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The General Manager
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Dear Sir

Response to Treasury Discussion Paper Improving the Taxation of Trust Income

Ernst & Young welcome the decision of the Government to act now to legislatively clarify certain issues associated with the taxation of trust income, and to consult with the community on these matters. We are pleased to provide our submission in this regard. Terms used in this submission have the same meaning as in the March 2011 Discussion Paper.

The overriding principle in relation to the taxation of trust income is that those beneficiaries who are presently entitled to an amount of income or gains should bear the tax liability related to that amount. The trust deed is the key document for determining the entitlement to amounts of trust income and capital and in our view any amendments to the tax legislation should not detract from the role of the deed, and should not require taxpayers to make unnecessary amendments to the deed.

In summary, we highlight that:

1. With respect to the use of a new statutory definition of 'income of the trust estate' to achieve a better alignment to the trust's taxable income, we consider that the statutory definition outlined in the third option in Section 2.2.3 of the Discussion Paper is the preferred approach (i.e. simple addition of assessable capital gains if not already included). However, we do not support this approach if it comes with an integrity rule that is either complex or does not provide sufficient certainty for taxpayers.

2. If an integrity rule is considered necessary (which we submit it is not), we consider that the preferred approach is instead that outlined in Section 2.2.1 of the Discussion Paper (defining distributable income using tax concepts adjusted for specified amounts). We do not support a statutory definition based on accounting concepts.

3. There is however significant complexity associated with the definition of "adjusted taxable income" (ATI) proposed in Section 2.2.1 of the Discussion Paper and in determining what beneficiaries have an entitlement under the trust deed to amounts (income or capital) included in that definition of ATI.

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4. For these reasons, we consider that where possible trustees should be spared having to apply these rules where there is not any benefit to the trust or the revenue in doing so. We have therefore put forward for consideration a variation of the option outlined in section 2.2.1 of the Discussion Paper. That is, rather than seek to impose the new statutory definition in all cases, it would only apply as an 'exception' to the current rules where distributable income (as per current law) is less than taxable income.

5. The benefit of this approach is that it would leave unchanged the position for a large number of trusts where their circumstances are such that the current rules provide an equitable outcome for both the revenue and the taxpayers.

6. With respect to streaming of income, we believe that what is required is to legislatively clarify in Division 6 that the proportionate approach applies on a "class of income" basis where the trustee has conferred entitlements to different classes of income on different beneficiaries. The benefit of this approach compared to those outlined in the Discussion Paper is that it not only effectively deals with the two classes of income referred to in the paper (franked dividends and capital gains) but also addresses issues that arise for other classes of income under other provisions of the tax legislation (e.g. foreign income that has been subject to foreign tax). We consider that there is no policy reason to differentiate between the streaming of franked dividends and capital gains compared to other classes of income and gains.

7. We believe that further certainty is required for taxpayers with respect to prior years. While retrospective amendments are not recommended due to the potential rework required by a lot of taxpayers, we consider that taxpayers should not be penalised for adopting positions that are consistent with these announcements (income streaming in particular). We seek confirmation that taxpayers who have adopted positions consistent with these announcements in prior years should be able to rely on the amendments in those years.

8. We also consider that these amendments highlight that it is impractical to require trustees to determine present entitlement to income and capital amounts by 30 June each year. We therefore submit that Division 6 should be amended to ensure that present entitlement for Division 6 purposes is only required by the later of 31 October following the end of the year of income and the earliest due date for lodgement of the beneficiaries' tax returns (i.e. rather than 30 June each year).

9. Similarly, we consider that confirmation should be provided that trust deed amendments made in response to these legislative amendments (for example, to better match distributable income in the deed to the new statutory definition, to enable capital gains and franked dividends to be streamed to particular beneficiaries etc) should not give rise to a new trust for tax purposes (i.e. do not cause a resettlement).

10. Finally, in addition to the two issues put forward in the Discussion Paper, we consider that the Government should introduce amendments for one other matter that requires immediate attention. That is, it has long been recognised that the current definition of 'fixed trust' is virtually impossible for many unit trusts to meet and following comments by Justice Stone in the Colonial Case to this effect, we consider that an immediate and retrospective amendment to these rules are required.

Our submission is attached in Appendix A together with our responses to specific questions raised in the Discussion Paper in Appendix B.

Should you have any questions or would like to discuss our submission further please do not hesitate contact me on (07) 3243 3711, Tony Stolarek on (03) 8650 7654 or Brian Lane on (03) 8650 7250.

