the subject transaction, due to the capital unit held outside the Originator tax consolidated group, the SPE is not a member of the Originator's tax consolidated group.[25]

Accounting treatment

28. However, the ATO is advised that the SPE will form part of the Originator's accounting consolidated group. It does so on the basis of control.[26]

29. The ATO is aware of different approaches that taxpayers have taken to derecognition. The ATO is aware of securitisations similar to the subject transaction where the securitised loans have been derecognised.[27] However, the ATO has been advised that the current preponderant view is that the mortgage loans would not be derecognised. (The ATO is also aware of one securitisation where the taxpayer received advice that the equitable assignment under the securitisation had not effected a transfer of the contractual rights to receive the cash flows of the mortgage loans,[28] but the ATO does not understand the basis of this conclusion.)

30. The ATO has been advised that the basis of the predominant view that there has been no derecognition is that under the securitisation, there has not been a transfer of substantially all the risks and rewards of ownership, and the entity retains substantially all the risks and rewards of ownership.[29] It has been argued that the residual income unit is significant in reaching this conclusion.

31. It has also been argued that basis and interest rate swaps would be significant in reaching the conclusion not to derecognise the loans.

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[23] See Prudential Standard APS 120 paragraph 9.

[24] In theory, by the use of the special purpose entity, the Originator can get access to relatively low cost funds, because investors in notes issued by the special purpose entity (SPE) may be prepared to accept a rate of return that takes into account the limited assets and liabilities of the SPE, but this may not hold true in practice.

[25] The ATO is advised that this is due to a desire to minimise the risk of the tax sharing agreement not being effective. The ATO understands that some recent securitisations have not involved a capital unit issued outside the consolidated group and therefore have not involved deconsolidation.

[26] See AASB 127 paragraph 9, and definitions of control and subsidiary in paragraph 4, and especially UIG Interpretation 112 paragraphs 8 to 10.

[27] Post-AIFRS.

[28] AASB 139 Paragraph 18.

[29] See AASB 139 paragraph 20(b).

32. Paragraphs 21 and 22 of AASB 139 state that

> 21. The transfer of risks and rewards (see paragraph 20) is evaluated by comparing the entity's exposure, before and after the transfer, with the variability in the amounts and timing of the net cash flows of the transferred asset. An entity has retained substantially all the risks and rewards of ownership of a financial asset if its exposure to the variability in the present value of the future net cash flows from the financial asset does not change significantly as a result of the transfer (e.g. because the entity has sold a financial asset subject to an agreement to buy it back at a fixed price or the sales price plus a lender's return). An entity has transferred substantially all the risks and rewards of ownership of a financial asset if its exposure to such variability is no longer significant in relation to the total variability in the present value of the future net cash flows associated with the financial asset (e.g. because the entity has sold a financial asset subject only to an option to buy it back at its fair value at the time of repurchase or has transferred a fully proportionate share of the cash flows from a larger financial asset in an arrangement, such as a loan sub-participation, that meets the conditions in paragraph 19).
>
> 22. Often it will be obvious whether the entity has transferred or retained substantially all risks and rewards of ownership and there will be no need to perform any computations. In other cases, it will be necessary to compute and compare the entity's exposure to the variability in the present value of the future net cash flows before and after the transfer. The computation and comparison is made using as the discount rate an appropriate current market interest rate. All reasonably possible variability in net cash flows is considered, with greater weight being given to those outcomes that are more likely to occur.

33. Derecognition requires assessment of the entity's exposure, before and after the transfer, to variability in the amounts and timing of the net cash flows of the transferred asset. But the precise scope of which transactions ought to be considered in this assessment is not clear. Further, there do not seem to be express principles as to how such scope is determined. Reading paragraphs 21 and 22 in the light of the examples at AG 51 of AASB 139, it is tentatively suggested that whether payments on the swaps are contingent on payments being received under the mortgages is relevant to whether the cash flows under the swaps are relevant to assessing whether to derecognise the mortgage loans. Under the transaction documents, the swaps amounts are calculated with reference to the outstanding principal on the mortgage loans in each calculation period.[30] However, it does not appear to be the case that payments under the swap are contingent on whether payments are made by mortgagors under the mortgage loans. It is therefore not clear on what basis it would be appropriate to consider the swaps in assessing whether to derecognise the mortgage loans.

Question 2: Is it appropriate under AASB 139 to take into account the swaps in assessing whether to derecognise the mortgage loans? What is the technical accounting basis of this?

34. The operation of the 'cash flow waterfall'[31] through the special purpose vehicle is that the moneys paid by the mortgagors to the Originator, which are paid to the SPE, are paid by the SPE in a specified order. Residual payments to the residual income unit holder (the Originator) are only made if there is income left over after meeting the specified payments to trustees, noteholders etc.[32] Therefore, whether payments are made on the residual income unit is contingent on whether payments are made on the mortgage loans by the mortgagors. It would therefore appear to be appropriate to take into account the residual income unit in assessing whether to derecognise the mortgage loans. Whether, including in one's consideration the residual income unit, substantially all the risks and rewards of ownership of the financial asset have been transferred is a question to be determined on the facts of a particular transaction.

Question 3: Do you agree with this analysis?

[30] For example, 'Basis swap amount'.
[31] Clause 14 'Cashflow allocation methodology' Trust Supplemental Deed.
[32] Paragraph 14.9(h) Trust Supplemental Deed.

35. The ATO understands that the increase in cash from the SPE's purchase of an equitable interest in the mortgage loans would be (on a standalone basis) matched by a liability to the SPE, and interest from the loans would be matched by an obligation to the SPE. There would be the customary profit and loss impacts from the liquidity agreement, the swaps, the servicing agreement, etc. There would also be a profit and loss impact from a distribution on the residual unit. There would be the customary balance sheet impacts from the swaps, the liquidity agreements etc.

Prudential treatment

36. Pursuant to Prudential Standard APS 120, an ADI securitisation must comply with specified requirements:

- there must be appropriate disclosure of the nature and limitations of an ADI's involvement
- the ADI's obligations must be only those set out in legal documents
- an ADI must not knowingly allow the perception to arise that it will provide support beyond that contractually specified
- all ADI dealings with an SPV and its investors must be on arm's length terms, and
- regulatory capital must be held against credit risk as specified.

37. In summary, there must be sufficient separation between the ADI and the SPE, and there must be full disclosure regarding the limits of the ADI's role in the securitisation. The separation is important to ensure that investors do not inappropriately obtain preference over depositors so as to breach the *Banking Act 1959*.[33]

38. An originating ADI may, in calculating its regulatory capital for credit risk, exclude exposures for which it would otherwise be required to hold regulatory capital, if it satisfies specified criteria, including:

- the exposures are legally isolated from the ADI
- the ADI is not obliged to retain the credit risk of the exposures
- significant credit risk associated with exposures has been transferred to third parties, and
- securities issued by the SPE are not obligations of the ADI.

A comparison of prudential and accounting treatment

39. In very broad terms, prudential treatment would, focussing on the credit risk, be more in tune with the loans having been disposed of by the assignor Originator; accounting treatment may be more in tune with the loans being retained by the Originator. However, this high-level comparison hides more than it reveals: it is more helpful to see each of these treatments as operating within its own frame of reference for its own purposes, than to infer that there is a necessary conflict. Accounting is in its essence about the provision of appropriate information to those who need that information: other things being equal, more rather than less information would be the conservative approach. The prudential treatment is not blind to the possible exposure of the Originator to some degree of risk through, for example, the residual income unit.

[33] See Prudential Standard APS 120 paragraph 7; *Banking Act 1959* section 13A.

The structure of Division 230

40. The building blocks of Division 230 are 'financial arrangements', and 'gains' and 'losses'.

41. Except in relation to the hedging financial arrangements election[34], all TOFA gains and losses are brought to account under Subdivision 230-A as a gain or loss you make from a financial arrangement, having been calculated – or identified – under the other subdivisions.

42. Sections 230-45 and 230-50 provide when you have a financial arrangement:

- Section 230-45[35] is the general test, and focuses on the nature of rights and/or obligations under an 'arrangement' identified pursuant to subsection 230-55(4).
- Subsection 230-50(2) also tests whether the rights and obligations under that which subsection 230-55(4) identifies as an 'arrangement' meet the definition of a financial arrangement depending on whether particular criteria are met.
- Subsection 230-50(1), on the other hand, provides that an equity interest (as defined) constitutes the financial arrangement. That is, subsection 230-55(4) does not have work to do in relation to an equity interest.[36] That which Subdivision 974-C (for companies) and section 820-930 (for partnerships and trusts) identifies as an equity interest is relevantly the Division 230 unit of taxation where subsection 230-50(1) applies to identify a financial arrangement.

43. That is, subsection 230-55(4) determines the scope of that to which the section 230-45 and subsection 230-50(2) tests apply, providing criteria by which it is determined whether a number of rights and/or obligations are themselves an 'arrangement' or are 2 or more separate 'arrangements' for the purposes of Division 230.

44. The particular 'financial arrangement' identified by section 230-45 or subsection 230-50(2) will depend on the particular 'arrangement' identified by subsection 230-55(4).

45. The 'arrangement' is determined by applying subsection 230-55(4). The 'financial arrangement' tests in section 230-45 and subsection 230-50(2) apply to the rights and/or obligations under the 'arrangement'.

46. Therefore, in order to determine whether (and how) Division 230 applies in relation to the subject transaction, the following preliminary issues will be considered in turn:

- are there rights and/or obligations?

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[34] and also excepting amounts brought to account pursuant to subsections 230-495(2) and230-495(3).

[35] Pursuant to section 230-45, you have a financial arrangement if you have, under an arrangement, a cash settlable right to receive or obligation to provide a financial benefit, or a combination of such rights and/or obligations, unless, broadly, you have not insignificant other rights to receive or obligations to provide something which is not a financial benefit or the rights or obligations are not cash settlable. That is, there is a positive test (paragraphs 230-45(1)(a) to 230-45(1)(c)) – one or more cash settlable rights and/or obligations – and a negative test (paragraphs 230-45(1)(d) to 230-45(1)(f)) – that there is not one or more not insignificant rights and/or obligations which are either not a financial benefit or not cash settlable – and both the positive and negative tests must be satisfied for there to be a financial arrangement. Subsection 230-45(2) provides that a right to receive or obligation to provide a financial benefit is cash settlable, in what might be called a direct way - if the benefit is money or a money equivalent as defined, or, in what might called an indirect way – very broadly, if you have an intention or practice of dealing with the right or obligation or settling the right or obligation such that it behaves like a financial arrangement that is settled in money. This can mean that, very broadly, an arrangement with a clearly non-financial element is nevertheless cash settlable if the manner in which that element will be dealt with means the arrangement behaves like a financial arrangement. In summary, a financial arrangement must be cash settlable, either:

- directly, where the right is to receive, or obligation is to provide, money or a section 230-45 financial arrangement or
- indirectly, pursuant to the way you deal with the right or obligation (according to subsections 230-45(2) and 230-45(3)),

and there cannot be other non-cash settlable rights and/or obligations which are relevantly not insignificant. (If such not insignificant rights and/or obligations which are ordinarily non-cash settlable are, pursuant to subsection 230-45(2), dealt with in such a way that they are indirectly cash settlable, they will be cash settlable, and the arrangement will be a financial arrangement).

[36] cf: paragraphs 2.35, 2.43, 2.48 and 2.52 of the Explanatory Memorandum to the Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008 (EM), which might be understood to imply the contrary. On the other hand, paragraphs 2.28 and 2.40 might be understood to be consistent with the suggested outcome.

- is there an equity interest?
- what does subsection 230-55(4) identify as the arrangement?
- is there a section 230-45 financial arrangement?[37]

The Originator

Is each mortgage loan a financial arrangement prior to the securitisation?

47. Prior to the securitisation, the Originator has rights and obligations under the mortgage loans. Those rights include rights to repayment of principal, and rights to interest. There may be an obligation to provide a redraw amount. For the purposes of this paper, it is assumed that each mortgage loan is identified by subsection 230-55(4) as an arrangement. In the ordinary course, a mortgage loan will be a debt interest for the purposes of Division 974, so it will not be an equity interest.[38] Assuming that there are no not insignificant, non cash settlable rights, the mortgage loans will be financial arrangements pursuant to section 230-45, as under them the Originator has a cash settlable right to receive a financial benefit, and may have a cash settlable obligation to provide a financial benefit.

Rights and/or obligations

48. It has been argued by members of the Securitisation subcommittee that, subsequent to the securitisation, the Originator does not have a cash settlable legal or equitable right to receive financial benefits from the debtor, and, therefore, it no longer has a financial arrangement. The argument is, that upon the equitable assignment, the Originator no longer has a right, because, it is said, it is necessary for the Originator to obtain the assent of the assignee and join it as a plaintiff. If the existence of a right were commensurate with its ability to be enforced, the argument is put, the Originator will not have a right.

