TR 2014/D1EC - Compendium

Ruling Compendium – Draft Taxation Ruling TR 2014/D1

This is a compendium of responses to the issues raised by external parties to Draft Taxation Ruling TR 2014/D1 *Income tax: employee remuneration trust arrangements*. Terms and abbreviations used throughout this Compendium have the same meaning as that referred to in Draft Taxation Ruling TR 2017/D5 *Income tax: employee remuneration trusts*.

This compendium of comments has been edited to maintain the anonymity of entities that commented on TR 2014/D1.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
General comments: Including scope and application		
1	**Application to employee share schemes (ESS)**[1] The Ruling should provide better context in relation to the type of employee remuneration trust (ERT) arrangements that it is seeking to address. The Ruling should clearly and unequivocally clarify whether employee share trusts[2] and ESS arrangements are excluded from the ambit/scope of the Ruling. The Ruling should specifically exclude circumstances that result in income being provided to employees which is taxable under Division 83A of the *Income Tax Assessment Act 1997* (ITAA 1997). If the Ruling is intended to apply to ESS arrangements, it should contain a separate section (or be dealt with in a separate product such as a	Paragraphs 1 and 3 of TR 2017/D5 clarify the scope of the Ruling and specifically carve out ESS arrangements. It is acknowledged that the operation of Division 83A of the ITAA 1997 is relevant to the subject matter. However, TR 2017/D5 is not a suitable product to deal with all of the taxation outcomes that apply to participants of ESS arrangements. We have recently been consulting with the community on how to best structure our public advice and guidance on ESS arrangements, including any additional issues requiring guidance or clarification.

[1] All references to 'ESS arrangements' throughout this compendium, are to arrangements that deliver an ESS interest under an employee share scheme (within the meaning of the *Income tax Assessment Act 1997* (ITAA 1997)) that is taxed under Subdivision 83A-B or 83A-C of the ITAA 1997.
[2] As defined in subsection 130-85(4) of the ITAA 1997.

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	ruling or determination) that solely deals with the specific tax provisions that apply to these arrangements and how the principles discussed in TR 2014/D1 are intended to apply to these arrangements, having regard to the commercial derivers for these arrangements.	
2	**Prepayment rules (section 82KZMA)** If section 82KZMA of the *Income Tax Assessment Act 1936* (ITAA 1936) applies to any of the examples in the Ruling, then the examples should outline its application.	Paragraphs 20 to 22 and 91 to 96 have been added to TR 2017/D5 to clarify the circumstances in which the prepayment provisions will apply to contributions that are otherwise deductible under section 8-1 of the ITAA 1997. Where section 82KZMA of the ITAA 1936 is relevant in the context of a specific example in TR 2017/D5, this has been noted (see example 4 at paragraph 22).
3	**General anti-avoidance provisions** TR 2014/D1 does not consider the general anti-avoidance provisions of Part IVA of the ITAA 1936, which is a fundamental issue concerning any ERT arrangement and is discussed by the Full Federal Court in *Pridecraft Pty Ltd v. FC of T*[3] *(Pridecraft)* and Kiefel J in *Essenbourne v. FC of T*[4]. The Ruling should provide an indication of those arrangements that are not likely to attract the operation of Part IVA of the ITAA 1936.	The application of Part IVA of the ITAA 1936 to any particular ERT arrangement depends on a careful weighing of all the facts and circumstances of the arrangement. It is therefore not possible to provide certainty as to those arrangements that are not likely to attract the operation of Part IVA of the ITAA 1936 in the absence of each factual situation being fully examined. TR 2017/D5 includes (at paragraph 143) a list of factors which, if present in a particular ERT arrangement, will likely result in the Commissioner exercising his powers under subsection 177F(1) of the ITAA 1936 to cancel the tax benefit. Part IVA may still apply even if an ERT arrangement does not have any of the factors listed (see paragraph 145 of TR 2017/D5).
4	**Assessability of contributions to the trustee** The Ruling should include views on the tax treatment of contributions in the hands of the trustee- specifically, whether they are ordinary income of the trustee under section 6-5 of the ITAA 1997.	It is beyond the scope of TR 2017/D5 to consider whether a contribution to an ERT is assessable to the trustee under section 6-5 of the ITAA 1997 because it depends on a number of different factors and needs to be treated on a case by case basis.

[3] [2004] FCAFC 339; 2005 ATC 4001; (2004) 58 ATR 210.
[4] [2002] FCA 1577; 2002 ATC 5201; 51 ATR 629.