Yours sincerely

Ian Burgess
Partner

Appendix A

Ernst & Young Response to Treasury Discussion Paper

Detailed Discussion

1. Better Aligning the Concepts of Distributable Income and Taxable Income

1.1. We support the introduction of specific rules to ensure those beneficiaries that enjoy the benefit of trust entitlements also bear the appropriate tax impost. The Trust Deed is the key document that determines which beneficiaries are entitled to benefits from the trust. This needs to be borne in mind in determining the appropriate form of the legislative amendments.

1.2. With respect to the aim of achieving a better alignment between distributable income of a trust and its taxable income, we understand that each of the three options proposed in Section 2 of the paper involves inserting a statutory definition of 'income of the trust estate' in Division 6. We understand the aim is that Division 6 would then require an examination of what amounts beneficiaries are presently entitled to (both income and capital distributions under the trust deed) which are included in that definition. Once this is determined, each beneficiary would be assessed on that share of the trust's taxable income (i.e. net income per Section 95).

1.3. In this regard, the first option (Section 2.2.1) is for a 'comprehensive' statutory definition. The second (Section 2.2.2) is for the statutory definition to be determined by reference to accounting concepts. The third option (Section 2.2.3) is to use the definition of distributable income in the deed and add to it any taxable capital gains to the extent the deed definition does not do that.

1.4. We consider that the optimum approach is the one which is the simplest to implement and deals effectively with known anomalies that arise under the current law. In this regard, we consider that the statutory definition outlined in the third option in Section 2.2.3 of the Discussion Paper is the preferred approach. However, we do not support this approach if it comes with an integrity rule that is either complex or does not provide sufficient certainty for taxpayers.

1.5. If an integrity rule is considered necessary (which we submit it is not), we consider that the preferred approach is instead that outlined in Section 2.2.1 of the Discussion Paper (defining distributable income using tax concepts adjusted for specified amounts). We consider that an integrity rule should not be needed to address the sort of issues set out in example 2 of Section 1.6 in the Discussion Paper. We consider that the ATO could manage these issues either on the basis the re-characterisation is not effective or via the general anti-avoidance rules.

1.6. We do not support a statutory definition based on accounting concepts.

1.7. If specific integrity rules are considered necessary, we would support the approach in Section 2.2.1. There are however significant complexities associated with the definition of "adjusted taxable income" (ATI) (discussed below) and in determining what beneficiaries have an entitlement under the trust deed to amounts (income or capital) that might be reflected in that definition of ATI.

1.8. For these reasons, we consider that where possible trustees should be spared having to apply these amendments where there is not any benefit to taxpayers or the Revenue in doing so. We have therefore put forward for consideration a variation of the option outlined in section 2.2.1 of the Discussion Paper. That is, rather than seek to impose the new statutory definition in all cases, it would only apply as an 'exception' to the current rules where distributable income (as per current law) is less than taxable income.

1.9. The rationale and advantage of this approach is as follows:

1.9.1. The anomalies that need to be addressed arise where taxable income of the trust estate is greater than the distributable income of the trust estate (this is consistent with the examples outlined in section 1.6 of the Discussion Paper).

1.9.2. Where distributable income is equal to or greater than the trust's taxable income it is appropriate to retain the current approach to allocating taxable income, subject to the legal entitlements of a beneficiary to particular classes of income (see comments on streaming below). That is, the current method of allocating the trust's taxable income based on present entitlement to distributable income is an appropriate 'default' position and retaining it would mean that many trusts are not impacted by potentially complex new rules.

1.9.3. One of the key issues with the approach outlined in section 2.2.1 is the method by which a trustee is to determine what beneficiaries, if any, are presently entitled to amounts making up the statutory definition of distributable income (this is not addressed in the Discussion Paper). The other key issue is the calculation of ATI as discussed below. By retaining the current approach based on distributable income under the Deed in situations where anomalous results do not arise, a large number of trustees are spared this additional exercise.

For example, consider the position where a trust's distributable income equals its taxable income (e.g. there is only interest income) but there have been distributions of both income and capital during the year. By retaining the current default to taxing the trust income based on share of trust income, the trustee is not forced to apply a new set of rules to determine whether any taxable income should be allocated to beneficiaries receiving capital distributions.