49. As stated, Division 230 relies on the core construct of rights and obligations, which are the fundamental building blocks of a financial arrangement. Subsection 230-45(1) provides:

> You have a financial arrangement if you have, under an *arrangement:
>
> (a) a *cash settlable legal or equitable right to receive a *financial benefit; or
>
> (b) a cash settlable legal or equitable obligation to provide a financial benefit; or
>
> (c) a combination of one or more such rights and/or one or more such obligations;
>
> ...
>
> The right, obligation or combination covered by paragraph (a), (b) or (c) constitutes the financial arrangement.

50. It is noted that paragraphs 230-45(2)(b) and 230-45(2)(d) refer to a right being 'satisf[ied] or settle[d]'.

51. Although other provisions refer to right and obligations, these provisions do not seem to shed light on the issue at hand.[39] [40] [41] Irrespective of whether something needs to be enforceable or transferable in order to be relevantly a right for section 230-45, it does need to be recognised as a right by the law. Where no right (or obligation) exists, section 230-45 will not apply.

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[37] At which point the question of cash settlability arises.

[38] Subsection 974-70(1)(b).

[39] Subsections 230-55(1) and 230-55(2) provide, for the avoidance of doubt (subsection 230-55(3)), that if you have a right to receive, or obligation to provide, 2 or more financial benefits, you are taken for the purposes of Division 230 to have a separate right to receive, or obligation to provide, each financial benefit. Therefore the fundamental particle on which subsections 230-45 and 230-55(4) operate - a right and/or obligation - is, in relation to rights to receive or obligations to provide financial benefits, at the level of a right to receive, or obligation to provide, each financial benefit.

[40] It is also noted that section 230-85 provides:

To avoid doubt:

52. Although the matter is not settled in Australia, the better view would seem to be, as the Western Australia Court of Appeal stated in *APT Finance Pty Ltd v. Bajada*,[42] that the failure to join an equitable assignee would not render an action by an equitable assignor a nullity.

53. Further, it does seem to be well settled - even on the majority view in *Three Rivers*[43] – that the assignor can sue in the capacity of a constructive trustee.

54. The word 'legal' in the term 'legal right' might mean only the entire undivided legal and equitable estate, rather than the 'mere' legal estate upon which the equitable estate has been impressed.[44] However, there is nothing in the legislative context to so confine it. If anything, the immediate contrast with 'equitable right' in paragraph 230-45(1)(a) and with 'equitable obligation' in paragraph 230-45(1)(b) would suggest that the ordinary meaning of the term would include a 'mere' legal right.

55. Therefore, subsequent to the securitisation, the Originator continues to have a right to receive a financial benefit from the mortgagor and may have an obligation to provide a financial benefit to the mortgagor.

Question 4: Do you agree with this analysis?

Subsection 230-55(4)

56. Subsection 230-55(4) determines whether a number of rights and/or obligations are themselves an arrangement or are 2 or more separate arrangements for the purposes of Division 230. This raises the question of whether the Originator has one or more arrangements in entering into the subject securitisation transaction.

The nature of the rights and obligations

57. Contracts giving rise to rights and/or obligations in the Originator include:

- Offer to Sell

(a) a right is treated as a right for the purposes of this Division even [if] it is subject to a contingency; and
(b) an obligation is treated as an obligation for the purposes of this Division even if it is subject to a contingency.

The EM relevantly states as follows:

> 2.65. A right to receive, or an obligation to provide, a financial benefit for the purposes of Division 230 will exist irrespective of whether the value or existence of the right or obligation to the financial benefit is contingent on some event or other thing. For example, a party that issues an option assumes an obligation to provide a financial benefit, notwithstanding that the value or existence of the obligation is contingent on the exercise of the option. [Schedule 1, item 1, section 230-85].

When the EM states that a 'right to receive ... a financial benefit for the purposes of Division 230 will exist irrespective of whether the ... existence of the right ... to the financial benefit is contingent on some event or other thing' it ought not to be understood to saying that where a right does not exist, Division 230 will recognise one. A right that is subject to a contingency must be a right. So, a pre-contractual agreement to agree - which agreement a Court would not enforce - would not give rise to a right or an obligation. On the other hand, it is clear that a right subject to a condition subsequent is a right. It is less clear whether a right subject to a condition precedent is relevantly a right. Where that contingency is as to performance, rather than to existence, it is suggested that there can be a right that Division 230 would recognise. Where no right exists unless a contingency is satisfied, it is suggested that there is no Division 230 right where the contingency is not satisfied. In the context in which the EM discusses a right existing where the existence of the right is contingent, the EM gives the example of an option. In such a case, it is not in doubt that a right would be created by an option contract. In short, section 230-85 does not appear to shed light on whether the Originator continues to have a cash-settlable right subsequent to the securitisation.

[41] It is noted for completeness that the term 'arrangement' is defined very broadly so as to include:

> any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.

Nevertheless, once an arrangement is in view, Division 230 asks whether there are rights or obligations under such arrangement. The possible unenforceability of that creature under which one looks for rights or obligations – the arrangement – is not relevant to determining whether such rights or obligations should be understood to be enforceable.

[42] [2008] WASCA 73.

[43] *Three Rivers District Council v. Bank of England* [1995] 4 All ER 312.

[44] *DKLR Holding Co (No 2) Pty Ltd v. Commissioner of Stamp Duties (NSW)* 82 ATC 4125; (1982) 12 ATR 874.

- Sale Agreement
- ISDA Schedule[45]
- Fixed Swap
- Basis Swap
- Supplemental Deed[46]
- Servicing Agreement[47]
- Liquidity Facility Agreement[48]
- Master Trust Deed,[49] and
- Class B note documentation (including trust documentation and including security documentation in relation to the class B noteholders).

58. The following sets out the key rights and obligations considered separately (in their contractual context):

- The Offer to Sell and the Sale Agreement together effect the equitable assignment of the Originator's interest in the Mortgage Loans to the Issuer Trustee.
- The swap documents effect a swap or swaps between the Issuer Trustee and the Originator.
- The Supplemental Deed provides, among other things, the terms and conditions regarding the establishment of the Trust, the entitlement of the beneficiaries including the Residual Income Unit Holder, the terms of the Notes and the cash-flow allocation or 'waterfall', the terms of the clean-up offer, and the fee which the Servicer is entitled as consideration for performing its functions and duties in respect of the Trust.
- The Liquidity Facility is a loan facility entered into by the Issuer Trustee, the Trust Manager and the Originator (in its capacity as Liquidity Facility Provider) to cover short-term Liquidity Shortfalls in relation to the Trust. The amount available under the facility is limited to (very broadly) the outstanding principal on the aggregate principal[50] outstanding on performing loans and non-performing loans subject to a valid mortgage insurance claim.
- The Servicing Agreement is the contract under which the Originator (acting as Servicer) is appointed to manage the business of the SPE and service[51] the portfolio of Trust Assets.
- Various documents effect rights and obligations in relation to the issue of class B notes.

59. In summary, the Originator:

- receives cash for the equitable assignment of the mortgages
- pays some cash for the class B notes
- has a right to, and an obligation to, service the mortgages, for which it will receive a fee
- is the counterparty to a swap or swaps

[45] Relevant to the Originator in its capacity as swap counterparty.
[46] Relevant to the Originator in its capacity as Residual Income Unit Holder, in relation to the Clean-Up offer and as Servicer.
[47] Relevant to the Originator in its capacity as Servicer.
[48] Relevant to the Originator in its capacity as Liquidity Facility provider.
[49] Relevant to the Originator in its capacity as Residual Unit Holder.
[50] Including capitalised interest.
[51] 'Service' here in the sense of 'provide administrative services in relation to', not in the sense of 'pay interest on'.

- is the counterparty to a liquidity facility
- would expect to be able to, but is not obliged to, buy back the mortgages once the outstanding principal falls below 10% of the original amount, and
- will receive any excess amounts, very broadly, after all payments to every other entity are up to date, and on termination of the arrangement.

60. It may be that a mortgage loan that is the subject of such equitable assignment contains an obligation on the part of the Originator to provide redraw amounts to the mortgagor. Such obligation is retained by the Originator.

61. The effect of these rights and obligations in combination is:

- the Originator has swapped its mortgage assets for some cash; and has acquired some other assets (facility, swap, notes, servicing agreement, etc);
- the Originator has certain specific credit risk and other risk, but no longer is exposed to general credit risk in relation to the mortgages; and
- the Originator ceases to be beneficially entitled to the income on the mortgages, has cash which it can deploy freely to earn a return, has various assets on which it might earn income (or may in some cases make a loss), and will receive any the residual spread between the mortgage rate and the return on the notes after other expenses are met and noteholders are paid.

62. What is effected is one commercial transaction achieving a coherent set of rights and obligations to achieve particular commercial ends. The transaction involves exchanging mortgage assets for cash, which mortgage assets are to then support the issue of notes paying lesser interest than received on the mortgages, with some of the excess paid out in fees, and the residue to be received by the Originator. Other contracts are entered into to facilitate the risks and cashflows being such as to make the notes acceptable to investors.

63. A number of connections between rights and obligations may be noticed:

- There is an equitable assignment of the mortgages, to create in the Issuer Trustee the equitable interest in them, and a clean-up mechanism, whereby when the outstanding principal falls below 10% of the original amount, the Issuer Trustee may (and would be expected to, but is under no obligation to) offer to the Originator to extinguish its interest in the mortgages.
- The rights and obligations under the swaps and liquidity facility come into being with the primary object of facilitating the risks and cashflows being such as to make the notes acceptable to investors.
- If there is a subscription for the lowest tranche of notes, its primary purpose is to facilitate the issue of the notes.
- The cash-flow waterfall and the issue of the residual income unit returns excess spread to the Originator. The effect of the residual income right may be regarded as representing deferred consideration to the Originator on the structuring of the transaction and assignment of the Mortgage Loans to the SPE[52].
- The agreement as to servicing the mortgages ought to be understood in the context of the commercial desirability of the Originator continuing to service the mortgages while ceasing to be exposed to the general credit risk in them. Commercially, the Originator would not assign the mortgages without agreement to service them.[53]

64. Considering this criterion together with the paragraph 230-55(4)(f) objects criterion, the question arises, on the assumption that it might otherwise be appropriate to aggregate all the

[52] Residential Mortgage-Backed Securitisation, Joint paper prepared by the Australian Securitisation Forum and the ABA Accounting Committee, October 2003; http://australiansecuritisation.com.au/docs/residential_mortgage_backed_sec.pdf.

[53] Redemption of the notes issued by the SPE is an event that will lead to termination of the servicing agreement.

particular elements in the wider arrangement, whether there might be reasons why particular elements ought not to be aggregated. If, for example, aggregating, say, swaps were to 'distort ... your trading, financing and investment decisions and your risk taking and risk management', that might be a reason not to aggregate the swaps.

65. Perhaps the same question might arise in relation to the non-financial[54] arrangement of the servicing agreement, even though it is commercially an essential component of the broader transaction.

Their terms and conditions (including those relating to any payment or other consideration for them)

66. It is assumed that all contracts are on arm's length terms and all consideration is arm's length.[55] (If, for example, one contract contained an underpricing of something and another contract contained an overpricing of something else, such that taken together both parties received a reasonable return overall, that might indicate that the two contracts should be seen as one financial arrangement.)

The circumstances surrounding their creation and their proposed exercise or performance (including what can reasonably be seen as the purposes of one or more of the entities involved)

67. All of the rights and obligations spring from the controlling mind of the Originator[56] and are structured as a single commercial transaction to achieve particular commercial ends. Accounting consolidation recognises the control of the Originator, in so far as SPE's role in the arrangement may be seen as a pre-determined 'autopilot', one to produce benefits for the Originator.

68. The clean-up offer is necessarily drafted in accordance with Prudential Standard APS 120 to impose no moral or legal obligation on the Originator to reacquire the remaining mortgages. It could not be said that it was unconditionally proposed to accept such a clean up offer. Nevertheless, it could be said that, if it were possible, it would be proposed to accept the clean-up offer.

Whether they can be dealt with separately or must be dealt with together

69. Pursuant to clause 10 of the Trust Sale Agreement, the Originator contracts, broadly, not to deal with its rights under any 'Transaction Document' without the consent of the Issuer Trustee. 'Transaction Document' is defined[57] to include every document that forms part of the entire arrangement including the servicing agreement, the swaps and the facility.

70. The separate rights and obligations are therefore subject to limitation as to separate dealing. This would tend to suggest aggregation.

71. It is understandable that the arrangement should be structured in such a way that the noteholders can be confident as to the source of underlying cash flows.

Normal commercial understandings and practices in relation to them (including whether they are regarded commercially as separate things or as a group or series that forms a whole)

72. In assessing the commercial substance of an arrangement, no one source of information is determinative. One source of information is accounting. Another source is regulatory requirements,

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[54] Under which there are significant non-cash settlable obligations on a standalone basis.
[55] See Prudential Standard APS 120 paragraph 9.
[56] Subject to what prospective noteholders (and for example, ratings agencies etc) will accept.
[57] Clause 1.3 Trust Sale Agreement incorporates clauses 1.2 to 1.5 of the Definitions Schedule, where 'Transaction Documents' is defined to have the meaning given to it in the Supplement Deed, in which Deed is defined 'Transaction Documents' and 'Support Facilities'

such as prudential requirements. The particular perspective of such information sources as these needs to be taken into account in assessing what they might contribute to the application of subsection 230-55(4). But, it can be appropriate, and will often be necessary in applying subsection 230-55(4), to go beyond these information sources to consider how something is, for example, marketed, distributed, and used; how an arrangement functions in the marketplace; what as a matter of commercial substance, is really going on.

