

***Australian
Securitisation***

Forum

PO Box H68 Australia Square
Sydney New South Wales 1215
Telephone 02 9237 6390
Facsimile 02 9237 4966

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Australian Tax Office
Attention: Assistant Commissioner
Law Design & Development (Entities)
PO Box 900
Civic Square ACT 2608

Dear Sir

**New Business Tax System (Entity Taxation) Bill 2000
Exposure Draft**

Thank you for the opportunity to comment on the Exposure Draft Legislation and for inviting our representatives (Michael Barbour of Westpac and Charles Armitage of Allen Allen & Hemsley) to attend the recent consultation workshop.

1. Potential Problem with Fixed Trust Definition

Securitisation trusts are generally fixed trusts. The trustee receives known and certain cashflows and the beneficiaries receive predetermined fixed distributions and/or there is a residuary beneficiary who may be entitled to a nominal balance after distributions of trust income (or interest is paid to bond holders and fees paid to service providers).

However, on the basis of the existing definition of Fixed Entitlement contained in Division 272 in Schedule F to the Income Tax Assessment Act 1936 (*1936 Act*) many existing trusts may fail to be treated as fixed trusts on technical grounds. As securitisation trusts receive and distribute known and certain cashflows and so are, by their nature, not intended to be discretionary trusts, we hope that you will give favourable consideration to ensuring that trusts which are intended to be fixed trusts, such as securitisation trusts, will not fail to be treated as fixed trusts on the basis of an overly technical test being applied to distinguish fixed trusts from non-fixed trusts.

We believe that the two aspects which are most likely to cause a technical failure of the fixed trust requirement (or, at the very least, create considerable uncertainty and concern as to whether the ATO would accept certain trusts as fixed) are as follows:

- the price at which units in the trust may be redeemed and/or issued would not normally be specified. It is therefore possible that a trustee may redeem units otherwise than at a price based on the net tangible assets of the trust; and
- in some cases, the Trust Deed may provide the Trustee with broad discretion to amend the Trust Deed without the Unitholder's consent.

2. Possible Solutions

There would appear to be several possible solutions to the problem which could be implemented either as alternatives or as complementary measures.

(a) Broaden Concept of Fixed Trust and/or Excluded Trust

There are no doubt various ways in which a securitisation trust could be defined.

(i) Simple approach to Defining Fixed Trust

Our preferred approach would be for fixed trusts to be defined as trusts under which the trustee has no discretion in relation to the distribution of income or capital of the trust. This would be simple. If considered necessary, there could be safeguarding provisions to deal with subsequent amendments to the trust deed to give the trustee such discretion.

(ii) Securitisation Trusts as Excluded Trusts

The alternative approach would be to treat *securitisation trusts* (as defined) as excluded trusts for the purposes of the entity taxation regime thus preserving their existing flowthrough taxation treatment.

In our previous submission (refer attached), in Appendix C, we proposed a possible definition for securitisation trusts. In that definition, the third bullet point would require alteration to avoid a securitisation trust being thrown back into the general non-fixed trust rules. For example, there could be a sub-section which states that for the purposes of the definition of a securitisation trust, a trust can be a fixed trust notwithstanding that the trustee can issue or redeem units at a price other than one based on the net tangible assets of the trust and notwithstanding that the trustee has broad powers to amend the trust deed without the consent of the unitholders. This concession would be limited to securitisation trusts.

The second bullet point should also be amended by adding a third possibility: *or acquired by a bank or financial institution.*

(b) Phasing in of Definition

The second approach might be to use the approach outlined above only as a transitional provision. In other words, there would not appear to be any great impediment to ensuring that future trusts satisfy the existing restrictive definition but there would be concerns that amending existing trust deeds could involve potential capital gains tax and/or stamp duty exposures and very significant practical difficulties with obtaining consents and generally administering the changes. Accordingly, the above exclusion for securitisation trusts could apply in respect of trusts created prior to the commencement date of the new legislation. New trusts would be constituted to comply with the definition of fixed trusts.

(c) Restructure Rollover relief

The third approach would be to provide transitional relief to the effect that no tax consequences will arise from amending trust deeds to ensure that trusts comply with the definition of Fixed Trust. A simple form of relief based on that provided for Managed Investment Schemes in sub-division 960-E of the Income Tax (Transitional Provisions) Act 1997 would be appropriate.

One major concern with this approach would be the lack of certainty as to the approach which the various Offices of State Revenue would take in relation to providing complementary stamp duty relief. In the absence of any certainty as to the stamp duty outcome, this approach of simply allowing tax relief for converting to fixed trust status could not be favoured.

Another significant problem is that many existing trust deeds can only be amended with the consent of bondholders (ie the creditors of securitisation trust). This could be a very difficult and costly exercise.

(d) Public Ruling

The fourth approach would involve a purely administrative solution. Instead of making any legislative amendments, the ASF would work with the ATO to draft a mutually acceptable public ruling outlining the circumstances in which the Commissioner would exercise his discretion to deem fixed entitlement pursuant to sub-section 272-5(3) in Schedule 2F of the 1936 Act. It would be intended that the public ruling would cover securitisation trusts broadly and, for this to be a viable course of action, the ruling would have to be very clear in its confirmation that if the criteria set out in the Ruling is satisfied then the Commissioner's discretion *will* be exercised. A concern with this approach would be that the ATO might decline to provide a ruling until the legislation had come into effect and the ASF and the ATO might then fail to reach agreement on a satisfactory form of ruling and the opportunity to follow one of the other alternative courses of action would then have been lost. What are for all intents and purposes fixed trusts would then be subject to the vagaries of whatever definition is then adopted in the legislation. This would not be an acceptable course of action.

We look forward to the opportunity of discussing these various alternative approaches with you with a view to developing a mutually satisfactory solution which will provide certainty that securitisation trusts will continue to be taxed as flow through entities.

When you are in a position to discuss this submission or if you have any queries in relation to it, please do not hesitate to contact, in the first instance, Ian Godfrey on 02 9258 1425.

Yours faithfully

Ian Godfrey
Convenor
ASF Taxation Sub-Committee