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5	**Black hole expenditure section 40-880** The Ruling, for clarity and completeness, should address the application of section 40-880 of the ITAA 1997 and provide guidance for employers who are otherwise denied a deduction for a contribution under section 8-1 of the ITAA 1997.	Guidance on the application of section 40-880 of the ITAA 1997 to capital contributions will be provided in a separate product because the application of this section to such contributions is beyond the intended scope of TR 2017/D5.
6	**Effective salary sacrifice arrangements** The Ruling should clarify that PAYG withholding is not required with respect to benefits provided under an effective salary sacrifice arrangement. The decision in *Yip v. FC of T*[5] (*Yip*) has thrown some doubt on what an effective salary sacrifice arrangement is in the context of an ERT arrangement.	Taxation Ruling TR 2001/10[6] outlines the Commissioner's view as to what constitutes an effective salary sacrifice arrangement, which is not impacted by the decision in *Yip*. Whether PAYG withholding is required on a payment is determined in accordance with section 12-35 of *Schedule 1 to Taxation Administration Act 1953* (TAA). Where a non-cash benefit is provided in lieu of a salary or wages payment, section 14-5 of Schedule 1 to the TAA imposes an obligation to withhold on the entity providing the benefit. One exception to section 14-5 of Schedule 1 to the TAA is where the non-cash benefit is a fringe benefit. Where a fringe benefit is provided in lieu of a salary or wages payment, the fringe benefit is treated in accordance with TR 2001/10.
7	**Controller vs. arm's length ERTs** Separate rulings issue on 'controller ERTs' and 'arm's length ERTs' because, due to its length, TR 2014/D1 often confuses the taxation consequences that apply to each type. If separate rulings cannot be issued, the discussion of tax issues should be separated.	The principles that apply to controller or arm's length ERTs are substantially the same, albeit with potentially different taxation outcomes. Separately dealing with each type within TR 2017/D5 would increase its length and make it repetitive. The structure and content of TR 2017/D5 has been simplified and streamlined, to more clearly articulate the Commissioner's view.
Application of section 8-1 of the ITAA 1997		

[5] [2011] AATA 785; 2011 ATC 10-214; (2011) 82 ATR 761
[6] Taxation Ruling TR 2001/10 *Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements.*

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8	**A contribution incurred by way of set off** Paragraph 169 of TR 2014/D1 suggests that only cash or property contributions will be considered to be incurred when ownership of that contribution passes. The Ruling should accept, consistent with Taxation Ruling TR 97/7[7], that a deductible loss or outgoing can also occur by way of set off where funds that are contributed are used to acquire shares in the contributing entity by way of subscription.	A contribution to an ERT, in most circumstances, is a voluntary payment. TR 2017/D5 outlines (at paragraph 77) that where, in return for a contribution, the employer issues shares to the trustee this gives rise to a liability on the part of the trustee but as there is no cross liability, there can be no set off. As such the contribution is not incurred for the purposes of section 8-1 of the ITAA 1997.
9	**Case law on deductibility of contributions** Case law in Australia – *Pridecraft, Spotlight Stores Pty Ltd v. FC of T*[8] (*Spotlight*), *Cameron Brae Pty Ltd v. Federal Commissioner of Taxation*[9] *(Cameron Brae)* and *Walstern Pty Ltd v. Commissioner of Taxation*[10] *(Walstern)* have all concluded that absent a finding that Part IVA of the ITAA 1936 applies to the contribution, it is deductible under section 8-1 of the ITAA 1997.	Of the cases cited, only in *Pridecraft* did the Full Federal Court observe that the contribution to the ERT in that case would have been deductible, absent Part IVA of the ITAA 1936 applying. Contributions to trusts in *Cameron Brae*[11] and *Walstern*[12] were found to be of a capital nature and not deductible under section 8-1 of the ITAA 1997.
10	**Connection between contributions and the derivation of business income** Courts have consistently allowed a contribution as revenue in nature having identified a nexus between the contribution for the benefit of the employees of an employer and the resultant increase or likely improvement to the generation of income.	In *Spotlight*, Merkel J observed that the expected result in increased profits from year to year was one of the criterion considered in determining that the contribution in that case was not of a capital nature. Reference was also made to the expected improved staff retention rates, lower staff turnover and improved staff morale, efficiency productivity and loyalty that would result from the contribution. TR 2017/D5 clarifies the circumstances in which a contribution will have the necessary connection with business for the purpose of

[7] Taxation Ruling TR 97/7 *Income tax: section 8-1 - meaning of 'incurred' - timing of deductions*.
[8] [2004] FCA 650; (2004) 55 ATR 745; 2004 ATC 4674
[9] (2007) 161 FCR 468; [2007] FCAFC 135; 2007 ATC 4936; (2007) 67 ATR 178
[10] (2003) 138 FCR 1; [2003] FCA 1428; (2003) 54 ATR 423; 2003 ATC 5076
[11] At FCAFC [62]-[65]; FCR 486-487; ATC 4936 at 4951 to 4952; ATR 196
[12] At FCR 21; FCA [80]-[82]; ATC 5091, ATR 440.