73. The accounting treatment does not appear to say much about whether the separate rights and obligations are regarded commercially as separate things or as a group.

74. Accounting will treat the SPE as being accounting consolidated. It does so on the basis of control.[58] Accounting standards are concerned to ensure that users of accounting information of an entity are aware of each other entity controlled by the entity. The recognition and measurement of assets of the controlled entity is a separate issue which depends on separate criteria. Whether accounting standards derecognise a financial asset depends on specified criteria in relation to rights and obligation concerning cash flows, whether risks and rewards are transferred, and control.[59]

75. In relation to these tests, it may be observed that accounting standards, in using control as the test for accounting consolidation, reflect a preference for disclosing information in financial statements. Likewise, the tests for derecognition may also be seen to reflect a preference for such disclosure.

76. Considering closely the tests for control in Interpretation 112, the fact of accounting taking into account the setting up an entity on 'autopilot' so as to give benefits to the setting-up entity in how it presents information is not necessarily, of itself, especially significant in determining whether securitisation is commercially one or more arrangements. What this accounting consolidation treatment does reveal is that bank securitisation is set up by a bank in order to ensure that the bank benefits in an intended way. It does reinforce the obvious reality that such securitisation is carefully structured and, at a level of generalisation, operates as one structured transaction to produce a predetermined outcome.

77. Accounting treatment which continues to recognise the mortgages, despite their having been equitably assigned, means that the effect of all of the transactions taken as a whole is that, despite the equitable assignment, substantially all the risks and rewards of ownership of the mortgages has not been transferred. The equitable assignment, of itself, does transfer the risks and rewards of ownership, so non-derecognition is consistent with looking at the joint effect of all of the transactions together.

78. The prudential regulatory regime makes plain that the general credit risk of the equitably assigned mortgages has been removed from the originator, leaving whatever specific risk has been assumed. It also makes plain that the noteholders must not have legal or moral recourse to the assets of the originator.

79. The prudential regulatory recognition that a permitted securitisation successfully removes the general credit risk, and the requirement for banks to subsequently hold capital in relation to particular credit exposures arising from particular contracts would tend to, of itself, support not treating the securitisation as one arrangement.

80. Normal commercial understanding could be said to regard the rights and obligations created in the subject securitisation arrangement as forming one arrangement. It could also be said that the arrangement is devised, carried out and managed as one arrangement. At least some of the contracts would not be entered into without entering into other contracts. Of itself, these considerations might tend to support treating the securitisation as one arrangement.

81. However, it is necessary to go beyond merely considering the commercial substance of the combination of rights and/or obligations. The tailpiece to subsection 230-55(4) requires it. Although

[58] See AASB 127 paragraph 9, and definitions of control and subsidiary in paragraph 4, and especially UIG Interpretation 112 paragraphs 8 to10.

[59] AASB 139 paragraph 18 ff. If paragraph 20(c)(ii) applies, the entity's exposure to the changes in the value of the transferred asset is relevant.

it may be true that normal commercial understandings and practices are to regard the various contracts as giving rise to one arrangement, that does not prevent it being true that normal commercial understandings and practices are also to treat them as stand alone arrangements.

82. In the subject transaction, do the separate arrangements stand alone commercially?

83. The ATO understands industry advice to be that the swaps, the liquidity agreement and the subscription for the lowest tranche of securities would all be transactions that could stand alone commercially for the Originator.

84. On the other hand, the equitable assignment of the mortgages is unlikely to be something that would stand alone commercially without, for example, the residual income unit and the servicing agreement. Having said that, it is necessary to also consider whether paragraph (a) of the objects provision, section 230-10, is enlivened by treating the equitable assignment of the mortgages as a separate transaction. On our present understanding, treating the arrangements separately would not appear to distort recognition of income and expenses.

The objects of this Division

85. It would appear to minimise compliance costs to treat arrangements separately and doing so would not appear, on our present understanding, to distort appropriate recognition of gains and losses.[60]

Summary

86. It will be seen that there are some factors that tend to the conclusion that the entire transaction ought to be treated as one arrangement, and some factors that tend to the contrary conclusion.

87. Case study 4 in the TOFA EM[61] deals with a securitisation transaction and discusses whether the originator has one or more arrangements under the securitisation. On the facts of the transaction in that example, it concludes that:

> … at least a majority of the rights and obligations that arise from this type of structure could, in particular circumstances, be viewed in combination as constituting one arrangement.

88. It is suggested that this does not provide a clear indication of the legislative intention on the facts of the subject transaction.

89. Although the question is very finely balanced, on the premise that the individual agreements make sense as commercial arrangements in their own right, and that taxing the separate agreements aligns tax with economic income, it is considered appropriate to treat each contract as giving rise to a separate arrangement.

Question 5: Applying subsection 230-55(4) to the subject transaction, what is identified as the arrangement or arrangements?

Financial arrangement

Mortgage loans

90. Subsection 230-45(1) provides:

[60] It might be suggested that whether a securitisation transaction is treated as one or many financial arrangements is not important on the basis that section 230-235 would in any case apply to separate out any fair value bits of the broader arrangement. From the EM and from the language of the provision – note the repetition of the specific number 2 and the singular 'that asset or liability' in paragraph 230-235(1)(b) – it would appear that this provision was intended to deal with the accounting construct of an embedded derivative in, for example, a convertible note. Given its automatic operation, and its intent, there is reason to believe it ought not to be read to extend beyond its literal sphere of operation.

[61] Page 443 ff.

You have a financial arrangement if you have, under an *arrangement:

(a) a *cash settlable legal or equitable right to receive a *financial benefit; or

(b) a cash settlable legal or equitable obligation to provide a financial benefit; or

(c) a combination of one or more such rights and/or one or more such obligations;

unless:

(d) you also have under the arrangement one or more legal or equitable rights to receive something and/or one or more legal or equitable obligations to provide something; and

(e) for one or more of the rights and/or obligations covered by paragraph (d):

(i) the thing that you have the right to receive, or the obligation to provide, is not a financial benefit; or

(ii) the right or obligation is not cash settlable; and

(f) the one or more rights and/or obligations covered by paragraph (e) are not insignificant in comparison with the right, obligation or combination covered by paragraph (a), (b) or (c).

The right, obligation or combination covered by paragraph (a), (b) or (c) constitutes the financial arrangement.

91. As discussed in paragraphs 48 to 55 of this discussion paper under 'Rights and/or obligations', under the mortgage loans, the Originator has a legal right to receive interest and principal and may have an obligation to provide redraw amounts. These things which must be provided are financial benefits that are money, and therefore are cash settlable.[62]

92. On the assumption that there are not non-insignificant non-cash-settlable rights and/or obligations, the mortgage loans will continue to be a financial arrangement after the securitisation.

Does a financial arrangement arise from the equitable assignment of the mortgage loans?

93. In the securitisation, the Originator sells its entire right, title and interest in, to and under, broadly:

- residential mortgage loans
- mortgages on such loans
- related property insurance
- monetary rights in relation to such loans, and
- relevant title documents

by means of making an offer to sell which is accepted by payment of the Purchase Price (the outstanding principal balance on the loans, including any unpaid capitalised interest). The Issuer Trustee pays the Purchase Price money. The Originator pays interest and principal it receives under the mortgage loans to the Issuer Trustee in money. Upon the equitable assignment, the Originator has equitable obligations to provide to the Issuer Trustee financial benefits of the interest and principal it receives under the mortgage loans which arose in return for it receiving the Purchase Price.

94. On the assumption that there are not non-insignificant non-cash-settlable rights and/or obligations, these equitable obligations will satisfy the definition of being a financial arrangement. (However, to determine whether Division 230 applies to gains and losses from such a financial arrangement, it is necessary to consider the exception in subsection 230-460(3) for a right carried by an interest in a trust or an obligation that corresponds to such a right: see paragraphs 95 to 97 of this discussion paper.)

Subsection 230-460(3)

[62] Paragraph 230-45(2)(a).

95. Subsections 230-460(1), 230-460(3) and 230-460(4) provide as follows:[63]

> 230-460(1)
>
> This Division does not apply to your gains and losses from a *financial arrangement for any income year to the extent that your rights and/or obligations under the arrangement are the subject of an exception under any of the following subsections.
>
> ...
>
> *Interest in partnership or trust*
>
> 230-460(3)
>
> A right carried by an interest in a partnership or a trust, or an obligation that corresponds to such a right, is the subject of an exception if:
>
> (a) there is only one class of interest in the partnership or trust; or
>
> (b) the interest is an *equity interest in the partnership or trust; or
>
> (c) for a right or obligation relating to a trust - the trust is managed by a funds manager or custodian, or a responsible entity (as defined in the Corporations Act 2001) of a registered scheme (as so defined).
>
> 230-460(4)
>
> Subsection (3) does not apply if, assuming that the *financial arrangement were a *Division 230 financial arrangement, a *fair value election, or an *election to rely on financial reports, would apply to it.

96. Upon the equitable assignment, the Originator has an equitable obligation to provide the interest and principal under the mortgage loans to the Issuer Trustee. The constructive trust which arises because of the equitable assignment for consideration gives rise to a right in the Issuer Trustee to receive the interest and principal under the mortgage loans. The obligation of the Originator under the constructive trust is the correlative of the right of the Issuer Trustee. In the words of subsection 230-460(3), the Originator's obligation corresponds to the right of the Issuer Trustee which is carried by its right/s under the constructive trust[64]. Such rights are 'carried by an interest' in the constructive trust.

97. Therefore, gains and losses from the obligations owed by the Originator to the Issuer Trustee are not subject to Division 230.

Division 6 of Part III of the ITAA 1936

98. Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) deals with the taxation of beneficiaries and trustees and uses concepts of the (trust law) income of a trust estate and the (tax) net income of the trust estate. The question arises whether Division 6 would apply in relation to the constructive trust arising upon the equitable assignment to provide for assessability of either the Originator trustee or the beneficiary under the equitable assignment.[65] To answer this, it is necessary to consider whether there is net income of the trust estate, and whether Division 6 can apply to a trust that arises upon such an equitable assignment.

Can Division 6 of Part III of the ITAA 1936 apply to a trust that arises upon such an equitable assignment?

99. The term trustee is defined in subsection 6(1) of the ITAA 1936:

> In this Act, unless the contrary intention appears: ...
>
> trustee in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes:

[63] The EM is silent as to the policy basis of the exception - see paragraphs 2.149 - 2.152.

[64] If the constructive trust arising on the equitable assignment is recognised under Division 6 of the *Income Tax Assessment Act 1936*, it would presumably be within the purview of the term 'trust' in subsection 230-460(3).

[65] The beneficiary of the constructive trust is itself a trustee (Issuer Trustee): there is a chain of trusts.

(a) an executor or administrator, guardian, committee, receiver, or liquidator; and

(b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability.

100. In *Federal Commissioner of Taxation v. Bamford & Ors; Bamford & Anor v. Federal Commissioner of Taxation*, the High Court referred to this definition and commented:

> In considering this definition it is important to note that it is said in s 6(1) to apply 'unless the contrary intention appears'. Thus, it is not to be assumed that every person or entity which answers the statutory definition will be a trustee for the purposes of Div. 6 of Pt III. The opening words of the definition speak of a trustee in the ordinary sense of a person who holds property on trust while pars (a) and (b) include persons in whom trust property is not vested. For example, a liquidator, although identified in par (a), is not a trustee of a trust estate in any ordinary sense.[66]

101. The ordinary meaning of the definition would clearly include a trustee of the constructive trust arising on an equitable assignment. The Originator is a 'person ... constituted trustee by act of parties ... or by operation of law'. There is a trustee, a beneficiary, and trust property.

102. It is further suggested that nothing in the language and context of Division 6 indicates that it ought not to apply in the case of such a trustee and trust estate.

103. Does case law provide guidance on whether Division 6 can apply to a constructive trust arising from an equitable assignment?[67]

104. *Federal Commissioner of Taxation v. Everett*[68] (*Everett*) involved the assignment of a 6/13ths share of a partnership interest in a legal firm by a husband partner in the legal firm to his wife, for value. The partnership interest was a legal chose in action. Because only a partial share was assigned, the assignment took effect in equity, rather than at law. At issue was who was assessable on partnership profits subsequent to the assignment. The High Court held that the profits attributable to the assigned partnership interest were assessable to the assignee wife. The Court does not expressly say that the assignee wife is assessable pursuant to section 97 of the ITAA 1936, but the Court's reasoning leads to the conclusion that she was assessable as a presently entitled beneficiary under the constructive trust.[69]

105. The High Court does not discuss whether such a trust is a bare trust. Note, however, the High Court's discussion of the continuing nature of the trust:[70]

> Does this trust relationship come to an end when the contract of sale is completed and a formal equitable assignment is executed? The question must, we think, be answered in the negative, though the nature of the trust changes once the vendor receives payment under the contract. Our reason for saying that a trust continues is that the assignment does not constitute the assignee a partner or pass to him the powers of management, administration and inspection of books and accounts which repose in the assignor as a partner. What is more, legal title to the assets of the partnership continues to vest in the partners to the exclusion of the assignee and he has no access to the assets. The extent of the assignee's equitable interest is ascertainable only on dissolution. These considerations lead us to the conclusion that the assigning partner continues to stand in the relationship of a trustee to the assignee, notwithstanding that the assignee may be entitled to receive payments from partnership profits direct from the partnership.

