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Sent via email to: [lyn.freshwater@ato.gov.au](mailto:lyn.freshwater@ato.gov.au)

14 March 2017

Dear Lyn

**RE: Comments in relation to Draft Tax Determination TD 2016/D4**

Further to our letter of 8 March 2017 in relation to the King & Wood Mallesons submission, we have also been provided the draft joint submission by the Tax Institute, Chartered Accounts Australia and New Zealand, Tax and Super Australia, CPA Australia and Institute of Public Accountants and find their submission compelling.

In summary, we are of the view that the better construction of the interaction of Division 6, Subdivision 115-C and Section 855-10 is that Australian beneficiaries should be subject to the capital gains tax provisions of Subdivision 115-C in relation to capital gains on non-taxable Australian property derived by foreign trusts to which they are presently entitled. In particular, we note the words in Section 115-215 that states that “the trust estate’s capital gains are treated as a beneficiary’s capital gain.”

This provides character flow through and taxes Australian investors on capital gains made on non-Taxable Australian assets regardless of whether they hold them directly or indirectly through a foreign trust.

Section 885-10 should be restricted to where the trustee might be subject to tax under the likes of Sections 98, 99, 99A, 102 etc. Section 99B might then apply to the extent any of these amounts are subsequently distributed to Australian residents.

It should be noted that we do not agree with the proposition put forward in paragraph 19 of the draft TD. Foreign beneficiaries of a non-fixed trust should only be taxed on their share of gains from non-taxable Australian property to the extent the gains are Australian sourced. As such, the interpretation above should not provide an “unnecessary administrative burden” as noted in paragraph 20.

Please don’t hesitate to contact me should you require any further information.

Yours sincerely,



**SPYRIDON PREMETS**  
Senior Policy Manager – Tax and Economics