

EXPOSURE DRAFT

1 Inserts for
2 **Tax Laws Amendment (2009 Measures**
3 **No. 6) Bill 2009: CGT and trusts etc.**
4

EXPOSURE DRAFT (02/09/2009)

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Commencement information

| Column 1 | Column 2 | Column 3 |
|----------------|--|--------------|
| Provision(s) | Commencement | Date/Details |
| 1. | | |
| 2. Schedule ?? | The day on which this Act receives the Royal Assent. | |
| 3. | | |

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Schedule ??—CGT and trusts etc.

Part 1—Removing trust cloning exception

Income Tax Assessment Act 1997

1 Subsection 104-55(5)

Repeal the subsection, substitute:

Exception

- (5) **CGT event E1** does not happen if you are the sole beneficiary of the trust and:
- (a) you are absolutely entitled to the asset as against the trustee (disregarding any legal disability); and
 - (b) the trust is not a unit trust.

2 Subsection 104-60(5)

Repeal the subsection, substitute:

Exception

- (5) **CGT event E2** does not happen if you are the sole beneficiary of the trust and:
- (a) you are absolutely entitled to the asset as against the trustee (disregarding any legal disability); and
 - (b) the trust is not a unit trust.

3 Application

The amendments made by this Part apply to CGT events happening after 31 October 2008.

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2 **Part 2—Roll-over for fixed trusts**

3 *Income Tax Assessment Act 1997*

4 **4 Section 109-55 (after table item 8F)**

5 Insert:

8G You hold a membership interest in the receiving trust involved in a roll-over under Subdivision 126-G when you acquired the corresponding membership interest in the transferring trust involved in the roll-over section 115-30

6 **5 After section 112-54**

7 Insert:

8 **112-54A Transfer of assets between eligible fixed trusts**

9

Eligible fixed trusts

| Item | In this situation: | Element affected: | See section: |
|-------------|--|--|---------------------|
| 1 | There is a roll-over under Subdivision 126-G relating to the transfer of a CGT asset between eligible fixed trusts | First element of cost base and reduced cost base of the CGT asset | 126-240 |
| 2 | There is a roll-over under Subdivision 126-G relating to the transfer of a CGT asset between eligible fixed trusts | First element of cost base and reduced cost base of membership interests in each trust | 126-245 |

10 **6 Section 112-150 (at the end of the table)**

11 Add:

10 Transfer of a CGT asset between eligible fixed trusts Subdivision 126-G

12 **7 Subsection 115-30(1) (at the end of the table)**

13 Add:

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- 9 A *CGT asset that:
- (a) is a *membership interest in the receiving trust involved in a roll-over under Subdivision 126-G; and
 - (b) is held by the acquirer just after the transfer time for the roll-over
- (a) when the acquirer acquired the corresponding membership interest (or membership interests) in the transferring trust involved in the roll-over; or
 - (b) if the roll-over asset for the roll-over has been involved in an unbroken series of roll-overs under Subdivision 126-G—when the acquirer acquired the corresponding membership interest (or membership interests) in the transferring trust involved in the first roll-over in the series

1 **8 At the end of Division 126**

2 Add:

3 **Subdivision 126-G—Transfer of assets between eligible fixed** 4 **trusts**

5 **Guide to Subdivision 126-G**

6 **126-215 What this Subdivision is about**

7 This Subdivision sets out when there is a roll-over relating to the
8 transfer of a CGT asset between eligible fixed trusts.

9 **Table of sections**

| 10 | Operative provisions | |
|----|-----------------------------|---|
| 11 | 126-220 | Object of this Subdivision |
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| 13 | 126-230 | Requirements for roll-over |
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| 15 | 126-240 | Consequences of roll-over for the trusts |
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| 17 | 126-250 | No other cost base adjustment for beneficiaries |
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Operative provisions

126-220 Object of this Subdivision

The object of this Subdivision is to facilitate the efficient restructuring of businesses, and investment funds, held in certain trusts by ensuring that capital gains tax considerations are not an impediment to such restructuring.