106. However, in the Full Federal Court, there is some (obiter) speculation by Bowen CJ:[71]

The correct approach in such a case appears to be to treat the trustee as the partner for income tax purposes and to look to other provisions of the Assessment Act such as those in Div. 6 of Pt. III to determine whether the trustee or the beneficiary is to be taxed upon the income (see *Tindal* v. *F.C. of T.* (1946) 72 C.L.R. 608). The position may be different in the case of a bare trustee. Should Mr. Everett be treated simply as a bare trustee for Mrs. Everett's 6/13 share of profits as at the end of the year? In my opinion, although

[66] [2010] HCA 10 at paragraph 28.
[67] It was suggested by a member of the Securitisation Working Group that such a constructive trust was a bare trust that would not be subject to Division 6.
[68] (1980) 143 CLR 440.
[69] *Everett* (1980) 143 CLR 440; 80 ATC 4076 per Barwick CJ, Stephen, Mason and Wilson JJ.
[70] Everett (1980) At 143 CLR 448.
[71] *Federal Commissioner of Taxation v Everett* 78 ATC 4595 at 4598.

the beneficial interest in net income or profits vested in Mrs. Everett as the year ended, Mr. Everett still had rights and duties as a trustee which had to be exercised and performed at least until the partnership accounts were finalized.

107. Note, though, Fisher J to the contrary in the same matter:

> It seems to me that Div. 6 of Pt. III applies as a specific direction in the present circumstances where I see the taxpayer as a bare trustee of portion of his share in the partnership. This portion of his share is the trust estate which produces the income. Thus the taxpayer as a bare trustee is obliged to account to the assignee for the full amount of the share of profits whether distributable or not which the partnership share produces and without any deduction therefrom by him in his capacity as trustee and is not liable himself to pay tax thereon unless specifically directed (sec. 98). This situation is analogous to that of the shareholder trustee who is exempted by sec. 96 from his prima facie obligation under sec. 44, to the extent that the shares (and not merely the dividends) are assets of the trust estate (*Norman v. F.C. of T. (supra)*, per *Dixon* C.J. at p. 16 and *Menzies* J. at p. 23).[72]

108. Perhaps another source of support for the proposition that Division 6 cannot apply to a constructive trust arising from an equitable assignment might be found in the decision of Stone J in *Colonial First State Investments Ltd v. FC of T*[73] (*Colonial*). In that matter, the Commissioner had issued a private ruling concluding that the applicant was not (relevantly for Division 6) a beneficiary of a Wholesale Fund on the premise that the units in the Wholesale Fund were vested in a third party (Citicorp) in its capacity as custodian of the Retail Fund and were held on a sub-trust for the applicant. Stone J stated:

> 19. The Commissioner's conclusion that the applicant is not a beneficiary of the Wholesale Fund because of the interposition of the custodian ignores equity's concern with substance rather than form: see *Corin* v. *Patton* (1990) 169 CLR 540 at 579 per Deane J. It is undoubtedly the case that the structure of the Retail Trust requires payment of the Redemption Amount to be made to Citicorp, in its capacity as custodian of the Retail Fund. In that sense it is correct to say that Citicorp has 'title' to the unit however the concept of title is of limited relevance in determining who is a beneficiary. Because of the legal arrangements pursuant to which the applicant, as trustee of the Retail Fund, has appointed Citicorp as the custodian, Citicorp is the conduit through which the payment must flow to the applicant but it is the applicant not Citicorp to whom the Redemption Amount must be paid.
>
> 20. As a unitholder in the Wholesale Fund, the applicant 'is entitled to enforce the trustee's obligation to administer the trust according to its terms': *Kafataris* v. *Deputy Commissioner of Taxation* (2008) 172 FCR 242 at [42] per Lindgren J. As such the applicant is a beneficiary of the Wholesale Fund and the relevant beneficiary for the purposes of s 97. As Lindgren J added at [43]:
>
>> The word 'beneficiary' reaches beyond a person who has a beneficial interest in the trust property. It is possible for the legal estate in land to be vested in 'trustees' without equitable ownership being vested in someone else. The trustees must, however, owe fiduciary obligations in respect of the trust property to persons who, although they may have no interest in the trust property and may never have an interest in the trust property, are called 'beneficiaries'.

109. The ATO's Decision Impact Statement for *Colonial* notes that:

> in situations with facts materially the same as those in *Colonial*, a retail fund is a beneficiary of a wholesale fund in respect of units in the wholesale fund that a custodian holds as trustee of a sub-trust for the retail fund. ... However, the fact that a custodian may not be a beneficiary of a wholesale fund in these circumstances does not have the effect of removing the custodian sub-trust or its net income or tax losses (if any), calculated apart from the relevant units, from the operation of Division 6 of Part III.[74]

110. This decision (made in relation to a different factual matrix from the subject transaction) does not support the proposition that Division 6 cannot apply to a constructive trust arising from an equitable assignment.

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[72] *Federal Commissioner of Taxation v Everett* 78 ATC 4595 at 4619.

[73] 2011 ATC 20-235. In a different context, the High Court held the Trustees of a statutory wheat pool to be mere mandatories, and not subject to Division 6 (*DFC of T v. Trustees of the Wheat Pool of Western Australia* [1932] HCA 15 but cf: *Re C of T v. Ronald Winston Harmer* [1990] FCA 258).

[74] The Decision Impact Statement also cites *Harmer v. FCT* (1991) 173 CLR 264 and *Di Lorenzo Ceramics Pty Ltd & Anor v. FC of T* 2007 ATC 4662 in considering the application of Division 6 to so-called 'bare trusts'

111. It is clear from *Everett* that on the facts of that case, Division 6 would have application. Turning to the facts of the subject transaction, subsequent to the assignment, the legal title in the mortgage loans remains with the assignor Originator. The Originator may continue to have financial obligations to the mortgagors (to provide redraw amounts) and continues to have administrative obligations to the mortgagors. The Originator, under the servicing agreement, has a number of obligations in relation to servicing the loans. There is a contractual bar on the assignee taking steps to protect its title or disclosing any information in respect of any sale, transfer or assignment, or giving any notice to, or communicating with, any Debtor or Security Provider unless there is a Title Perfection Event.

112. In *Stewart Dawson Holdings Pty Ltd v. Commissioner of Taxation of the Commonwealth*,[75] it was held that Division 6 applied in relation to an implied trust that the High Court found to have existed as an inference from 'the circumstances surrounding the acquisition of ... shares'.[76]

113. In *Zobory v. Federal Commissioner of Taxation*[77], the Federal Court held that Division 6 applied to a constructive trust arising upon an employee stealing funds from his employer, investing those funds at interest in accounts under his control or in his own name. The question at issue was whether interest income was income of a trust estate or income of the taxpayer personally. Burchett J pointed to the rule that 'the general provisions of the *Income Tax Assessment Act 1936* are directed to income to which a taxpayer is beneficially entitled', and quoted a number of cases in support. His Honour then noted that in *MacFarlane v. Federal Commissioner of Taxation*[78], 'Beaumont J. ... made it clear (at ATC 4486; FCR 367) that a constructive trust, as well as an express trust or resulting trust, would be fully effective to divert the liability to income tax to the beneficiary.'[79] Accordingly, Burchett J held that the taxpayer was the trustee of a constructive trust and the interest income he had earned was not assessable to him as trustee. It is difficult to see how Division 6 could apply to the constructive trust that arose from the embezzlement of funds by a thief and not apply to the constructive trust that arises upon the equitable assignment of a legal chose in action for value.

114. A contrary argument may be put. In *Shepherd v. The Commissioner of Taxation*[80] (*Shepherd*), Division 6 is not discussed. The Court found that the assignee was assessable. If the assignee were assessable on the equitable assignment in the subject transaction, it would follow that there would be no net income to which Division 6 might apply:[81] the assignee would already have derived the income.

115. A difficulty with this argument is that it relies on the 1965 High Court case of *Shepherd*, where Division 6 is not discussed. In the later Full High Court case of *Everett*, Division 6 was put before the Court, and the Court seems to have found that Division 6 applied. Although one might think that assessability of the assignee might be appealing to a Court as being more commercially straightforward, the later case would appear to be the stronger authority.

116. It may be argued that assignment of a partnership interest is different from assignment of a mortgage loan. It may also be argued that the Originator's role in relation to a mortgage loan subsequent to the equitable assignment is distinguishable from the solicitor's continuing role in the legal partnership. In relation to the first of these arguments, it is not clear on what basis a difference exists. In relation to the second argument, though acknowledging the difficulties in arguing by analogy, the continuing role of the Originator bank in relation to a mortgagor seems closer to that of legal practitioner and client, than to a mere custodian. Obligations are not transferred to the assignee, so any redraw obligation remains with the Originator. There are numerous other terms in the mortgage loan contract which are not obligations of the Originator, but

[75] (1965) 39 ALJR 300
[76] ibid at 301 per Kitto J
[77] (1995) 129 ALR 484; (1995) 30 ATR 412; (1995) 95 ATC 4251
[78] 86 ATC 4477; (1986) 13 FCR 356
[79] He also cited Deane J in *Muschinski v. Dodds* 1985) 160 CLR 583 at 614 for the proposition that equity will recognise the existence of a constructive trust without the need for a 'curial declaration or order'.
[80] (1965) 113 CLR 385.
[81] *Leighton v. Commissioner of Taxation* [2011] FCAFC 96 at paragraph 20. *Leighton* deals with an agency, which is a different factual situation from an equitable assignment, but the proposition that if someone had already derived the income, it would not be net income of the trust estate is not confined to an agency situation.

which contemplate the mortgagor asking the Originator to exercise a discretion in its favour. The Originator is the contracted agent of the assignee under the servicing agreement, but it is also in a continuing commercial relationship with the mortgagor in its own right.

117. The matter is not free from doubt, but the better view is that Division 6 can apply to such a constructive trust arising from an equitable assignment.

Question 6: Do you agree with this view?

Is there net income of the trust estate?

118. If the trust estate were the mortgage loans, the interest which flowed therefrom would be income of the trust estate, and the assignee Issuer Trustee would be assessable on such income as presently entitled beneficiary pursuant to section 97 of the ITAA 1936. This raises the question of what is the trust estate and is there income of that trust estate.

119. It is clearly established that if the trust estate extends to include (not only the loans but also) the interest flowing from the loans, such interest would not be income of the trust estate because it would be itself part of the trust estate.[82] The majority of the High Court in *Everett* discusses this issue in dismissing an argument that the future partnership profits became subject to the trust and therefore corpus of it at the moment they came into existence. Although dismissing the argument on the facts in *Everett*, the Court supported the principle that if an amount is part of the trust estate it cannot be income of the trust estate:

> The argument is based very largely on the proposition, founded on the judgment of Kitto J. in *Stewart Dawson Holdings Pty. Ltd.* v. *Federal Commissioner of Taxation* (61), that income derived by a trustee from his own property or by means of his personal exertion, 'income with respect to which a trust arises at the moment of derivation', does not answer the statutory description. Kitto J. was making the point that when a person establishes a trust of his future income simpliciter, the income when it is derived is the subject matter or corpus of the trust, not the fruit of it. To use the terminology of s. 95, it is because the income is the 'trust estate' that it cannot be 'the net income of' that trust estate.[83]

120. What is assigned is:

> the Seller's right, title and interest in and to:
>
> (a) each Housing Loan comprising part of each Mortgage Loan identified in the Offer to Sell;
>
> (b) each Mortgage and each Collateral Security in relation to each such Housing Loan;
>
> (c) any Property Insurance in relation to the Land which is referable to each Housing Loan and Mortgage;
>
> (d) each Other Secured Liability which is in existence from time to time in respect of each Mortgage and each Collateral Security specified in clause 0;
>
> (e) the Monetary Rights from time to time in relation to each such Housing Loan; and
>
> (f) any Mortgage Title Documents from time to time in relation to each such Housing Loan.

121. In the transaction documents, the term 'Housing Loan' is defined to mean:

> in respect of an Initial Sale Agreement, each housing loan sold ...

122. The term 'Mortgage Loans' is defined to mean:

> the entire right, title and interest of the Seller in, to and under the Housing Loans, Mortgages and Collateral Securities including, without limitation:

[82] *Liedig v. FC of T* 94 ATC 4269 at 4277; *Stewart Dawson Holdings Pty Ltd v. FC of T* (1965) 39 ALJR 300 at 301; *Leighton (as Trustee of the Leighton Family Trust) v. FC of T* 2010 ATC 20-215 at paragraph 34; *Leighton v. C of T* [2011] FCAFC 96 paragraphs 10 and 20; *FC of T v. Walsh (P.J. and B.J.)* 83 ATC 4415 per Lockhart J at 4427-4428 and per Fitzgerald J at 4437.