1.10. A possible disadvantage of this approach compared to the proposal in section 2.2.1 is that there would be no standard definition of distributable income in Division 6 that would apply to all trusts. However, given any legislative definition in Division 6 still requires an assessment of what amounts included in that definition have been conferred on beneficiaries by the trustee (which will vary for each trust), this may not be seen as a major issue. That is, even where there is a standard definition, there will be no standard means of identifying who has benefited from the amounts included in that definition.

1.11. Under this variation to the Section 2.2.1 approach, the outcome in Example 3, 4 and 5 would be same as outlined in the Discussion Paper (i.e. these are all examples of where distributable income is less than taxable income).

2. Definition of Adjusted Taxable Income (ATI)

2.1. Both the approach outlined in Section 2.2.1, and the variation described above, require a calculation of an ATI amount.

2.2. We agree that this should be taxable income calculated under section 95 adjusted to exclude amounts which are not generally available for distribution or which have the potential to distort the desired outcome. On this basis we believe the section 95 net income amount should be adjusted as follows:

2.2.1. Subtract non-cash gross ups such as imputation credit gross ups, foreign tax credit gross ups etc.

If these amounts were included in the calculation, Trustees would be forced to distribute amounts that haven't been received. While there is some argument that refundable imputation credits are an asset that could be distributed, common trust accounting practices are not to recognise them. In addition, many trust deeds would not recognise these amounts as assets which could be used to satisfy a beneficiary's entitlement.

2.2.2. Subtract notional taxable amounts such as attributable income or deemed dividend amounts. Any difference between actual consideration and deemed market value consideration on transfer of an asset should also be adjusted (the alternative is to leave this in and allocate these amounts to the party receiving the benefit of the transfer, assuming that entity is a beneficiary or potential beneficiary of the trust. However, this would be an added complexity).

2.2.3. Add back any tax timing differences.

If this is not done, there is likely to be amounts of ATI which have not been distributed leading to an inequitable taxing of the trustee. For example, if the trust has $100 of assessable income and $50 of accrued expenses which have not yet been incurred for tax purposes, the section 95 net income would be $100. However, the distributable income of the trust may be income according to accounting concepts which would be $50. If this is distributed to beneficiaries but there are no distributions of capital, beneficiaries would only have 50% of ATI hence would only be taxed on 50% of section 95 income with the trustee being taxed under S99A on the balance.

2.3. We consider that there should be no add-back of "non-cash" tax deductions such as investment allowance, R&D concession uplift, tax and building depreciation etc. Similarly, we consider that other income or gains which are not taxable such as the part of a capital gain not included in taxable income by virtue of Division 115 (CGT Discount) or 152 (small business concessions) or other non assessable non exempt income should not be added to the ATI calculation.

The rationale for this is that a trustee should be permitted to accumulate non taxable amounts or amounts sheltered by these 'non-cash' deductions without impacting on the allocation of taxable income. In many family trust situations, the preference is not to distribute these non taxable amounts to beneficiaries because it exposes additional assets to potential creditors of the beneficiaries. Similarly, in trusts with active businesses, there is often a need to reinvest in the business and the ability to accumulate these amounts assists with these cash flow requirements.

2.4. We consider on balance that non-deductible expenses such as entertainment costs, fines and penalties etc should not be adjusted in the calculation of ATI. While on the one hand these are amounts which have been expended and therefore not readily available for distribution, if these amounts are subtracted from ATI it would increase the likelihood that there could be no ATI and hence the trustee would be assessed on the resulting taxable income at what are effectively penalty rates.

2.5. For similar reasons, we consider that there should be no adjustment for net capital losses of that year or an earlier year. These amounts are not included in section 95 'net income' and any reduction in ATI for these amounts may inappropriately cause ATI to be nil or negative (with result that trustee is taxed on section 95 net income). Carry forward revenue losses will obviously be included in the calculation by virtue of their impact on section 95 net income.

3. Enabling Streaming

3.1. Section 97 requires a taxpayer who is entitled to a "share" of the income of the trust estate to include in their assessable income "that share of the net income" of the trust estate. The Bamford decision has confirmed that the "proportionate approach" to allocating taxable income to beneficiaries is the correct approach. However that case did not specifically address the issue as to whether the proportionate approach applies on a class of income basis or a 'whole of net income' basis. Similarly, the Court was not required to decide this issue in the Colonial case.

3.2. As there remains some uncertainty in relation to this issue, we welcome the Government's decision to clarify the law in relation to the streaming of franked dividends and capital gains.