126-225 When a roll-over may be chosen

- (1) A roll-over may be chosen if:
- (a) the trustee of a trust (the *transferring trust*):
 - (i) creates a trust (the *receiving trust*) over a *CGT asset (the *roll-over asset*) by declaration or settlement; or
 - (ii) transfers a CGT asset (the *roll-over asset*) to an existing trust (the *receiving trust*);at a particular time (the *transfer time*); and
 - (b) if subparagraph (a)(ii) applies—the receiving trust has no CGT assets, other than small amounts of cash or debt, just before the transfer time; and
 - (c) *CGT event E4 is capable of happening to all of the units and interests in each of the trusts at the transfer time; and
 - (d) the extra requirements in section 126-230 are met; and
 - (e) the exceptions in section 126-235 do not apply.

Note 1: A roll-over cannot be chosen if either trust is a discretionary trust.

Note 2: A consequence of the roll-over is that any pre-transfer losses of the receiving trust cannot later be utilised (see subsection 126-240(3)).

- (2) The roll-over only happens if both the trustee of the transferring trust, and the trustee of the receiving trust, choose to obtain it.

126-230 Requirements for roll-over

Beneficiaries and trust interests must be the same etc.

- (1) An extra requirement is that, just after the transfer time:
- (a) each of the trusts must have the same beneficiaries; and
 - (b) each beneficiary's *membership interests in each of the trusts must be interests in, or rights relating to, the income and/or capital of the trust; and

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- 1 (c) the nature and extent of each beneficiary's membership
2 interests in each of the trusts must be capable of being
3 worked out solely from the constituent document of the trust;
4 and
5 (d) the receiving trust must have the same *classes of
6 membership interests that the transferring trust had just
7 before, and has just after, the transfer time; and
8 (e) the sum of the *market values of each beneficiary's
9 membership interests of a particular class in both trusts must
10 be the same as the sum of the market values (just before the
11 transfer time) of the beneficiary's membership interests of
12 that class in the transferring trust.

13 For the purposes of paragraph (e), disregard any small amounts of
14 cash or debt held by the receiving trust just before the transfer
15 time.

16 *No power to materially alter beneficiaries entitlements etc.*

- 17 (2) Another extra requirement is that no entity have either of the
18 following powers in relation to either trust just after the transfer
19 time:
20 (a) the power to materially alter a beneficiary's *membership
21 interests in the trust;
22 (b) the power to issue or redeem membership interests in the
23 trust at a discount of more than 10% of their *market value.

24 **126-235 Exceptions for roll-over**

25 *Foreign trustees*

- 26 (1) An exception applies if:
27 (a) the receiving trust is a *foreign trust for CGT purposes for the
28 income year that includes the transfer time (the **current**
29 **year**); and
30 (b) the roll-over asset is not *taxable Australian property just
31 after the transfer time.

32 Note: For **taxable Australian property**, see section 855-15.

33 *Corporate unit trusts and public trading trusts*

- 34 (2) Another exception applies if either trust is a trust to which
35 section 102K or 102S of the *Income Tax Assessment Act 1936*
36 applies for the current year.

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Choices

- 1
- 2 (3) Another exception applies if, just after the transfer time:
- 3 (a) a choice (however described) under a provision of a *taxation
- 4 law is in force for either of the trusts in relation to particular
- 5 circumstances; and
- 6 (b) the same choice (however described) under that provision is
- 7 not also in force for the other trust in relation to those
- 8 circumstances (a *mirror choice*); and
- 9 (c) the absence of a mirror choice would or could have an
- 10 ongoing impact on the calculation of an entity's *net income
- 11 or taxable income for the current year or a later income year.

- 12 (4) However, the exception in subsection (3) does not apply if:
- 13 (a) the other trust makes a mirror choice before the first time
- 14 after the transfer time when the absence of the mirror choice
- 15 would impact on the calculation of an entity's *net income, or
- 16 taxable income, for an income year; or
- 17 (b) it would not be reasonable for subsection (3) to apply.

18 Note: For paragraph (a), the other trust must still be able, under the relevant

19 provision of the taxation law, to make the mirror choice.