[83] (1980) 143 CLR 440 at 452.

(a) all moneys, present and future, actual or contingent, owing at any time in respect of or in connection with such Housing Loan (including, without limitation, the Monetary Rights in respect of, or in connection with, such Housing Loans) under or in connection with the relevant Mortgage Title Documents;

(b) the right to payment of all principal, interest and other moneys due, owing or payable by any Debtor;

(c) the benefit of any warranties, undertakings or other obligations of any Debtor;

(d) the right to take any action permitted by the terms of the Housing Loans, Mortgages and Collateral Securities.

123. The term 'Monetary Rights' is defined to mean:

> with respect to any Housing Loan, all moneys, present and future, actual or contingent, owing at any time in respect of or in connection with such Housing Loans, including all principal, interest, reimbursable costs and expenses and any other amounts incurred by or payable by the Seller ... irrespective of whether ... (a) such amounts become due and payable before or after the date of assignment for such Housing Loans; and (b) such amounts relate to advances made or other financial accommodation provided by the Seller to the Debtor before or after the date of assignment for such Housing Loans.

124. In *Everett*, the majority in the High Court held that the assignment of the share of the partnership interest automatically carried with it the right to future profits:

> None the less a share in a partnership carries with it the right to receive the proportion of the partnership profits to which the· partner is entitled by virtue of the partnership agreement. Consequently, when the share is assigned, it carries with it the right to receive the assigning partner's proportion of those profits. In the same fashion, when a portion of a share is assigned, the portion carries with it the right to receive the proportion of profits attributable to that portion. ...
>
> The fundamental consideration, as we see it, is that the partner's fractional interest is an entire chose in action; it is capable of division by assignment into further fractions, but it is not capable of division by assignment so that the right to participate in partnership profits which is inherent in the interest is hived off from the rest of that interest. Consequently, a partner's entitlement to participate in profits is not separate and severable from the interest of the partner.[84]

125. In *Shepherd*[85], the High Court considered a voluntary equitable assignment under seal of all the assignor's right, title and interest in and to an amount of ninety per cent of certain royalties over the following 3 years. Kitto J stated:

> The tree, though not the fruit, existed at the date of the assignment as a proprietary right of the appellant of which he was competent to dispose; and he assigned ninety per centum of the tree.

126. In the Full Federal Court decision in *Federal Commissioner of Taxation v. Everett*, Deane J explains *Shepherd* as follows:

> *Barwick* C.J., and *Kitto* J., also held that, in the circumstances, the contractual right to receive royalties was an existing right susceptible of partial immediate voluntary assignment in equity. The future royalties, being future property or an expectancy, were not in themselves susceptible of such independent voluntary assignment. When such royalties became in fact payable however, they flowed from, or represented ``the fruit'' of ``the tree'' which had been effectively assigned (per *Kitto* J., *ibid*., at p. 396).[86]

127. If, under an assignment, all of a person's right title and interest in a loan is assigned to an assignee, it would follow that the interest which flows from the loan would belong to the assignee. It would not be necessary to specifically deal with the interest 'fruit'. As in *Everett* and *Shepherd*, if the 'tree' had been assigned, the destination of the 'fruit' would automatically follow the destination of the tree.

128. In commenting on the decision of *Norman v. FC of T*[87], in *Shepherd*, Barwick CJ stated:

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[84] (1980) 143 CLR 440 at 449-450.
[85] (1965) 113 CLR 385.
[86] 78 ATC 4595 at 4607. Deane J dissented in that decision, but this statement does not go to that dissent.
[87] (1963) 109 CLR 9.

> Reference was made on behalf of the Commissioner in this connexion to *Norman v. Federal Commissioner of Taxation* (1963) 109 CLR 9 . But that case did not decide anything to the contrary of what I have just said. So far as the case dealt with the attempted assignment of the promise to pay interest, it must, in my respectful opinion, depend upon the view that the promise to pay interest in that case inhered in the existence of a principal sum upon which the interest was to be calculated and payable. Consequently, there was there no promise to pay interest, if no principal remained due.[88]

129. Therefore, on one view, the purported assignment of '

> all moneys .. future ... including all ... interest... irrespective of whether ... such amounts become due and payable before or after the date of assignment for such Housing Loans'

achieved nothing, given the assignment of the loans.

130. If that were so, it would follow that the assignee would be assessable on such interest pursuant to section 97 of the ITAA 1936.

131. It is possible that there may be a different outcome in relation to interest which flows from further advances of loan principal after the date of assignment.

132. On the other hand, the drafting is almost luxurious in seeming to want to effect the assignment of future interest flows. If such assignment were to be held effective to *separately* assign such flows, such flows would be subject to the constructive trust as corpus of the trust estate.

Question 7: Is the better view that the purported separate assignment of the interest amounts is ineffective, given the assignment of the loans?

Assuming the interest flows are part of the trust estate, who is assessable thereon?

133. If the interest flows were the trust estate, they would not be income of the trust estate. This raises the question of, on this hypothesis, who would be assessable on such interest.

134. The central provisions of Division 6 would not appear to be enlivened if the interest flows were the trust estate. Sections 97 of the ITAA 1936 (in respect of the assessability of beneficiaries) and section 98 of the ITAA 1936 (in respect of the assessability of trustees) depend on there being net income of the trust estate.

135. It is assumed that section 99B of the ITAA 1936 would have no application on these facts.[89] [90]

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[88] (1965) 113 CLR 385 at 393.

[89] Section 99B: Receipt of trust income not previously subject to tax

Proposed section 99B will require the inclusion in a beneficiary's assessable income of amounts paid to or applied during a year of income for the benefit of a resident beneficiary where that amount represents trust income of a class which is taxable in Australia but which has not previously been subject to Australian tax in the hands of either the beneficiary or the trustee. It will normally apply where accumulated foreign-source income of a non-resident trust estate (or of a resident trust estate that previously was not able to be taxed in Australia in the light of the Union Fidelity decision) is distributed to a resident beneficiary.

Sub-section (1) of proposed section 99B, which is subject to the important qualifications expressed in sub-section (2), sets out the basic general rule that where during a year of income a beneficiary who was a resident at any time during the year is paid a distribution from a trust estate or has an amount of trust property applied for his benefit, that amount is to be included in the assessable income of the beneficiary.

Proposed sub-section (2) modifies this general rule and will have the effect that the amount to be included in assessable income under sub-section (1) is not to include anything that represents either -

- corpus of the trust estate, but an amount will not be taken to represent corpus to the extent that it is attributable to income derived by the trust estate which would have been subject to tax had it been derived by a resident taxpayer (paragraph (a)).

[90] Note *Traknew Holdings Pty Ltd v. FC of T* 91 ATC 4272 per Hill J at 4284 where His Honour speculated (obiter) as to the possible need to read down section 99B of the ITAA 1936.

136. The question then arises as to whether the trustee Originator, or the beneficiary would be assessable on the amounts referable to the interest paid by the mortgagors. There is authority for the proposition that for an amount to have an income character, it must represent a gain, and there is no gain unless something is derived by the taxpayer beneficially.[91] If this proposition correctly states the law applicable to these facts, the assignor Originator will not be assessable on its receipt of interest flows.

137. Instead, the 'Issuer Trustee' would be assessable. In *Everett* (supra) an equitable assignment of a part share in a partnership interest was held to be effective to make the assignee assessable. In *Shepherd* (supra) an equitable assignment of a voluntary equitable assignment under seal of all the assignor's right, title and interest in and to an amount of ninety per cent of certain royalties over the following three years was held to be effective to make the assignee assessable. Here, there is an equitable assignment of the mortgage loan tree, and on the hypothesis being explored, also the interest flowing from such tree. In the assignee's hands, it is receiving a regular flow of income from the mortgage loans which have been assigned to it. On the reasoning in *Everett* and *Shepherd*, the assignee 'Issuer Trustee' would be assessable on such interest.[92]

Question 8: Do you agree with this analysis?

Subsection 960-100(3)

138. Subsection 960-100 relevantly provides as follows:

> 960-100(1) Entity means any of the following: ...
>
> (f) a trust;
>
> 960-100(2) The trustee of a trust, of a *superannuation fund or of an *approved deposit fund is taken to be an entity consisting of the person who is the trustee, or the persons who are the trustees, at any given time.
>
> Note 1: This is because a right or obligation cannot be conferred or imposed on an entity that is not a legal person.
>
> Note 2: The entity that is the trustee of a trust or fund does not change merely because of a change in the person who is the trustee of the trust or fund, or persons who are the trustees of the trust or fund.
>
> 960-100(3) A legal person can have a number of different capacities in which the person does things. In each of those capacities, the person is taken to be a different entity.
>
> Example: In addition to his or her personal capacity, an individual may be:
>
> - sole trustee of one or more trusts; and
> - one of a number of trustees of a further trust.
>
> In his or her personal capacity, he or she is one entity. As trustee of each trust, he or she is a different entity. The trustees of the further trust are a different entity again, of which the individual is a member.

[91] Parsons, R.W., *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* The Law Book Company Ltd 1985, Income under the Assessment Act adopting ordinary usage, proposition 5, paragraph 2.41; *Countess of Bective v. FC of T* (1932) 47 CLR 417 at 423; *MacFarlane v. FC of T* 86 ATC 4477 at 4487; *Vegners v. FC of T* 91 ATC 4213 at 4215; *Liedig v. FC of T* 94 ATC 4269 at 4276; *Zobory v. FC of T* 95 ATC 4251 at 4253. (Contrast the derivation pursuant to section 44 of the registered shareholder who has equitably assigned the right to dividends: *Norman v. FC of T* (1963) 109 CLR 9; *ABB Australia Pty Ltd v. FC of T* 2007 ATC 4765; cf: *Bluebottle UK Ltd & Ors v. DFC of T & Anor* 2007 ATC 5302). The Full Federal Court in *Leighton v. Commissioner of Taxation* [2011] FCAFC 96 found that the taxpayer was an agent rather than a trustee, and therefore the amounts at issue in that case were derived by the non-resident companies as principals.

[92] Depending on the application of Division 6 to the express trust of which it is the Trustee.

139. Consider an example:

Eleanor Pty Ltd makes an express declaration of trust in favour of Rosemary Pty Ltd in relation to a mortgage loan.

Applying subsection 960-100(3) on these facts, Eleanor Pty Ltd as itself has ceased to have the mortgage loan, Eleanor Pty Ltd as trustee has begun to have the legal interest in the mortgage loan, and Rosemary Pty Ltd has begun to have the beneficial interest in the mortgage loan.[93]

140. The question that arises is whether the same analysis applies in relation to the constructive trust arising on an equitable assignment, and how section 960-100 ought to be construed to operate with section 230-435. This is considered below.

Balancing adjustment: section 230-435 of the ITAA 1997; section 26BB of the ITAA 1936

141. Section 230-435 provides as follows:

SECTION 230-435 When balancing adjustment made

When balancing adjustment made

230-435(1) A balancing adjustment is made under this Subdivision if:

(a) you transfer to another entity all of your rights and/or obligations under a *financial arrangement; or

(b) all of your rights and/or obligations under a financial arrangement otherwise cease; or

(c) you transfer to another entity:

(i) a proportionate share of all of your rights and/or obligations under a financial arrangement; or

(ii) a right or obligation that you have under a financial arrangement to a specifically identified *financial benefit; or

(iii) a proportionate share of a right or obligation that you have under a financial arrangement to a specifically identified financial benefit; or

(d) an *arrangement that is a *Division 230 financial arrangement ceases to be a financial arrangement.

230-435(2) Paragraphs (1)(a), (b) and (c) do not apply to a right or obligation under a *financial arrangement unless that right or obligation is one of the rights or obligations that constitute the financial arrangement.

Note: See subsections 230-45(1) and 230-50(1) and (2) for the rights and/or obligations that constitute a financial arrangement.

Modifications for arrangements that are assets

230-435(3) If the *financial arrangement is an asset of yours at the time the event referred to in subsection (1) occurs, paragraphs (1)(a) and (c) do not apply unless the effect of the transfer is to transfer to the other entity substantially all the risks and rewards of ownership of the interest transferred.

230-435(4) If a *financial arrangement is an asset of yours, for the purposes of applying this Subdivision to the arrangement, you are treated as transferring a right under the arrangement to another entity if:

(a) you retain the right but assume a new obligation; and

(b) your assumption of the new obligation has the same effect, in substance, as transferring the right to another entity; and

(c) the new obligation arises only to the extent to which the right to *financial benefits under the arrangement is satisfied; and

[93] Note also CGT event E1 section 104-55.

(d) you cannot sell or pledge the right (other than as security in relation to the new obligation); and

(e) you must, under the new obligation, provide financial benefits you receive in relation to the right to the entity to which you owe the new obligation without delay.

Historic rate rollover of derivative financial arrangement

230-435(5) For the purposes of paragraph (1)(b), all of your rights and/or obligations under a *financial arrangement that is a *derivative financial arrangement are taken to *cease if there is an historic rate rollover of the arrangement.