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		section 8-1 of the ITAA 1997 (see paragraphs 79 to 81) and when a contribution will be capital in nature (see paragraphs 15 to 19 and 85 to 90).
11	**Contributions are only capital in nature where they constitute the nucleus of the trust** TR 2014/D1 failed to consider the House of Lords decision in *British Insulated and Helsby Cables v. Atherton*[13] (*British Insulated*). Only those circumstances analogous to the decision in *British Insulated* are likely to attract a finding that a contribution is capital in nature and delivers to an employer an enduring benefit.	As was the case in *British Insulated*, an advantage that relates to the workforce may nevertheless be a capital advantage where the longevity of the advantage is substantial (being throughout the business life). *British Insulated* compared the contribution which established the pension fund to the acquisition of a permanent asset for the use and enjoyment by employees, such as purchase of recreational fields or bath houses or a library. Whilst a result of the acquisition of the fields or bath houses or the library would be more content, loyal and efficient employees, the cost to acquire a capital asset and to employ the asset as capital, would flavour the expense as capital.[14] This type of advantage should be distinguished from the year to year benefits that an employer derives from an expense that results in a loyal and contented workforce over the short term without the acquisition of a capital asset or lasting or permanent advantage (for example, from a payment of annual bonuses or salary or wages).[15] However, a finding that a contribution formed the nucleus of an ERT is not the only circumstance in which the contribution could be considered to be capital in nature. Paragraphs 85 to 90 of TR 2017/D5 clarify the circumstances in which a contribution is considered to be capital in nature.
12	**Owners, controllers or shareholders** It is possible for a contribution for the benefit of a controller to be	The vast weight of authority that has considered the use of incentive trusts and offshore superannuation trusts put in place for the owners

[13] [1926] AC 205.
[14] At AC 215-216.
[15] *Pridecraft* at FCAFC [97]-[99]; ATC 4021-4022; ATR 233-234.

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	deductible if it is made on an arm's length basis provided the payment of the incentive will contribute to the annual profitability of the enterprise.	and controllers of the business indicates that contributions to such vehicles for the benefit of controllers is likely to be characterised, primarily, as a distribution of profits and/or capital in nature. This is despite a finding, in some of the cases, that the contribution may still have some nexus with business and have some likely impact on profitability of the company or trading entity – see the decisions in *Essenbourne*, *Walstern, Cameron Brae, Benstead Services Pty Ltd v. FC of T,*[16] *Gandy Timbers Pty Ltd v. FC of T,*[17] *Wensemius v. FC of T,*[18] *Cajkusic v. FC of T.*[19] Paragraph 84 of TR 2017/D5 highlights that a contribution in these circumstances will generally be seen as a transfer of profits.
13	**Authority from United Kingdom (UK)** TR 2014/D1 failed to consider the decision in *Heather (Inspector of Taxes) v. PE Consulting Group Ltd*[20] *(Heather*) and subsequent decisions in *Jeffs v. Ringtons Ltd*[21] and *E Bott Ltd v. Price (E Bott)*[22] where contributions to the trustee of an employee share plan were held to be deductible. In *Heather,* and other UK decisions, no analysis was required as to how the incentive was to be treated in the hands of the employees, to	The analysis adopted in *Heather* had, as its primary focus, the recurrence of the contributions. In an Australian context, the primary focus of a capital/revenue analysis is contained in the tests prescribed by *Sun Newspapers Ltd and Associated Newspapers Ltd v. Federal Commissioner of Taxation*[24] *(Sun Newspapers)* and *Hallstroms Pty Ltd v. Federal Commissioner of Taxation*[25] (*Hallstroms)* of which recurrence is relevant but not determinative. Justice Merkel in *Spotlight* came to the conclusion that the contribution to the trust in that case was revenue in nature after considering the

[16] [2006] AATA 976; (2006) 64 ATR 1232; 2006 ATC 2511.
[17] [1995] FCA 1111; (1995) 30 ATR 232; 95 ATC 4167.
[18] [2007] AATA 1006; 2007 ATC 2035; (2007) 66 ATR 144.
[19] [2006] AATA 134; 2006 ATC 2098; (2006) 62 ATR 1091.
[20] [1973] 1 All ER 8.
[21] [1986] 2 All ER 144.
[22] [1987] STC 100.

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	determine the deductibility of the contribution to the trust. These UK decisions are supported in *Federal Commissioner of Taxation v. Trail Bros Steel & Plastics Pty Ltd*[23] (*Trail Brothers*) and by Merkel J in *Spotlight.*	matters to be taken into account as described by Dixon J in *Sun Newspapers.* Justice Merkel only makes reference to the decision in *Heather* in the context of interpreting and applying the decision in *British Insulated*.[26] In *Trail Bros*, contributions were made pursuant to contractual obligations arising out of employment agreements that the employer made with the employees. The Commissioner conceded and the AAT concluded that as the payments were made pursuant to those contracts, they were deductible having regard to the character of the promise that underlay the payments.[27]
14	**Capital advantage** TR 2014/D1 fails to consider that, when determining whether there is a capital purpose to expenditure, it is the purpose of the expenditure from the position of the payer, not the recipient, that is the relevant consideration.	Paragraph 15 of TR 2017/D5 has been updated to make it clearer that the purpose being examined is that of the employer in determining whether a contribution secures a capital advantage.
15	**Shares acquired on or off market** A company will not generally obtain a capital structure advantage as outlined in TR 2014/D1 from contributions made to an ERT regardless of whether the contributions are used by the trustee to purchase shares on market or to subscribe for newly issued shares. Whether shares are acquired on market or via a new issue is a decision made based on commercial considerations and these commercial considerations are what drives an employer to determine how the shares are to be sourced. Any capital structure advantage that may be obtained is an	Paragraph 87 of TR 2017/D5 has been inserted to clarify when, in the context of ERT arrangements, a contribution will be considered to secure a capital advantage for the employer. This includes where a contribution is used to acquire shares and/or equity in the employer or a holding company of the employer where it is not intended to divest legal and beneficial ownership of the shares to employees within a relatively short period of time. It makes no difference if the shares are acquired on-market or via a new issue of shares. The advantage sought is determined from the perspective of the