- 20 (5) If, just after the transfer time:
- 21 (a) a choice (however described) referred to in paragraph (3)(a)
- 22 is in force for either of the trusts (the *first choice*); and
- 23 (b) a provision of a *taxation law:
- 24 (i) prevents the revocation or variation of that choice; or
- 25 (ii) sets out a consequence for an entity if that choice is
- 26 revoked or varied;
- 27 that provision is taken to apply for a mirror choice, in force for the
- 28 other trust at or after that time, in a corresponding way to the way
- 29 in which it applies for the first choice.

30 Note: For example, if the provision sets out consequences that flow from the

31 revocation of the first choice, then those consequences will also flow

32 if the mirror choice is revoked.

126-240 Consequences of roll-over for the trusts

Disregard any capital gain or loss

- 34
- 35 (1) If the roll-over is chosen, disregard any *capital gain or *capital
- 36 loss the trustee of the transferring trust makes from:
- 37 (a) creating the receiving trust over the roll-over asset; or

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1 (b) transferring the roll-over asset to the receiving trust;
2 at the transfer time.

3 *Adjust roll-over asset's cost base and reduced cost base*

- 4 (2) If the roll-over is chosen:
- 5 (a) the first element of the roll-over asset's *cost base (in the
 - 6 hands of the receiving trust) is its cost base just before the
 - 7 transfer time; and
 - 8 (b) the first element of the roll-over asset's *reduced cost base is
 - 9 worked out similarly.

10 *Any pre-transfer losses of receiving trust cannot be utilised*

- 11 (3) If the roll-over is chosen:
- 12 (a) any *net capital loss of the receiving trust for an income year
 - 13 ending before the transfer time cannot be applied after the
 - 14 transfer time to reduce an amount of that trust's *capital
 - 15 gains; and
 - 16 (b) the sum of the receiving trust's *capital losses for the current
 - 17 year is reduced by an amount equal to any net capital loss
 - 18 that the trust would have had for that year were that year to
 - 19 have ended just before the transfer time; and
 - 20 (c) any *tax loss of the receiving trust for an income year ending
 - 21 before the transfer time cannot be deducted after the transfer
 - 22 time from an amount of that trust's assessable income or *net
 - 23 exempt income; and
 - 24 (d) the sum of the receiving trust's deductions for the current
 - 25 year is reduced by an amount equal to any tax loss that the
 - 26 trust would have had for that year were that year to have
 - 27 ended just before the transfer time.

28 *Pre-CGT assets*

- 29 (4) If the roll-over is chosen and the transferring trust last *acquired
- 30 the roll-over asset before 20 September 1985, the receiving trust is
- 31 taken to have acquired it before that day.

32 **126-245 Consequences of roll-over for beneficiaries**

33 *First element of cost base*

- 34 (1) If the roll-over is chosen, the first element of the *cost base (just
- 35 after the transfer time) of:

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- 1 (a) each of a beneficiary's *membership interests of a particular
2 *class in the transferring trust; and
3 (b) each of the beneficiary's membership interests of that class in
4 the receiving trust;

5 is worked out as follows:

6 *Method statement*

7 Step 1. Identify:

- 8 (a) each parcel (an *original parcel*) of the
9 beneficiary's *membership interests of that *class
10 in the transferring trust that have the same *cost
11 base, and the same *reduced cost base, just before
12 the transfer time; and
13 (b) the corresponding parcel (the *new parcel*) of the
14 beneficiary's *membership interests of that class in
15 the receiving trust.

16 Step 2. Add up the *cost bases (just before the transfer time) of
17 the *membership interests in the original parcel.

18 Step 3. Allocate the result to the original parcel, and the new
19 parcel, in such proportions as is reasonable having regard
20 to the matters specified in subsection (2).

21 Step 4. Divide the result of step 3 for the original parcel by the
22 number of *membership interests in that parcel. The
23 result is the first element of the *cost base (just after the
24 transfer time) of each of those interests.

25 Step 5. Divide the result of step 3 for the new parcel by the
26 number of *membership interests in that parcel. The
27 result is added to what would, apart from this section, be
28 the first element of the *cost base (just after the transfer
29 time) of each of those interests.