142. Paragraph 10.3 of the EM discusses the broad intention of Subdivision 230-G as follows:

> A balancing adjustment is an additional amount of gain or loss brought to account on the disposal of a financial arrangement to ensure the correct amount of gain or loss is brought to account from holding and disposing of the financial arrangement. Amounts recognised prior to disposal are taken into account in working out any gain or loss on disposal. This corrects any previous under-allocation or over-allocation of a gain or loss before disposal.

143. It is a wash-up provision intended to ensure that the correct gain or loss is ultimately brought to account by comprehending all cash flows and all tax recognised amounts.

144. It is clear from the structure of section 230-435, and from the EM[94], that, broadly, full disposal is generally intended to trigger a balancing adjustment, and partial disposal is intended to trigger a balancing adjustment only in specified circumstances.

The structure of section 230-435 in context in Subdivision 230-G

145. The structure of section 230-435 is as follows.

- Subsection 230-435(1) provides that a balancing adjustment is triggered in specified circumstances.
- Subsection 230-435(3) is a proviso that, if the financial arrangement is an asset of yours at the trigger time, paragraphs 230-435(1)(a) and 230-435(1)(c) will not apply unless the effect of the transfer is to transfer to the other entity substantially all the risks and rewards of ownership. If that criterion is satisfied, the balancing adjustment is switched off.
- Subsection 230-435(4), again where the financial arrangement is an asset of yours at the trigger time, provides that you are treated as transferring a right to another entity under the arrangement if specified criteria are met. The first of these criteria is that 'you retain the right but assume a new obligation'. Retaining a right would appear to be inconsistent with transferring a right. Subsection 230-435(4) is therefore intended to operate as a limited synthetic disposal rule. The legislative mechanism is that there is a deemed transfer, that is, that a condition for the satisfaction of subsection 230-435(1) is treated as happening.[95]

146. That is, the main gateway to there being a balancing adjustment is subsection 230-435(1), but it is subject to the proviso in subsection 230-435(3). And if subsection 230-435(1) is not satisfied, a further narrower gateway is subsection 230-435(4), which treats the key criterion in subsection 230-435(1) as being satisfied.

[94] See EM paragraph 10.9 page 316

[95] In other words, the structure of the provisions indicates that subsection 230-435(4) is intended to operate as a modification of subsection 230-435(1) rather than as a legislative direction that where there is a retention of a right and an assumption of a new obligation that it will only amount to a transfer in the circumstances set out in subsection 230-435(4).

147. This raises the question whether something that satisfies subsection 230-435(1) only because it satisfies subsection 230-435(4) must then also satisfy subsection 230-435(3). The matter by no means free from doubt. On one view, it may be argued that subsection 230-435(4) treats the subsection 230-435(1) criterion as being satisfied, and subsection 230-435(1) in its ordinary operation is subject to the subsection 230-435(3) proviso, subsection 230-435(1) as triggered by subsection 230-435(4) would also be subject to subsection 230-435(3).[96] [97]

148. The remainder of subdivision 230-G is as follows. Section 230-440 provides exceptions to a balancing adjustment being made. Section 230-445 provides the method statement for performing a balancing adjustment.

Subsection 230-435(1)

149. The structure of subsection 230-435(1) is that paragraph 230-435(a) deals with a transfer of all your rights and/or obligations; paragraph 230-435(b) deals with all your rights and/or obligations under a financial arrangement otherwise ceasing; paragraph 230-435(c) deals with 3 specific partial disposal situations; and paragraph 230-435(d) deals with a Division 230 financial arrangement ceasing to be a financial arrangement.

150. The use of the word 'otherwise' in paragraph 230-435(1)(b) arguably means that the paragraph is only intended to operate where paragraph 230-435(1)(a) does not operate, so that if paragraph 230-435(a) is satisfied, paragraph 230-435(b) will not be satisfied.[98]

151. Paragraphs 230-435(1)(a) and (b) deal with ‘all your rights and/or obligations under a financial arrangement’. The financial arrangement is defined in terms of legal or equitable rights and obligations in subdivision 230-A. Therefore, it would naturally follow that ‘all your rights and/or obligations under a financial arrangement’ would include your legal and equitable rights. As noted at paragraph 54 of this discussion paper, the structure of the definition of financial arrangement in section 230-45, in separately articulating legal and equitable rights and obligations, suggests that a mere legal right or obligation would be recognised.

152. Given that the financial arrangement is defined in terms of legal or equitable rights and obligations in subdivision 230-A, then if all you have is an equitable right, and you assign that to another entity, it would naturally follow that you would satisfy paragraph 230-435(1)(a).[99] A financial arrangement may consist solely of an equitable right to receive a financial benefit and it is consistent with the legislative scheme that where such a right is transferred that it may trigger a balancing adjustment.

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[96] Given paragraph 230-435(4)(b), it may be that, in practice, only transactions that would not attract the subsection 230-435(3) proviso would satisfy subsection 230-435(4).

[97] An argument for the contrary view may be put. Subsection 230-435(1) sets out a general rule for what triggers a balancing adjustment. Subsections 230-435 (3) and 230-435(4) can be seen as simply stand-alone modifications dealing with situations where there is a transfer (in fact) and where there is not a transfer (in fact). Subsections 230-435 (3) and 230-435(4) do not compete: one stops a balancing adjustment from happening, the other specifically causes one to happen. Further, it is difficult to see how the effect of a deemed transfer can be tested meaningfully. 'At the time the event … occurs' speaks of a factual enquiry: see also the ‘events’ listed in 230-440(3). Subsection 230-435 (3) does not say, for example, 'at the time subsection 230-435(1) is satisfied'. The event that occurs and is tested in Subsection 230-435(4) is the assumption of a new obligation, which if it is of a certain type will trigger subsection 230-435(1). The absence of any direct equivalence with AASB 139 and paragraph 230-435(4)(b) is consistent with subsections 230-435(3) and 230-435(4) being stand alone.

[98] This is relevant for the operation of subsection 230-435(3), which only prevents paragraphs 230-435(1)(a) and 230-435(1)(c) from operating.

[99] And perhaps paragraph 230-435(1)(c)(ii) as well. (The EM does not appear to expressly refer to equitable assignment.).

153. Notice also that paragraph 230-435(1)(a) is drafted in terms that contemplates there being a transfer of an obligation. It is trite law that an obligation cannot be assigned but only novated.[100] The word 'transfer' is being used in a broad, rather than strictly narrow, sense. On the other hand, paragraph 230-435(1)(b) might indicate that 'transfer' in paragraph 230-435(1)(a) would not necessarily extend to rights and/or obligations ceasing without the rights and/or obligations being transferred to another entity. At its broadest, the construct of 'transfer' in this provision might mean any actions which result in a right and/or obligation ceasing to be that of the one entity and becoming that of the other entity. Having said that, the starting point in subsection 230-435(1), is to establish whether the general law (including equity) would recognise that a transfer has occurred. A legal transfer of a legal interest is clearly within subsection 230-435(1). An equitable transfer of an equitable interest is also within subsection 230-435(1). The term 'transfer' means (at the least) 'the passing of a legal right from one person to another so as to vest that right in the other.'[101] The principal means of achieving this is through assignment, but, as argued above, transfer is a wider concept than assignment. In context, 'transfer' would appear to extend to novation.[102]

154. On a literal reading, if subsection 960-100(3) is ignored, an equitable assignment does not transfer[103] to another entity all of your rights and/or obligations. (Of course, if the Originator retains cash settlable obligations under the mortgage loan, all of its obligations are not transferred or do not cease.) But putting obligations to one side, you (the assignor) still have the legal right or rights. The same literal hurdle exists with paragraph 230-435(1)(b). All of your rights do not cease.

155. If it were appropriate to take into account subsection 960-100(3), the equitable assignment results in the assignor as itself no longer having the legal interest in the mortgage loans and the assignor as trustee starting to have such legal interest, and the assignee having the equitable interest.[104]

156. Whether subsection 960-100(3) ought to be so understood in relation to the subject transaction ought to depend on whether the constructive trust is otherwise tax recognised, unless the language and context of section 230-435 would suggest that it ought not to apply as described.

157. The following legislative context argument might be put: subsection 230-435(4) looks like it is intended to operate in the case of an equitable assignment,[105] and if it would otherwise have no operation, it would suggest that subsection 230-435 should be understood to operate without being affected by subsection 960-100(3). A key difficulty with this argument, however, is that in a (not uncommon) (contract based) participation agreement, where no trust arises, subsection 230-435(4) would appear to operate effectively. It is therefore suggested that nothing in the legislative context would deny operation to subsection 960-100(3) in relation to section 230-435.

[100] See for example *Goodridge v. Macquarie Bank [2010] FCA 67*

[101] Butterworths Legal Dictionary, 1997.

[102] A novation will also amount to a 'cessation' of an obligation, but this will only trigger 230-435(1)(b) if *all* your rights and obligations otherwise cease. The novation of a single obligation (if a transfer) would then be accommodated by paragraph 230-435(1)(c).

[103] On the view in *DKLR Holding Co (No 2) Pty Ltd v. Commissioner of Stamp Duties (NSW)* 82 ATC 4125; (1982) 12 ATR 874 an equitable assignment involves creating an equitable right in the assignee, the correlative obligation to which is impressed upon the assignor's legal title.

[104] There is a question as to in what capacity the Originator would be subject to the obligation.

[105] The EM is silent as to the purpose or effect of subsection 230-435(4).

158. If, as is suggested above, the constructive trust is tax recognised, arguably paragraph 230-435(1)(b) would apply on the equitable assignment such that all of the rights and obligations[106] of the assignor Originator (as itself) cease. Given the use of the word 'transfer' in relation to obligations, arguably paragraph 230-435(1)(a) would also be satisfied, and if it is satisfied, arguably paragraph 230-435(1)(b) is not satisfied.[107]

159. Therefore, unless subsection 230-435(3) applies, there would be a Subdivision 230-G balancing adjustment.

Relationship with accounting standards

160. One further issue needs to be addressed at this point. The EM notes that 'the design of the disposal provisions in Subdivision 230-G takes into account the derecognition criteria adopted by [AASB 139].'[108] Nevertheless there appear to be some differences:

- AASB 139.20(c) contemplates that an entity may neither transfer nor retain substantially all the risks and rewards, in which case a control test is applied. Subdivision 230-G, in contrast, does not recognise a transfer unless the positive test is satisfied.
- The main provisions dealing with 'transfer' in AASB 139 (paragraphs 16 to 38) all deal with financial assets. The derecognition of financial liabilities (paragraphs 39 to 42) and is generally in terms of cessation or assumption, although note single reference to 'transferred' at paragraph 41. Subdivision 230-G clearly contemplates that a liability can be 'transferred' (cf: assigned).
- The equivalent test to 230-435(4) in AASB 139.19 makes it clear that the only circumstance in which a retention of a right to cashflows that is coupled with a related obligation amounts to a transfer is in the circumstances there set out ('if and only if'). The drafting of subdivision 230-G is not so prescriptive.

161. On the one hand, it would, for example, be inappropriate to interpret 'transfer' in AASB 139 and mechanically apply such interpretation to determine the meaning of 'transfer' in 230-435: the terms are used in different senses and in respect of different subject matter. On the other hand, it would be desirable, if it is appropriate in terms of the statutory language, for there to be broadly similar outcomes between accounting and Division 230, though this is more the case where the language is the same.

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[106] If the Originator retains cash settlable obligations under the mortgage loan, all of its obligations are not transferred or do not cease.

[107] There is also an argument that an equitable assignment by the holder who retains the legal title could fall under paragraph 230-435(c). It may be arguable, on the words, that either subparagraphs 230-435(1)(c)(i) or 230-435(1)(c)(ii) could apply. It could be argued that, pursuant to subparagraph 230-435(1)(c)(i), a proportionate share of rights is transferred. It could be argued that, pursuant to subparagraph 230-435(1)(c)(ii), a right to a specifically identified financial benefit is transferred – in fact – several rights to specifically identified financial benefits are transferred – so this subparagraph would have to apply repeatedly. However, this raises a question as to whether the application of paragraph 230-435(1)(c) would accord with the legislative structure. Paragraph 230-435(1)(c) is clearly dealing with partial disposal in contrast to full disposal, and a complete equitable assignment is a full economic disposal. This is reinforced in relation to subparagraph 230-435(1)(c)(i) by subsection 230-445(2), which refers to 'reduc[ing]' amounts in the subsection 230-445(1) method statement 'by applying the proportion referred to in subparagraph 230-435(1)(c)(i) to them'. Presumably, the appropriate proportion would be 100%, which would not be a reduction. On the other hand, subsection 230-445(3) modifies the subsection 230-445(1) method statement by using particular amounts to the extent to which they are reasonably attributable to the right or obligation referred to in subparagraph 230-435(1)(c)(ii). Where there is a transfer of a number of rights and or obligations under a financial arrangement to a specifically identified financial benefit, if there are particular amounts which are so reasonably attributable to those rights or obligations, it is arguably consistent with the structure and purpose of the legislation if subparagraph 230-435(1)(c)(ii) were to apply to each such transfer. This is so irrespective of it applying in an equitable assignment where not all the rights are disposed of, but which is nevertheless a full economic disposal. Therefore, considering solely subsection 230-435(1), it might be argued that an equitable assignment of the mortgage loans would satisfy subparagraph 230-435(1)(c)(ii).