3.3. Although franked dividends and capital gains are two common examples of where "streaming" may give rise to different tax results to that which would occur if the proportionate approach is applied at the "whole of net income" level, there are clearly others that should be addressed in any amendments. That is, there is an equal compelling argument that streaming of these components of trust income should be permitted in the same manner as proposed for franked dividends and capital gains.

3.4. Some examples include:

3.4.1. where foreign income which has been subject to foreign withholding tax is allocated to a particular beneficiary(ies) under the Deed. The scheme of the tax legislation, like that for franking credits and capital gains, is to determine which beneficiaries have an entitlement to foreign income and to require those beneficiaries to include the amount of the withholding tax in assessable income and to claim a foreign income tax offset where available (e.g. Section 6B(2A) ITAA 36, Division 770 ITAA 97);

3.4.2. where dividends, interest or royalties are allocated to a non-resident beneficiary(ies) under the Deed. The trustee is required to withhold tax under Section 128B ITAA 36 based on the amount of dividends, interest and royalties to which the non-resident beneficiary(ies) is presently entitled (Section 128A(3) and Section 128B ITAA 36).

3.5. The Government's proposed approach to better aligning distributable income and taxable income is also predicated on the concept of identifying the entitlement of beneficiaries to particular components of income or capital of the trust (so as to allocate taxable income). That is, the approach of identifying components included in the new definition of distributable income and determining which beneficiaries are entitled to amounts of trust income and/or capital giving rise to those components, is consistent with determining the tax results on a class of income basis.

3.6. We consider that a simple amendment should be made to Division 6 which provides clarity that the proportionate approach should be applied on a "class of income" basis. For example, if a beneficiary is entitled to 100% of the franked dividend income, that beneficiary should include 100% of the taxable income from that class of income (Subdivision 207-B would mean that beneficiary is entitled to 100% of the franking credits related to that dividend income without amendment).

Similarly, if a beneficiary is entitled to 70% of the foreign income, that beneficiary should be assessed on 70% of the taxable income related to that foreign income (and would be entitled to 70% of the FITOs under Division 770).

3.7. Where beneficiaries' entitlements under a deed are not determined by reference to any particular class of income (for example, the deed does not contemplate the separate accounting and allocation of different classes of income, or such powers are not exercised) the proportionate approach would apply at a 'whole of net income' level.

3.8. This approach is consistent with the long held view of the flow through or conduit approach to the taxation of trusts and would provide clarity for all parts of the tax legislation. That is, this approach does not require amendment of all the current legislative provisions interacting with the taxation of trust income to clarify their interaction with Division 6 and means future amendments are not required (for example, when the announced 40% discount for interest income is enacted).

4. Application to Prior Years

4.1. The Government announcement and Discussion Paper makes no reference to the position to be adopted with respect to prior years. For example, many beneficiaries have lodged income tax returns in the past on the basis that where the trustee has streamed particular classes of income to them, they were assessable on their share of taxable income from that class of income (rather than their share of the net income as whole). Given the Discussion Paper raises uncertainty about this position, it would be highly desirable that taxpayers are provided with some comfort that the positions adopted in prior years will not be challenged in light of the Government's announcement.

4.2. We assume that the amendments are only being made prospectively on the basis that a retrospective amendment might disadvantage some taxpayers and also would require a lot of additional work for taxpayers and the ATO to go back and amend prior year returns. We agree that this is a valid reason for making the amendments prospective. However, we believe that taxpayers who have prepared returns in the past in a manner consistent with the proposed amendments should be protected from subsequent challenge by the ATO.

5. Time by which present entitlement required

5.1. To determine a beneficiary's liability to tax under Division 6, one must determine whether the beneficiary is "presently entitled" to income of the trust. Based on case law, it is commonly understood that for Division 6 purposes a beneficiary must be presently entitled to a share of the income of the trust by the end of the financial year (*Union Fidelity Trustee Co of Australia v FC of T* (1969) 119 CLR 177).

5.2. In the context of many discretionary trusts it is often practically difficult for trustees to determine the distributable income and to make resolutions as to entitlement to that income prior to 30 June each year. This has been acknowledged in practice statements by the ATO which has generally allowed trustees an additional two months to confer present entitlement (see for example PS LA 2005/1).