30 Note: For step 1, the new parcel is the proportion of the total membership
31 interests of that class in the receiving trust that corresponds to the
32 proportion that the original parcel bears to the total number of
33 membership interests of that class in the transferring trust (see
34 paragraphs 126-230(1)(d) and (e)).

35 Example: A roll-over is chosen for the transfer of an asset from OldTrust to
36 NewTrust. Just before the transfer time, Graeme has 1,000 Class A
37 units in OldTrust, each with a cost base of \$1 and a market value of

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1 \$5. He also has 200 Class A units in NewTrust, each with a cost base
2 of 50c.

3 Just after the transfer time, the market value of each of Graeme's
4 interests in OldTrust is reduced by 20% to \$4. A reasonable allocation
5 of Graeme's cost base for his OldTrust units would be:

- 6 (a) \$800 to OldTrust units [that is, (1,000 units at \$1) x 80%]; and
7 (b) \$200 to NewTrust units [that is, (1,000 units at \$1) x 20%].

8 The first element of the cost base of each of Graeme's units in
9 OldTrust is 80c (that is, \$800/1000 units). The first element of the cost
10 base of each of his units in NewTrust is \$1.50 (that is, \$200/200 units
11 + 50c).

12 (2) The matters are:

- 13 (a) the *market value of the original parcel just after the transfer
14 time, or an anticipated reasonable approximation of that
15 market value; and
16 (b) the market value of the new parcel just after the transfer time,
17 or an anticipated reasonable approximation of that market
18 value.

19 *First element of reduced cost base*

20 (3) The first element of the *reduced cost base (just after the transfer
21 time) of:

- 22 (a) each of a beneficiary's *membership interests of a particular
23 class in the transferring trust; and
24 (b) each of the beneficiary's membership interests of that class in
25 the receiving trust;
26 is worked out similarly.

27 *Time of acquisition for pre-CGT membership interests*

28 (4) Each *membership interest in the receiving trust is taken to have
29 been *acquired at the transfer time.

30 (5) However, a beneficiary is taken to have *acquired the beneficiary's
31 *membership interest in the receiving trust before 20 September
32 1985 if the beneficiary's corresponding membership interest (or
33 membership interests) in the transferring trust is a *pre-CGT asset
34 just before the transfer time.

35 **126-250 No other cost base adjustment for beneficiaries**

36 If a beneficiary of the trusts has to make adjustments under
37 section 126-245 to the first element of the *cost base, and the first

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1 element of the *reduced cost base, of the beneficiary's
2 *membership interests in relation to the *CGT event that is:

- 3 (a) the creation of the receiving trust over the roll-over asset; or
4 (b) the transfer of the roll-over asset to the receiving trust;

5 no other adjustment can be made under this Act to those cost bases
6 and reduced cost bases because of something that happens in
7 relation to that event.

8 Note: Section 126-245 deals with any value shift that might occur in relation
9 to the event and avoids the need for the general value shifting regime
10 to apply.

11 **126-255 Giving information to beneficiaries**

12 *Beneficiaries must be given particulars of the roll-over*

- 13 (1) If the roll-over is chosen, the trustee of the transferring trust must
14 give a written notice to each of the trust's beneficiaries within 3
15 months after the end of the current year. The notice must include
16 the particulars set out in subsection (2).

17 Note: The current year is the income year that includes the transfer time (see
18 paragraph 126-235(1)(a)).

19 *The particulars that must be given*

- 20 (2) The following particulars must be included in the notice:
21 (a) the transfer time;
22 (b) sufficient information to enable a beneficiary to work out:
23 (i) which of the beneficiary's *membership interests in
24 each of the trusts belong to the same *class; and
25 (ii) for each trust—the proportion that a membership
26 interest in each of those classes bears to the total
27 number of membership interests in the class;
28 (c) the *market value of the membership interests held by the
29 beneficiary in each of those classes in the transferring trust
30 just after the transfer time, or an anticipated reasonable
31 approximation of that market value;
32 (d) the market value of the membership interests held by the
33 beneficiary in each of those classes in the receiving trust just
34 after the transfer time, or an anticipated reasonable
35 approximation of that market value.

36 The notice may include other particulars of the roll-over.

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Offence

- 1
2 (3) A trustee commits an offence if the trustee contravenes
3 subsection (1).