[108] Paragraph 10.38 EM page 323.

Subsection 230-435(3)

162. The next issue to consider is the application of subsection 230-435(3). The test focuses on the effect of the 'transfer' event in paragraphs 230-435(1)(a) and 230-435(1)(c). The effect of that 'transfer' (the noun referring to the effect of the verb mentioned in subsection 230-435(1)) must be to transfer (verb) to the other entity[109] substantially all the risks and rewards of ownership of the interest transferred. It might be expected that the noun 'transfer' in subsection 230-435(3) would have the same scope it has (as a verb) in subsection 230-435(1).

163. As a matter of commercial reality, the effect of the equitable assignment is to transfer to the Issuer Trustee at least some credit risk in relation to the mortgage loans.[110] This is recognised in the prudential treatment.

164. The residual income unit and swaps would appear to be held by the Originator in its own capacity, rather than as trustee.

165. A key issue is the scope of enquiry in considering what is the 'effect of the transfer'. Is the equitable assignment considered on its own, or is it considered in the context of the entire securitisation transaction? In deciding if the effect of a transfer is to transfer substantially all the risks and rewards of ownership, is consideration given solely to the equitable assignment itself, or are other transactions taken into account which are part of the commercial context? Considering the legislative structure, and the language of 'effect', and the EM[111], it is necessary to consider the context of the transfer, but that that does not answer precisely what ought to be taken into account in such context.

166. At paragraph 33, this discussion paper suggests that in relation to financial accounting:

- The precise scope of which transactions ought to be considered in assessing the entity's exposure, before and after the transfer, of the variability in the amounts and timing of the net cash flows of the transferred asset is not clear, nor do there seem to be express principles as to how such scope is assessed. Reading AASB 139 paragraphs 21 and 22 in the light of the examples at AG 51 of AASB 139, it is tentatively suggested that whether payments on the swaps are contingent on payments being received under the mortgages is relevant to whether the cash flows under the swaps would be relevant to assessing whether to derecognise the mortgage loans. Under the transaction documents, the swaps amounts are calculated with reference to the outstanding principal on the mortgage loans in each calculation period.[112] However, it does not appear to be the case that payments under the swap are contingent on whether payments are made by mortgagors under the mortgage loans
- The operation of the cash flow waterfall[113] through the special purpose vehicle is that the moneys paid by the mortgagors to the Originator which are paid to the SPE are paid in a specified order. Residual payments to the residual income unit holder (the Originator) are only made if there is income left over after meeting the specified payments to trustees, noteholders, etc.[114] Therefore, whether payments are made on the residual income unit is contingent on whether payments are made on the mortgage loans by the mortgagors. It would therefore appear to be appropriate to take into account the residual income unit in assessing whether to derecognise the mortgage loans. Whether, including in one's consideration the residual income unit, substantially all the risks and rewards of ownership of the financial asset have been transferred is a question to be determined on the facts of a particular transaction.

[109] *Acts Interpretation Act 1901* section 23 – or entities.
[110] The Issuer Trustee transfers this risk to the noteholders by issue of the notes.
[111] See EM paragraph 10.41, page 323, discussing the repo in example 2.5.
[112] For example 'Basis swap amount'.
[113] Clause 14 'Cashflow allocation methodology' Trust Supplemental Deed.
[114] Paragraph 14.9(h) Trust Supplemental Deed.

167. It is unclear how a swap, which was not contractually contingent on payments being made under the mortgage loans, ought to be taken into account pursuant to the statutory language of 'the effect of the transfer'. Cashflows under the residual income unit, however, are contingent on the mortgage flows. It is suggested that the residual income unit ought to be considered in assessing the effect of the transfer pursuant to subsection 230-435(3).

168. Members of the Securitisation Working Group have submitted that not all the risks and rewards are transferred: that interest rate risk is retained, liquidity risk is retained, and (in a cross currency fact pattern) currency risk can be retained.

169. If a subordinated tranche is subscribed for, some credit risk would be retained.

170. In relation to rewards, it would follow that the spread between the mortgage loans and the notes would flow back to the originator except for trustee fees etc paid externally. Clearly some of the rewards of ownership would have been transferred. If the excess spread between the notes and the mortgages was not immaterial, arguably not substantially all the rewards of ownership would have been transferred.

171. As noted in paragraph 29 of this discussion paper, the ATO has been advised that the current predominant accounting view is that the mortgage loans would not be derecognised on the basis that substantially all the risks and rewards have not been transferred.

172. The ‘substantially’ element of this test means that it must depend on actual pricing in a particular transaction. If it be the case that the effect of the equitable assignment (in context in a particular securitisation transaction) is not to transfer substantially all the risks and rewards of ownership of the interest transferred, then subsection 230-435(3) will apply to prevent subparagraphs 230-435(1)(a) and (c) from applying. On the basis of the application of subsections 230-435(1) and (3), there would not be a balancing adjustment.[115]

173. (As noted in paragraph 153 of this discussion paper, assuming as argued at paragraph 158 of this discussion paper that paragraph 230-435(1)(b) might apply, the effectiveness of subsection 230-435(3) in switching off the balancing adjustment depends on paragraph 230-435(1)(a) applying on a broad reading of 'transfer' and therefore paragraph 230-435(1)(b) not applying. If paragraph 230-435(1)(a) does not apply, and paragraph 230-435(1)(b) does apply, subsection 230-435(3) would not switch off the balancing adjustment.)

Subsection 230-435(4)

174. The next issue to consider is the application of subsection 230-435(4). As stated above, subsection 230-435(4) is intended to operate as a limited synthetic disposal rule. That is, it applies where the right is retained rather than transferred, and applies such that you are treated as transferring a right to another entity. That is, a condition for the satisfaction of subsection 230-435(1) – the transfer of a right – is treated as happening.

175. As noted in paragraph 157, at first glance, it appears that subsection 230-435(4) might apply on the equitable assignment. Assuming that paragraphs 230-435(c)(d) and (e) are satisfied, there nevertheless three potential barriers to its application.

176. First, arguably, pursuant to subsection 960-100(3), the 'you' who is treated as transferring a right in the chapeau is different to the 'you' who in paragraph 230-435(4)(a) retains the right and assumes a new obligation, and the verb to 'retain' sits uncomfortably if 'you' in your own capacity have ceased to have something and 'you' in the capacity of a trustee have started to have it.

177. Second, if there has been a 'transfer' of either all your rights and obligations (paragraph 230-435(1)(a)) or all your equitable rights (paragraph 230-435(1)(c)(ii)) on a broad reading of 'transfer' in keeping with its use in relation to obligations, you have not relevantly retained the right.

[115] The application of other provisions such as section 26BB of the ITAA 1936 is considered in paragraphs 180 to 183 of this discussion paper.

178. Third, if in paragraph 230-435(4)(b)[116] the scope of what is taken into account as the 'assumption of the new obligation' is as broad as what is taken into account in considering the 'effect of the transfer' in subsection 230-435(3), then if it would be concluded pursuant to subsection 230-435(3) that substantially all the risks and rewards of ownership were not in effect transferred, then it would follow that the (broadly understood) assumption of the obligation would not have the same substantive effect as transferring the right to another entity.

179. It is suggested that the better view is that subsection 230-435(4) would not deem a transfer of the right.

Section 26BB of the ITAA 1936

180. If it were assumed that subsection 230-435(3) applies to prevent the balancing adjustment which subsection 230-435(1) would otherwise trigger, the question arises whether any gain or loss on the equitable assignment would nevertheless be brought to account under another provision.

181. It would appear that, unless something stops it applying, section 26BB of the ITAA 1936 would apply to such equitable assignment as being a disposal[117] of a traditional security.

182. What subsection 230-435(3) does, where it is triggered, is to prevent paragraphs 230-435(1)(a) and (c) from applying. If subsection 230-435(1) does apply (because paragraphs 230-435(1)(a) or (c) are satisfied) a balancing adjustment is made under Subdivision 230-G. On the words of subsection 230-435(3), it is difficult to see what could be understood to prevent section 26BB of the ITAA 1936 from operating.

183. This raises the question of whether sections 230-20 or 230-25 might so apply. On the hypothesis that subsection 230-435(3) applies to prevent the balancing adjustment that subsection 230-435(1) would otherwise trigger, there will be, as a result of the equitable assignment, no gain being included in assessable income or loss being allowed as a deduction under Division 230. Such a gain or loss is the essential trigger for section 230-20 to apply: subsection 230-20(1). Subsections 230-20(2) and 230-20(3) apply to such a gain, as does section 230-25. Without such a gain or loss being brought to account under Division 230, the provision would not appear to operate. (An argument that 'is included' in paragraph 230-20(1)(a) and 'is allowable' in paragraph 230-20(1)(b) could be read as 'might possibly be included (or allowable)' is rejected on the basis that that would be impractically uncertain.) Therefore, it would appear that, if no balancing adjustment is performed, section 26BB of the ITAA 1936 could apply to bring to account a gain or loss on disposal of the mortgage loans.

Question 9: Do you agree with this analysis?

Subitem 104(3) of Part 3 of Schedule 1 of the TOFA Act

184. Item 104 of the TOFA Act sets out the financial arrangements to which Division 230 of the ITAA 1997 applies. The default position, absent the taxpayer making the subitem 104(2) election, is that Division 230 will apply only to the financial arrangements that you start to have in the first applicable income year[118] or a later income year. Division 230 only applies to financial arrangements existing at the start of the taxpayer's first applicable income year, as defined, if an election is made under subitem 104(2) to ungrandfather existing financial arrangements. Subitem 104(3) limits the scope of this election by excluding certain financial arrangements from it. Subitem 104(3) provides:

> (3) The financial arrangement amendments do not apply under subitem (2) to a financial arrangement that arose from a disposal of property (including a disposal of a capital asset, a revenue asset, a depreciating asset or trading stock).

[116] It is noted that paragraph 230-435(4)(b) does not have a parallel in the accounting standards.
[117] Subsection 26BB(1) of the ITAA 1936 '*dispose* means ... assign'.
[118] The 'first applicable income year' is defined in item 102 to mean the first income year for which the financial arrangement amendments apply to you under item 103.

185. It is clear that subitem 104(3) is intended to have the effect that certain existing financial arrangements cannot be transitioned into Division 230. Such existing financial arrangements must continue to be taxed under the existing provisions. What is not clear is what is the intended scope of the exclusion, or why the exclusion exists. It will be seen that nothing in the law indicates why the exclusion exists.

186. The EM states as follows:

> 13.25 The election to bring existing financial arrangements within the scope of Division 230:
>
> - will apply to all financial arrangements a taxpayer starts to have prior to the time the Division first applies to the taxpayer and which the taxpayer still has at that time, other than financial arrangements (typically a deferred settlement) which are in existence at that time and arose from a disposal of property, including a disposal of a capital asset, revenue asset, depreciating asset or trading stock [Schedule 1, subitems 104(2) and (3)];…[119]

187. It will be seen that the extrinsic material also does not state why the exclusion exists.

188. Given the absence of a clear indication of why such an exclusion might exist, it is worthwhile considering what would happen if a financial arrangement that arose from a deferred settlement were to be able to be ungrandfathered. The type of such a situation would be that a taxpayer sells an asset for more than its market value with payment to be in the future, with the excess attributable to the vendor having to wait for its money. Analysis of what would happen in such a case shows that there can be double taxation. Analysis of a range of fact patterns would seem to indicate that the potential for double taxation exists where a financial arrangement has arisen where there has been a taxing point in cases where there is the intrinsic possibility of a gain or loss. So, for example, where the financial arrangement arises from the taxpayer disposing of something for more than the market value of the asset on a deferred settlement, there will be a taxing point and there will be the intrinsic possibility of a gain or loss. On the other hand, where a financial arrangement arises from the acquisition of an asset for more than the market value on a deferred settlement, there will only be the possibility of double taxation where there is a taxing point due to, for example, there being a capital allowances deduction, and it appears that the double counting rules may apply to prevent double taxation. Moreover, axiomatically, to the extent to which there are disposals from which financial arrangements arise where there is no intrinsic possibility of a gain or loss, there can be no double taxation. It might also be noted that there would not be double taxation had section 230-505 applied at the time of the sale. Nevertheless, this empirical analysis does no more than suggest what might have been intended by the subitem 104(3) exclusion. It does not provide a warrant for a firm conclusion as to the policy intent.

189. The subject matter of the subitem 104(2) election is arguably the 'financial arrangement amendments'. These amendments will on election apply to 'financial arrangements'. This is a defined term for the purposes of Division 230, but not for the purposes of the TOFA Act. In context, the financial arrangements to which the subitem applies are those to which Division 230 applies: an election under the subitem determines which financial arrangements are (or will be if the election is made) Division 230 financial arrangements.

'Property'

190. The *Macquarie Dictionary*[120] defines 'property' as:

> property
>
> 1. that which one owns; the possession or possessions of a particular owner.
>
> ...

[119] EM page 414.