5.3. The current proposals to better align the distributable income and taxable income of a trust are likely to make the decision making process for trustees more complex and time consuming. For example, the comprehensive approach to defining 'income of the trust estate' in Section 2.2.1 requires trustees to determine the taxable income and to make adjustments to that. It is impractical for this to occur by 30 June.

5.4. For these reasons we submit that a specific rule should be introduced to Division 6 which extends the time by which beneficiaries are required to be "present entitled" to the trust amounts included in the new statutory definition of income. We submit that this should be the later of 31 October and the earliest due date for lodgement of a beneficiary's income tax return in respect of the relevant year of income.

5.5. If such an extension of time was provided for in the legislation, many trust deeds would require amendment to extend the time by which the trustee was required to make income and capital determinations in favour of beneficiaries. That is, even if an extension of time was permitted in the tax law, trustees would still need to comply with their obligations under the deed. For this reason, we submit that clarity should be provided that any such amendment to the deed would not constitute a 'resettlement' of the trust for income tax purposes (and that State Revenue authorities accept that such amendments would not constitute a resettlement for stamp duty purposes) – see discussion below.

6. Fixed Trusts

6.1. The Discussion Paper makes various references to the Colonial case. One of the decisions of the Court in the Colonial case was that the Wholesale Fund was not a fixed trust for tax purposes because the members did not have "indefeasible" interests in the income or capital of the trust. In doing so, the Court relied on the general powers of amendment in the Constitution of the Wholesale Fund together with section 601GC of the Corporations Act 2001, which applies to registered managed investment schemes (MIS). This raises the possibility that no registered MIS can constitute a fixed trust for tax purposes. The same issues arise for many other unit trusts, particularly given the Commissioner's arguments in the Colonial case that the ability for a trustee to amend the Deed meant the member's interests were not vested and indefeasible. Clearly this is an unintended outcome and should be rectified immediately.

6.2. If a trust does not qualify as a fixed trust, this has various ramifications for tax purposes, including the rules that apply for determining whether the trust can carry forward tax losses, the application of the franking credit tracing rules and the eligibility of beneficiaries for discount capital gains treatment.

6.3. The Discussion Paper does not propose any amendments for the "fixed trust" issue raised in the Colonial case. While this may be addressed as part of the broader tax rewrite of the trust tax law and/or as part of the Managed Investment Trust regime, we consider it should be one of the interim immediate "fixes" due to the significant adverse implications referred to above.

6.4. We submit that the definition of a "fixed entitlement" to a share of the income or capital of a trust in section 292-5 of Schedule 2F of the Income Tax Assessment Act 1936 (together with Section 295-550 ITAA 97 in relation to fixed entitlements to trust income derived by superannuation investors) should be amended immediately and with retrospective application to ensure that typical unit trusts qualify as fixed trusts for all purposes in the tax legislation.

6.5. One way of achieving this might be for the "indefeasible" requirement to be omitted to make it easier to qualify as a fixed trust. That is, we consider that where it can be said that the beneficiaries have a vested interest in a share of the income or capital of the trust in a year of income then the trust should be regarded as a fixed trust. If that interest is later defeated then that would be the trigger for adverse tax outcomes rather than the mere possibility that it may be defeased.

7. Trust Deed Amendments

7.1. Any legislative amendments relating to the taxation of trusts should avoid the need for trustees to make amendments to the trust deed. However, it is possible that trustees may choose to amend a deed to better deal with these issues (for example, to better match distributable income in the deed to the new statutory definition, to enable capital gains and franked dividends to be streamed to particular beneficiaries etc). Where such amendments are made in response to the legislative amendments we submit that certainty should be provided that these amendments by themselves would not constitute the creation of a new trust for income tax purposes (i.e. do not create a 'resettlement' which causes a CGT Event to happen etc).

7.2. In the absence of some clarification in this regard, we would anticipate that the ATO would be 'flooded' with requests for private binding rulings from taxpayers seeking confirmation that amendments of this nature to the trust deed did not create a new trust.

7.3. Similarly, State Governments should be encouraged to provide clarity that such amendments will not cause the creation of a new trust for stamp duty purposes.

Appendix B

Responses to Specific Questions

Our responses to the specific questions contained in the 'Questions for Consultation' section of the Discussion Paper are set out below.

Consultation Question 1

If income of the trust estate is defined according to **tax concepts** should the gross capital gain be included in the income or only the net capital gain (after applying available discounts)?