[24] (1938) 61 CLR 337 at 363; [1938] HCA 73; (1938) 1 AITR 403 at 413; (1938) 5 ATD 87 at 96.
[25] (1946) 72 CLR 634 at 652; [1946] HCA 34; (1946) 8 ATD 190 at 198; (1946) 3 AITR 436 at 446.
[23] [2009] FCA 1210; 2009 ATC 20-141; (2009) 75 ATR 916.
[26] At FCA [66]-[74]; ATC 4693-4694, ATR 767-769.
[27] At FCA [20]; ATC 10259; ATR 922

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	incidental consequence of that decision. In addition, the accounting treatment of contributions will not differ regardless of whether contributions will be applied to acquire shares on market or via subscription and the method of acquisition does not change the share based payment expense recognised in the employer's profit and loss statement.	employer that makes the contribution.
16	**Shares acquired on or off market** TR 2014/D1 fails to consider that where the trustee utilises a contribution to acquire shares that are in existence, that there will be no capital advantage. The Ruling should make it clear that it does not apply to shares acquired by a trust on-market and does not apply if a contribution to a trust is made by a different entity to the company that issues the new shares.	See response to issue 15 above.
17	**De minimis – direct interest in the employer** It is unclear how the Commissioner will determine whether there is an intention by the employer for shares to be transferred to, and retained by, employees. Further it is unclear if intention is enough to satisfy this requirement, or if there is a requirement that the provision of shares actually occurs by transfer of legal title. <u>ESS arrangements</u> TR 2014/D1 fails to recognise that employees in an ESS, upon receipt of the shares from the trustee, may be required to sell their shares quickly in order to fund impending taxation liabilities. <u>Disposal of shares</u> The Ruling should not utilise the concept of period of time for which shares are to be held by employees, post vesting period, as a relevant consideration in determining whether a contribution to the trustee of an ERT is deductible (as discussed at paragraph 202 of TR 2014/D1). This concept should be removed. Generally, employers will not be aware of	Paragraph 87 of TR 2017/D5 clarifies when, in the context of ERT arrangements, a contribution will be considered to secure a capital advantage for the employer; including where a contribution is applied by the trustee to acquire shares in the employer and it is not intended to divest legal and beneficial ownership of those shares to employees within a relatively short period of time. TR 2017/D5 excludes ESS arrangements from its scope (see response to Issue No. 1). Consequently, the content from paragraph 202 of TR 2014/D1 has been removed from TR 2017/D5. Paragraph 16 of TR 2017/D5 clarifies when a capital advantage is considered to be small or trifling.

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	the intentions of an employee upon vesting to hold the shares for a period of time and is a relevant investment consideration of the employee, not the employer as to what period the shares are held. In any event, the award incentive is not impacted by the period of time the shares are held and the employer has no control to require the employee to hold the shares for a certain period. If this concept is retained, the relevant period of time should be the whole period from the grant of the original award to disposal of resulting shares.	
18	**Apportionment of contributions** The Ruling should include an example in which the Commissioner will attribute 50% of a contribution to the securing of capital advantages. The Ruling should outline the circumstances in which apportionment, as another safe harbour, would be applied for the purposes of section 8-1 of the ITAA 1997 where a contribution obtains both a revenue and capital advantage. If it is not appropriate, the part headed 'Apportionment of a contribution' (paragraphs 191 to 197 of TR 2014/D1) should be deleted.	Generally a contribution made under genuine ERT arrangement secures a capital advantage for the employer that is small or trifling. In which case, the capital advantage would be disregarded altogether and apportionment of the contribution would not be required. Paragraph 74 of TR 2017/D5 discusses when apportionment of a contribution may be required and it is noted that the Commissioner will accept all fair and reasonable bases of apportionment (paragraph 75 of TR 2017/D5). Reference to the 50% apportionment has been removed.
19	**Requirement that a contribution be paid out within a relatively short period of time** The Commissioner is taking an overly narrow approach to the decision in *Pridecraft/Spotlight* with too much emphasis on the period of time over which the contributions are to be diminished. The dissipation of a contribution over a 5 year period should not be determinative of the character of the contribution. There is no legislative basis upon which a contribution, in order to satisfy the connection with business, must be paid out within a 5 to 7 year time period.	Paragraphs 87 to 89 of TR 2017/D5 provide a set of parameters that indicate when a contribution is more likely to be capital or revenue in nature when made in certain circumstances. Where a contribution falls outside of these parameters, it cannot be automatically concluded that the expenditure is either capital or revenue in nature. The individual facts and circumstances of each case must be considered and whether a contribution is capital or revenue will depend upon this examination.
20	**Requirement for symmetry** There does not need to be symmetry between the treatment of the	Schemes that are designed primarily to secure an upfront deduction for contributions with the purported effect that distributions to employees