[120] *The Macquarie Dictionary,* [Multimedia], version 5.0.0, 1/10/01

191. The term 'property' has been judicially considered in a number of contexts. Such consideration must necessarily be considered in the light of the legislative context at hand. The central idea of property is that which is capable of being owned. In *Milirrpum & Ors v. Nabalco Pty Ltd & the Commonwealth*[121], Blackburn J said:

> I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be proprietary interest, or deny that each of them may be subject to qualifications.

Another general statement about the nature of property, again made in a particular context, was that of Lord Wilberforce in *National Provincial Bank Ltd v. Ainsworth*[122], in considering whether a permit was property:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

Courts have gone on to explain that inalienability does not prevent something from being property where, for example, alienation is barred by statute.[123] Although broad, the term 'property' has limits. Bare possibilities and expectations are not generally 'interests' in property.[124] The law also draws a distinction between property rights and mere personal rights.[125] Likewise, the term 'property' does not extend to services.

192. Turning to the provision itself, it is drafted such that property expressly includes a capital asset, a revenue asset, a depreciating asset and trading stock.

193. These terms would appear to be taxation terms. The capital asset/revenue asset distinction is strongly indicative of this, as is the context in a provision providing for grandfathering the existing tax treatment of existing assets. At first glance, it might be thought 'capital asset' might have been drafted as 'CGT asset'. Perhaps the term is intended to indicate an asset recognised for tax that is not a depreciating asset nor trading stock, nor a revenue asset.[126] The purpose of the inclusion is not beyond question. It is possible for a depreciating asset to not be property,[127] and so the inclusion serves the purpose of extending the scope of the exclusion.

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[121] (1971) 17 FLR 141 at p 272.

[122] [1965] AC 1175 at 1247-1248

[123] In *R v. Toohey & Anor; ex parte Meneling Station Pty Ltd & Ors* (1982) 158 CLR 327 at p 342 - 343**,** Mason J referred to Lord Wilberforce in *Ainsworth* and stated:

> Assignability is not in all circumstances an essential characteristic of a right of property. By statute some forms of property are expressed to be inalienable. Nonetheless, it is generally correct to say, as Lord Wilberforce said, that a proprietary right might be 'capable in its nature of assumption by third parties, and have some degree of permanence or stability.'

In *National Trustees Executors & Agency Co of Australasia Ltd v. FC of T* (1954) 91 CLR 540 at p 583, Kitto J observed:

> It may be said categorically that alienability is not an indispensable attribute of a right of property according to the general sense which the word 'property' bears in the law. Rights may be incapable of assignment, either because assignment is considered incompatible with their nature, as was the case originally with debts… or because a statute so provides or considerations of public policy so require, as in the case of some salaries and pensions; yet they are all within the conception of 'property' as the word is normally understood.

[124] *Craig v. FCT* (1945) 70 CLR 441 at p 454, *Perpetual Executors & Trustees Assn of Australia Ltd v. FCT*(1948) 77 CLR 1 at p 26-7.

[125] *Commissioner of Stamp Duties (NSW) v. Yeend* (1929) 43 CLR 235 at 241.

[126] cf: the definition of revenue asset in section 977-50.

[127] By subsection 40-30(2)(b), *mining, quarrying or prospecting information is a depreciating asset. The term is defined in subsection 40-730(8) as being 'geological, geophysical or technical information that: (a) relates to the presence, absence or extent of deposits of *minerals or quarry materials in an area; or (b) is likely to help in determining the presence, absence or extent of such deposits in an area.' Information is not property (unless protected by patent, copyright etc). In FC of T v. United Aircraft Corporation (1943) 68 CLR 525 at p534, Latham CJ stated:

> *I am unable to regard the communication of information as constituting a transfer of property. Upon such a communication the transferor still has everything that he had before and the transferee continues to have what he has received... Knowledge is valuable, but knowledge is neither real nor personal property.*

Gibbs J stated in *Brent v. FCT* (1971) 125 CLR 418 at 425:

> *Neither knowledge nor information is property in a strictly legal sense, although they can be said to be property in a loose metaphorical sense and have been referred to as property in a number of cases.*

194. It might be expected that a financial arrangement would not uncommonly be a revenue asset.[128]

'Disposal'

195. The *Macquarie Dictionary*[129] relevantly defines 'dispose of' and 'disposal' as follows:

> dispose of ...
>
> d. to make over or part with (property), as by gift or sale
>
> disposal ...
>
> 2. a disposing of as by gift or sale; bestowal or assignment.

196. The term 'disposal' can have a range of meaning depending on context. Case law in relation to disposal has included consideration of whether the creation and transfer of fractional interests was a disposal within the meaning of section 36 of the *Income Tax Assessment Act 1936-1948* (*Rose v. FC of T*),[130] and whether compulsory destruction of cattle was a disposal of the cattle (again in the context of section 36) or compulsory acquisition of land resulted in the fixtures thereon being disposed of (in the context of section 59 of the *Income Tax Assessment Act 1936-1948*).

197. In *Cooling v. FCT*,[131] Hill J, in discussing various statutory extensions to disposal in the context of the pre-TLAB capital gains tax provisions, commented on the ordinary meaning of the word:

> Thus sec. 160M(1) covers most, if not all of the field normally embraced by the word "disposal", particularly when it is remembered that the asset ``disposed of'' needs to have been acquired and owned by the taxpayer prior to the disposition. The normal meaning of disposal is "alienation": *Henty House Pty. Ltd. (in vol. liq.) v. F.C. of T*. (1953) 88 C.L.R. 141 at pp. 151-152. There is involved in the concept a dealing with the property in some way, the property remaining in existence: *Re Leven (Earl) (deceased)*; *I.R. Commrs v. William Deacon's Bank Ltd. & Ors* (1954) 3 All E.R. 81. Thus in *Equity Trustees Executors & Agency Co. Ltd. v. Commr of Probate Duties* (1976) 10 A.L.R. 131 at p. 134 Stephen J. observed that: "In any disposal of ownership one person loses title and another gains it..." ...
>
> The reason there may not have been a "disposal" in the ordinary sense of the word is that the legal ownership of the asset remains with the declarant who has not parted with it. ...
>
> Since the concept of disposition ordinarily requires the continuation in existence of the asset after the dealing with it, this second class of case clearly extends the operation of the legislation beyond the normal concept of disposal.

198. It is clear that the meaning of 'disposal of property' in this subitem does not have any relationship with that transfer which triggers a balancing adjustment pursuant to section 230-435. The constructs are independent.

199. In the context of a disposal of a capital asset, a revenue asset, a depreciating asset or trading stock, and in the context of the reference to deferred settlements, it could, perhaps, be argued that 'disposal' could be understood to be a disposal that is recognised for tax law. However, without more, it is difficult to conclude that the term 'disposal' must be read as having a meaning broader than its ordinary meaning.

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[128] Note that in section 230-450, 'property' includes' money or a money equivalent'.
[129] *The Macquarie Dictionary,* [Multimedia], version 5.0.0, 1/10/01
[130] (1951) 84 CLR 118.
[131] (1990) 21 ATR 13.

200. Turning to the specific question of whether 'a disposal' would encompass an equitable assignment, it may be observed that the question has been considered in different legislative contexts,[132] and, unsurprisingly, the answer has depended on the Court's understanding of the legislative language, context and purpose. It is suggested that it is not free from doubt what can be drawn from the language, context and purpose here. It is further tentatively suggested that as the ordinary meaning of disposal would extend to an equitable assignment, that the word should be so understood here.

Whose disposal?

201. Although not limited to 'your' disposal, and therefore potentially covering a financial arrangement that arose from a disposal by someone else of his, her or its property, it would be a natural reading to construe it as applying only to a financial arrangement that arose from 'your' disposal. This is consistent with the use of 'you' in subitems 104(1) and 104(2). It is also consistent with the included categories of asset, which depend for their character on how they are held/used in the hands of the holder of the asset (rather than being intrinsic qualities of the assets).

202. The phrase 'arose from a disposal of property' would seem to involve ideas of causation and source. A financial arrangement can be said to arise from a disposal of property in a deferred settlement in that the only remaining right to be performed is for the cash to be received in consideration for the disposal of the property under the agreement to dispose of that property. The right to cash is that which is received in return for the (completed) promise to dispose of the property.

Conclusion

203. Although the question of whether the word 'disposal' extends to an equitable assignment is not free from doubt, it is suggested that the better view is that the financial arrangement consisting of the equitable obligation to provide the mortgage cash flows in return for the receipt of money in the subject transaction arose from a disposal of property, and therefore the subitem 104(3) exception to ungrandfathering would apply.[133]

Question 10: Do you agree with this analysis?

The special purpose entity

Financial arrangement

204. On similar reasoning to that in paragraphs 93 and 94 of this discussion paper, assuming there are not non-insignificant non-cash settlable rights and/or obligations, the equitable rights the Issuer Trustee obtains on the equitable assignment would satisfy the definition of a financial arrangement.[134]

[132] For example, *Carter v. Carter* [1896] 1 Ch 62; *Re The Full Board of The Guardianship and Administration Board* [2003] WASCA 268; *Grimwade v. Federal Commissioner of Taxation* [1949] HCA 9 at [3].

[133] The parenthetic EM reference to 'typically a deferred settlement' provides insufficient warrant for radically reading down the plain meaning of the text of the subitem.

[134] It could be suggested that the Issuer Trustee could have two financial arrangements consisting of the equitable rights against respectively the Originator and the mortgagors. Sensibly, only one financial arrangement would be recognised.

Subsection 230-55(4)

205. On similar reasoning to that in paragraph 89 of this discussion paper, although the question is very finely balanced, on the premise that the individual agreements make sense as commercial arrangements in their own right, and that taxing the separate agreements aligns tax with economic income, it is considered appropriate to treat each contract as giving rise to a separate arrangement.

Subsection 230-460(3)

206. On similar reasoning to that in paragraph 97 of this discussion paper, pursuant to subsection 230-460(3), Division 230 would not apply to the Issuer Trustee's rights to mortgage principal and interest carried by its rights under the constructive trust arising on the equitable assignment.

Division 6 of Part III of the ITAA 1936

207. Paragraphs 99 to 137 of this discussion paper conclude that:

- Division 6 could apply to the constructive trust arising on the equitable assignment
- arguably the purported assignment of future interest, in the context of the assignment of the mortgage loans, would have no effect, and therefore the beneficiary[135] under the constructive trust would be assessable pursuant to section 97 of the ITAA 1936 or, alternatively
- if the interest flows were the trust estate, the assignee would nevertheless be assessable.

Subitem 104(3) of Part 3 of Schedule 1 of the TOFA Act

208. On similar reasoning to that in paragraph 201 of this discussion paper, subitem 104(3) of the TOFA Act would not apply to a financial arrangement that arose from someone else's disposal of property.

[135] As the beneficiary of the constructive trust is itself a trustee, Division 6 would apply iteratively

References

ATOlaw topic	Income Tax ~~ Taxation of financial arrangements (TOFA) ~~ financial arrangement Income Tax ~~ Taxation of financial arrangements (TOFA) ~~ identification of arrangement
Subject references	arrangement Division 230 – taxation of financial arrangements
Legislative references	ITAA 1936 6(1) ITAA 1936 26BB ITAA 1936 36 ITAA 1936 59 ITAA 1936 Div 6 ITAA 1936 97 ITAA 1936 98 ITAA 1936 99B ITAA 1936 99B(1) ITAA 1936 99B(2) ITAA 1997 Div 230 ITAA 1997 Subdiv 230-A ITAA 1997 230-45 ITAA 1997 230-45(1) ITAA 1997 230-45(1)(a) ITAA 1997 230-45(1)(b) ITAA 1997 230-45(1)(c) ITAA 1997 230-45(1)(d) ITAA 1997 230-45(1)(e) ITAA 1997 230-45(1)(f) ITAA 1997 230-45(2) ITAA 1997 230-45(2)(b) ITAA 1997 230-45(2)(d) ITAA 1997 230-45(3) ITAA 1997 230-50 ITAA 1997 230-50(1) ITAA 1997 230-50(2) ITAA 1997 230-55(1) ITAA 1997 230-55(2) ITAA 1997 230-55(3) ITAA 1997 230-55(4) ITAA 1997 230-55(4)(f) ITAA 1997 230-85 ITAA 1997 230-235 ITAA 1997 230-235(1)(b) ITAA 1997 Subdiv 230-G ITAA 1997 230-435 ITAA 1997 230-435(1) ITAA 1997 230-435(1)(a) ITAA 1997 230-435(1)(b) ITAA 1997 230-435(1)(c) ITAA 1997 230-435(1)(c)(ii) ITAA 1997 230-435(1)(d) ITAA 1997 230-435(2) ITAA 1997 230-435(3) ITAA 1997 230-435(4) ITAA 1997 230-435(4)(a) ITAA 1997 230-435(4)(b) ITAA 1997 230-435(4)(c) ITAA 1997 230-435(4)(d) ITAA 1997 230-435(4)(e) ITAA 1997 230-435(5) ITAA 1997 230-460(1) ITAA 1997 230-460(2)

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Attachment A

Structure and contracts for the subject bank-originated securitisation transaction