We submit that it should be the net capital gain that is included in the statutory definition. That is, any reductions in the amount of the gross capital gain, for whatever reason, including as a result of Division 115 (CGT discount) or Division 152 (small business) or by virtue of prior year capital losses should reduce the amount included in the statutory definition. If these amounts are included, it would effectively force the trustee to distribute these non-taxable components. We do not consider this to be a reasonable outcome for the reasons outlined in our submission.

Consultation Question 2

Should all notional amounts (for example receipts or expenses) be **excluded** from a definition of distributable income based on the concept of taxable income, or are there some notional amounts that should be included?

We consider that some amounts should be included and some excluded. For example, we consider that:

- Non-cash gross ups such as imputation credit gross ups; foreign tax credit gross ups etc should be excluded. If these amounts are not, trustees are forced to make distributions of amounts which are arguably not available for distribution to avoid having amounts to which no beneficiary is entitled (while there is some argument that refundable imputation credits are an asset that could be distributed, common trust accounting practices are to exclude them).

- Notional assessable amounts such as attributable income or deemed dividend amounts should be excluded for similar reasons as above.

- Any difference between actual consideration and deemed market value consideration on transfer of an asset should also be excluded (the alternative is to leave this in and allocate these amounts to the party receiving the benefit of the transfer, assuming that entity is a beneficiary or potential beneficiary of the trust).

- Notional tax deductions such as investment allowance, R&D concession uplift, tax and building depreciation etc should be included. That is, by leaving these amounts in the calculation of ATI, a trustee is not forced to distribute amounts sheltered by these deductions (that is, a trustee could accumulate these amounts to meet the costs of further capital expenditure etc).

Consultation Question 3

Would adjustments to the definition of distributable income also be needed where timing differences exist between the distributable income (as newly defined) and the trustee's calculation of "income" pursuant to the terms of the trust deed? How could this be achieved?

We consider that the statutory definition would need to be adjusted for any tax timing differences. If this is not done, there is likely to be amounts of ATI which have not been distributed leading to an inequitable taxing of the trustee. For example, if the trust has $100 of assessable income and $50 of accrued expenses which have not yet been incurred for tax purposes, the section 95 net income would be $100. However, the distributable income of the trust may be income according to accounting concepts which would be $50. If this is distributed to beneficiaries but there are no distributions of capital, beneficiaries would only have 50% of ATI hence would only be taxed on 50% of section 95 income with the trustee being taxed under S99A on the balance. This would clearly be an inequitable outcome.

Consultation Question 4

Would the introduction of a specific anti-avoidance provision be effective to ensure that re-classification clauses could not be used to re-classify amounts of income or capital to obtain a tax benefit?

We do not support a new specific anti-avoidance provision for this issue. We believe the matter can be dealt with as set out in our submission.

Consultation Question 5

Even if a specific anti-avoidance provision were introduced to restrict the reclassification of trust amounts, would the distributable income of a trust still need to include any capital gains made by the trust to ensure that income beneficiaries are not taxed on capital gains that only benefit capital beneficiaries?

Yes. Amendments would still be required to address the issue of legitimate differences between distributable income and taxable income.

Consultation Question 6

Apart from clarifying the operation of subsection 207-35(3) of the ITAA 1997 (in particular the meaning of the words 'despite Division 6') are other changes needed to ensure that subdivision 207-B operates appropriately?

Yes. We consider that the optimum approach is to amend Division 6 to clarify that the proportionate approach should be applied on a "class of income" basis. For example, if a beneficiary is entitled to 100% of the franked dividend income, that beneficiary should include 100% of the taxable income from that class of income (Subdivision 207-B would mean that beneficiary is entitled to 100% of the franking credits related to that dividend income without amendment).

Consultation Question 7
Should Subdivision 115-C continue to apply after the application of Division 6 where there is a discrepancy between a beneficiary's entitlement to a capital gain included in the distributable income of the trust and the amount of the trust's net capital gain included in the beneficiary's assessable income?

We consider that the optimum approach is to amend Division 6 to clarify that the proportionate approach should be applied on a "class of income" basis. This should provide the necessary clarity as to the interaction between Division 6 and Subdivision 115-C.

Consultation 8
Instead of looking to amounts assessed to beneficiaries under Division 6, should subdivision 115-C instead look to the trust entitlements of the beneficiaries?

No. For the reasons outlined in our submission, Subdivision 115-C should not be amended and should continue to look to amounts assessed to beneficiaries.