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	contribution going into the ERT which is revenue, and the contribution being paid out to employees, as capital. The symmetry of deduction to assessment as income is not supported by case law.	attract the capital gains tax (CGT) discount (without a commercial explanation for the structure) may attract the application of Part IVA of the ITAA 1936. Refer to Taxation Ruling TR 2010/6[28] as one such example where the Commissioner may consider the application of Part IVA of the ITAA 1936 if the contribution is not assessable to employees when paid out by the ERT.
Fringe benefits tax (FBT)		
21	**Otherwise deductible rule** TR 2014/D1 appears to apply a new test for an amount being otherwise deductible, by attempting to bring a *Fletcher & Ors v. Federal Commissioner of Taxation*[29] (*Fletcher*) style test to bear in determining whether something is otherwise deductible. The likelihood of generating assessable income in excess of the interest expense should not have an impact on the application of the otherwise deductible rule.	In *National Australia Bank v. Commissioner of Taxation*[30], Ryan J applied the principles in *Ure v. Federal Commissioner of Taxation*[31] and *Fletcher* to limit the amount of deduction that would have otherwise been allowable had the employee incurred the expense. Whilst, as acknowledged in this case, the otherwise deductible rule requires hypothetical questions to be posed, the approach of limiting the deduction based on subjective purpose in applying section 19 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) is 'consonant with the legislative purpose'.[32] The Commissioner's view about the deductibility of expenditure under section 8-1 of the ITAA as it is relevant to interest in this context is articulated in Taxation Ruling IT 2684.[33]
22	**Loan as remuneration** The statement at paragraph 76 of TR 2014/D1 that a loan is not a form	Where a loan fringe benefit arises, it is the value of the 'loan' by reference to a notional interest component that represents the taxable value. It is the benefit in terms of savings of interest that would be the

[28] Taxation Ruling TR 2010/6 *Income tax, Pay As You Go Withholding and fringe benefits tax: tax consequences on the issue, holding and redemption of bonus units as part of an employee benefits trust arrangement*
[29] (1991) 173 CLR 1; [1991] HCA 42; (1991) 22 ATR 613; (1991) 91 ATC 4950.
[30] (1993) 46 FCR 252; [1993] FCA 531; (1993) 93 ATC 4914; (1993) 26 ATR 503.
[31] [1981] FCA 9; 81 ATC 4100; (1981) 11 ATR 484.
[32] At FCA [59]; FCR 272; ATC 4930; ATR 522.
[33] Taxation Ruling IT 2684 *Income tax: deductibility of interest on money borrowed to acquire units in a property unit trust.*

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	of remuneration is unsubstantiated and patently incorrect. The provision of an interest free loan is the provision of a fringe benefit to be provided to an employee as part of their remuneration in respect of their employment.	form of remuneration. A genuine 'loan' however is not 'income'.
	Section 6-5 and assessability of benefits	
23	**Trust distributions assessable as remuneration** Where the trustee receives an amount from an employer, whether by way of cash contribution or by loan, and the trustee uses that money to invest in assets, distributions made by the trustee to the beneficiaries have no connection to the services provided by the employee to the employer at the time the distribution is made. Distributions from the ERT of either income or capital lack any nexus with the provision of services by the employee to the employer. To suggest otherwise is to disregard the different parties involved and the legal nature of the arrangements. Neither *Federal Commissioner of Taxation v. Dixon*[34] (*Dixon*) nor *Murdoch v. Commissioner of Payroll Tax* (Vic)[35] (*Murdoch*) support the position in TR 2014/D1 at paragraphs 265 to 268. The analysis in relation to the characterisation of the distributions from the ERT to an employee beneficiary is in error. The character of the distribution will be determined by the proper application of the trust assessing provisions as to whether the distribution includes a distribution of income or capital.	Trust distributions not dealt with by the trust assessing provisions can be assessed as ordinary income to the employee if they bear that character in the hands of the employee. Where a distribution from an ERT is intended to be paid as a form of remuneration, and is paid as such, then it is ordinary income of the employee. Where the amount is paid from and who pays it will not alter its character. See paragraphs 122 to 124 of TR 2017/D5. In *Pridecraft*[36], the ERT invested the funds that it received from the employer entity and utilised a return on the amounts loaned to make payments to employees. There was no dispute that the distributions from the Incentive Trust were paid out as bonuses of the employees. Refer to paragraphs 10 to 13 of TR 2010/6. Where an employee receives an amount from the trustee of an ERT that does not have a sufficient connection with employment, the amount is not remuneration. Paragraph 126 of TR 2017/D5 includes a list of factors that will evidence that benefits provided by the trustee are not remuneration.
24	**Owners, controllers or shareholders** The Ruling should include examples where an individual is both an	There will be some instances where an owner/controller may be participating in an ERT in his or her capacity as an employee.

[34] (1952) 86 CLR 540; [1952] HCA 65; (1952) 10 ATD 82; (1952) 5 AITR 443.
[35] (1980) 143 CLR 629; [1980] HCA 33; 80 ATC 4424; (1980) 11 ATR 135.
[36] see *Pridecraft* at FCAFC 37; ATC 4010; ATR 210 at 220.