4 Penalty: 30 penalty units.

- 5 (4) An offence against subsection (3) is an offence of strict liability.

6 Note: For strict liability, see section 6.1 of the *Criminal Code*.

If the transferring trust has multiple trustees

- 7
8 (5) If the transferring trust has 2 or more trustees, the obligation
9 imposed by subsection (1) is imposed on each of the trustees, but
10 may be discharged by any of the trustees.

11 Note: Each of the trustees commits an offence against subsection (3) if none
12 of them discharges the obligation imposed by subsection (1).

Obligations of beneficiary unaffected if not given a notice

- 13
14 (6) A failure by a trustee to give a notice to a beneficiary under this
15 section does not affect the application of section 126-245 to the
16 beneficiary.

9 Subsection 995-1(1) (definition of *class*)

17 After “company”, insert “or trust”.

10 Application

18
19
20 The amendments made by items 4 to 8 of this Part apply to CGT events
21 happening after 31 October 2008.

11 Transitional: time for making mirror choices

- 22
23 (1) Subsection 126-235(3) of the *Income Tax Assessment Act 1997* does not
24 apply if the other trust makes a mirror choice under a provision of a
25 *taxation law by:

26 (a) 6 months after the day on which this Act receives the Royal
27 Assent; or

28 (b) a later day allowed by the Commissioner of Taxation.

29 Note: For this item to have effect, the other trust must still be able, under that provision of the
30 taxation law, to make the mirror choice.

- 31 (2) This item has effect in addition to subsection 126-235(4) of the *Income*
32 *Tax Assessment Act 1997*.

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1 **12 Transitional: deadline for giving information to**
2 **beneficiaries**

- 3 (1) This item applies in relation to a roll-over chosen under
4 Subdivision 126-G of the *Income Tax Assessment Act 1997* if the
5 transfer time for the roll-over happens during the 2008-09 income year.
- 6 (2) Subsection 126-255(1) of that Act has effect, in relation to the roll-over,
7 as if the reference in that subsection to 3 months after the end of the
8 current year were a reference to 6 months after the day on which this
9 Act receives the Royal Assent.

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2 **Part 3—Other amendments**

3 *A New Tax System (Goods and Services Tax) Act 1999*

4 **13 Subsection 184-1(2) (note)**

5 Omit “Note”, substitute “Note 1”.

6 **14 At the end of subsection 184-1(2)**

7 Add:

8 Note 2: The entity that is the trustee of a trust does not change merely because
9 of a change in the person who is the trustee of the trust, or persons
10 who are the trustees of the trust.

11 *Income Tax Assessment Act 1997*

12 **15 Subsection 104-10(2)**

13 Repeal the subsection, substitute:

14 (2) You *dispose of* a *CGT asset if a change of ownership occurs from
15 you to another entity, whether because of some act or event or by
16 operation of law. However, a change of ownership does not occur
17 if you stop being the legal owner of the asset but continue to be its
18 beneficial owner.

19 Note: A change in the trustee of a trust does not constitute a change in the
20 entity that is the trustee of the trust (see subsection 960-100(2)). This
21 means that CGT event A1 will not happen merely because of a change
22 in the trustee.

23 **16 At the end of subsection 104-55(1)**

24 Add:

25 Note: A change in the trustee of a trust does not constitute a change in the
26 entity that is the trustee of the trust (see subsection 960-100(2)). This
27 means that CGT event E1 will not happen merely because of a change
28 in the trustee.

29 **17 At the end of subsection 104-60(1)**

30 Add:

31 Note: A change in the trustee of a trust does not constitute a change in the
32 entity that is the trustee of the trust (see subsection 960-100(2)). This
33 means that CGT event E2 will not happen merely because of a change
34 in the trustee.

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1 **18 Subsection 960-100(2) (note)**

2 Omit “Note”, substitute “Note 1”.

3 **19 At the end of subsection 960-100(2)**

4 Add:

5 Note 2: The entity that is the trustee of a trust does not change merely because
6 of a change in the person who is the trustee of the trust, or persons
7 who are the trustees of the trust.

8