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	employee and shareholder (or associate) and receives a benefit in the individual's capacity as a shareholder (or associate) and not as an employee. The Ruling should provide further explanation in respect of the phrase 'in, or by reason of, that capacity' to differentiate between the employee and the shareholder. The capacity in which an entity receives a benefit is a question of fact and will depend on factual circumstances in question. To this extent, the Ruling should provide a list of factors that assist taxpayers in determining the capacity in which they have received a benefit.	In what capacity an entity receives a benefit is a matter of fact and will be determined with regard to the individual factual circumstances of each case. Paragraph 84 of TR 2017/D5 clarifies when a contribution is applied for the benefit of owners, controllers or shareholders in that capacity. Paragraph 126 of TR 2017/D5 includes a list of factors that evidence when benefits provided by a trustee of an ERT will have an insufficient connection with employment. Miscellaneous Taxation Ruling MT 2019[37] outlines when a benefit provided to a shareholder who is also an employee receives the benefit in respect of their employment and in their capacity as an employee.
25	**Salary or wages** The explanation in TR 2014/D1, other than in the examples, fails to consider the circumstances (for example where it is dependent on the employee's work performance) in which a trust distribution would be characterised as a payment of salary, wages or a bonus. The Ruling should include comments to this effect and refer to *FC of T v. White*[38] (*White*).	In *White,* Gordon J found that the contribution was remuneration of Mr White as, in accordance with an agreement with his employer, it represented a reward for services and he directed the way in which the reward was dealt with (by directing it be paid to the ERT instead of directly to him).[39] Paragraph 125 of TR 2017/D5 includes a list of factors that will evidence that benefits provided by a trustee of an ERT are remuneration. It includes the circumstance such as in *White* where the benefit provided by the ERT is agreed between the employer and employee to be consideration for services rendered by the employee.
26	**Receipt of amounts previously taxed to the trustee under 99A** The Ruling should provide that amounts that are paid by the trustee, for which the trustee has previously been assessed on under section 99A of the ITAA 1936, to an employee are not included in the employee's	Paragraph 123 of TR 2017/D5 clarifies the ATO view that it is irrelevant whether an amount is paid from an amount previously assessed to the trustee in determining if the amount is income in the hands of an employee beneficiary and outlines that subparagraph 99B(2)(c)(ii) of the ITAA 1936 (concerning amounts previously assessed to the trustee

[37] Miscellaneous Taxation Ruling MT 2019 *Fringe benefits tax : shareholder employees of family private companies and directors of corporate trustees*
[38] [2010] FCA 730; 2010 ATC 20-195; (2010) 79 ATR 498.
[39] At FCA [28]; ATC 11,177; ATR 505.

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	assessable income under sections 6-5 and 15-2 of the ITAA 1997. The relevant exception in paragraph 99B(2)(c)(ii) of the ITAA 1936 can be relied upon to reduce the employee's assessable income to nil. Furthermore, where the employee is a non-resident, the net cash distribution should not be subject to Australian withholding tax. If the Ruling suggests that such distributions should be taxable to the employee, this conflicts with existing practice, relevant legislation and previous Class Rulings issued by the ATO, specifically Class Ruling CR 2013/15.[40]	of a non-resident trust estate) does not generally apply to ERT arrangements. The character of a payment in the hands of a taxpayer (an employee, in the case of an ERT) is not informed or determined by whether the amount has been taxed to the payer in an earlier income year (the trustee, in the case of an ERT) under section 99A of the ITAA 1936. Therefore, if a payment meets the requirements of section 6-5 of the ITAA 1997 (in that it is made to an employee as remuneration), it is assessable to the employee under section 6-5 regardless of whether it was assessed to a trustee under section 99A of the ITAA 1936 in an earlier income year. It is outside of the scope of the 2017 Draft Ruling to consider whether a distribution to a non-resident employee is subject to Australian withholding tax or the tax implications of ERTs that are or were non-resident trust estates. Class Ruling CR 2013/15 applies to the defined class of entities who take part in the scheme as described in that Ruling. It is outside of the scope of TR 2017/D5 to consider ESS arrangements. The position for ESS arrangements is outlined in Draft Taxation Determination TD 2017/D2 *Income tax: When will a dividend equivalent payment, made by a trustee under an employee share scheme that delivers ESS interests taxed by Subdivision 83A-B or 83A-C of the Income Tax Assessment Act 1997 be assessable as remuneration under section 6-5?*
Division 7A		

[40] Class Ruling CR 2013/15 *Income tax: Leighton Holdings Limited Equity Incentive Plan.*

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27	***Section 109J*** The test for what an employer is obligated to do for the purposes of section 109J of the ITAA 1936 should be a broad one, so that if an employer is making contributions in conformity with commitments given to employees to remunerate them using an ERT, this should be considered to be an obligation for the purposes of section 109J. It should not be necessary for the employer to have contracted with the trustee. Upon a board of a company making a resolution to establish an ERT and make a payment to the trustee for the benefit of the general class of employees, the company has a pecuniary obligation to do so and would be a payment to which section 109J of the ITAA 1936 applies. The trustee may also demand payment of the contribution if the board resolves to make a contribution but does not pay it. The Trust Deed creates a unilateral contract arrangement between the trustee and the employer. The Ruling should consider the nature of an obligation an employer may owe its employees.	A resolution by a company's board to pay an amount to an ERT is not a pecuniary obligation to which section 109J of the ITAA 1936 applies. Contributions made by an employer to an ERT are settlements of corpus. The trustee is bound to deal with that corpus according to the terms of the governing Trust Deed. Settlements of corpus are made unilaterally by the settlor (the employer in an ERT arrangement). It is not made in discharge of any antecedent obligation on the part of the settlor. A contribution forming the corpus of an ERT involves no discharge of any obligation capable of being the trigger event for section 109J of the ITAA 1936. See paragraphs 109 to 111 of TR 2017/D5.
28	***Payments through an interposed entity*** The application of section 109T of the ITAA 1936 depends upon a number of facts and, as such, the Ruling should make a considered statement regarding section 109T and outline the facts that would lead to a finding that section 109T applies.	Paragraph 118 of TR 2017/D5 describes the conditions that must arise before section 109T of the ITAA 1936 can apply to an ERT. See also paragraphs 40 and 41 of TR 2017/D5.
29	***Further clarity required on when a deemed dividend is taken to have been paid to trustee or an employee*** The Ruling should make it clearer that the trustee can be taxed under section 109C of the ITAA 1936 on the contribution or the employee can be taxed under section 109T on the loans. It must be stated that the two outcomes are mutually exclusive.	A contribution to an ERT made by an employer that is a private company may be deemed under section 109C of the ITAA 1936 to be a dividend to the trustee. Where the contribution is not a deemed divided to the trustee, the contribution may be a deemed dividend taken to have been paid to an employee by their private company employer.

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		Paragraph 39 of TR 2017/D5 clarifies that a loan by a trustee is taken to be a deemed dividend only in situations where the payment or loan to the trustee is itself not a deemed dividend.
30	***Disadvantage to private companies*** The application of Division 7A to ERT arrangements creates an unwarranted distinction between public and private companies resulting in private companies being significantly disadvantaged in terms of remunerating staff compared to public companies. It is questionable as to whether this could have been an intended policy outcome.	Where an arrangement is structured to obtain favourable tax outcomes, Division 7A of the ITAA 1936 may apply to the arrangement. Division 7A of the ITAA 1936 is an integrity provision intended to catch the untaxed distribution of private company profits and necessarily treats private companies differently to public companies.
31	***Payments and loans not treated as dividends*** A fringe benefit is excluded from being included in a recipient's assessable income by application of section 23L of the ITAA 1936. Section 23L of the ITAA 1936 would therefore make an amount which attracts FBT non-assessable non-exempt income and therefore also be excluded from the operation of Division 7A by application of section 109L of the ITAA 1936.	The ordering of provisions contained in Division 7A of the ITAA 1936 and the FBTAA depends upon the benefit being provided. In some circumstances, where a benefit is provided to an employee which attracts FBT, it will be non-assessable non-exempt income in the hands of the employee by application of section 23L of the ITAA 1936 and will therefore not be a benefit which is a deemed dividend by application of Division 7A. However, by virtue of section 109ZB of the ITAA 1936, loans are treated differently (see paragraph 118 of TR 2017/D5).
32	***Loans made in the ordinary course of business*** Loans to employees provided by a company as a form of remuneration have been made in the ordinary course of that company's business and should therefore be excluded from the operation of Division 7A by	The Commissioner will consider whether or not section 109M of the ITAA 1936 would apply to relevant loans made from a private company directly to employees. However, the arrangements considered in TR 2017/D5 involve the private company making payments or loans to

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	section 109M of the ITAA 1936.	the trustee of the ERT, rather than directly to employees. In an arrangement involving a loan from a private company to an interposed entity, a notional loan may be taken to arise by virtue of section 109T of the ITAA 1936.[41] There is no suggestion that loans provided under an ERT arrangement are made in the private company's ordinary course of business, nor that the private company have usual terms on which it lends to arm's length parties. These are requirements before section 109M of the ITAA 1936 would apply (and before the Commissioner would factor in its role in determining any amount of deemed payment or notional loan to an employee arising through the operation of section 109T of the ITAA 1997[42]). These requirements place the focus of section 109M of the ITAA 1936 on those companies who provide loans in the ordinary course of their money-lending business, or business as a financier. A detailed consideration of the role of section 109M of the ITAA 1936, beyond that already dealt with in TD 2011/16, is outside the scope of TR 2017/D5.
33	***Distributable surplus*** The calculation in section 109Y of the ITAA 1936 for distributable surplus is too broad and may operate to extend the operation of Division 7A where the net income of the company is actually very low.	A consideration of the policy and detailed operation of section 109Y of the ITAA 1936 is outside the scope of TR 2017/D5.
34	***Loans to purchase shares under ESS arrangements***	Section 109NB of the ITAA 1936 recognises that loans to employees

[41] In determining the amount of any deemed payment or notional loan arising under section 109T of the ITAA 1936, the Commissioner will consider a number of factors. See Taxation Determination TD 2011/16 *Income tax: Division 7A - payments and loans through interposed entities - factors the Commissioner will take into account in determining the amount of any deemed payment or notional loan arising under section 109T of the Income Tax Assessment Act 1936.*

[42] In this context, we note that paragraph 28 of Taxation Determination TD 2012/12 *Income tax: Division 7A: do the rules in Subdivision D of Division 7A of Part III of the Income Tax Assessment Act 1936 which exclude certain payments or loans from being treated as dividends under Subdivision B of Division 7A of that Act necessarily affect the circumstances in which a deemed payment or notional loan arises under Subdivision E of Division 7A of that Act* states that 'it is difficult to imagine how section 109M could apply to a notional loan between the private company and the target entity'.

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	Section 109NB of the ITAA 1936 may be manipulated by companies to remove the arrangement from the application of Division 7A by providing low discounts on share allocations as part of an ESS arrangement.	made in the course of genuine ESS arrangements should not attract Division 7A. If a scheme or arrangement is artificially manipulated so as to access tax benefits without a commercial explanation for doing so, Part IVA of the ITAA 1936 may apply to cancel such tax benefits.
35	***Amounts treated as dividend is not a fringe benefit*** Payments by an employer to a trust so that employees may enjoy fringe benefits in respect of employment (by way of low interest loans and share units) are tax deductible and should not be subject to Division 7A. The Ruling should identify the interaction between FBT and Division 7A where ordinarily, FBT will not arise if the benefit is a deemed dividend for the purposes of Division 7A.	In order for the exception in subsection 109ZB(3) of the ITAA 1936 to apply to a contribution, it must be made to an employee or an associate of an employee in that capacity. An employee must be the identifiable recipient of the payment or an identifiable associate of the recipient. A payment to the trustee of a trust in respect of employees in a general sense does not fall within the exception contained in subsection 109ZB(3) of the ITAA 1936. See paragraphs 105 to 107 of TR 2017/D5.
	Receipt of franked distributions	
36	**Receipt of franked distributions** <u>Clarify when employees are entitled to franking offsets</u> The Ruling should provide clarification when employee beneficiaries in a typical ERT should be entitled to franking offsets and discuss what it means to have a delta greater than 30%. The reference at paragraph 329 of TR 2014/D1 to the amount payable on redemption would suggest that the ATO would accept that an employee beneficiary has a vested and indefeasible interest in the relevant shares if they were entitled to be paid the market value of the shares. The fact that the trustee of the an ERT has a lien over an employee beneficiary's shares as security for repayment of a loan made to the employee beneficiary does not mean that the employee beneficiary does not have a vested and indefeasible interest in the shares (*Dwight*	Whether a tax offset is available to a beneficiary will depend on the specifics of the arrangement entered into and will need to be determined on the facts of the case (including the rights and entitlements of the parties to the arrangement) having regard to the explanation of the relevant law set out in TR 2017/D5. Paragraph 48 of TR 2017/D5 outlines that a relevant employee participating in an ERT is only entitled to a tax offset for any share of franking credits attached to franked distributions of the ERT if the employee is a qualified person as defined, and the other legislative conditions are satisfied. To satisfy the qualified person rules an employee beneficiary of an ERT will need to have a vested and indefeasible interest. Paragraph 50 of TR 2017/D5 provides circumstances that are relevant and likely to impact this requirement.

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	v. Commissioner of Taxation[43]). Draft Ruling TR 2004/D25[44] concludes at paragraph 63, that a beneficiary can have an absolute entitlement to an asset of the trust, under the CGT provisions, despite the asset being subject to a mortgage. The Commissioner has also taken the view, in Private Ruling Authorisation Numbers 1012032078130 and 1011801351978 that a lien held by a trustee for repayment of a loan to a participant in an ERT does not interfere with the participants vested and indefeasible interest in shares held of their behalf by the trustee. <u>No franking credits can be distributed by an ERT</u> Because most relevant ERTs are not fixed trusts and most ERTs have vesting conditions, virtually no ERT can receive a franked dividend and pass on the franking credit to an employee unless their interest has vested. The ATO should make a direct statement to this effect early in the Ruling. There is a risk that if this conclusion is embedded at the end of a lengthy ruling, it will be overlooked. <u>*Soubra*</u> The decision in *Soubra v. FC of T*[45] (*Soubra)*, that a beneficiary in the ERT who has a three year vesting period prior to receiving either the underlying shares or units in an ERT, generally, cannot be treated as having a vested and indefeasible interest in the share for the purposes of former subsections 160APHL(10) and (14) of the ITAA 1936 is incorrect. <u>Commissioner's discretion</u> The interpretation of former subsection 160APHL(14) of the ITAA 1936 in *Soubra* is too literal an application of the discretion and results in the	Consideration of whether the relevant interest is vested and indefeasible is not of itself determinative. Relevantly, redemption at market value (or, specifically, net asset value) is deemed by the Act to not of itself make the interest defeasible in the relevant sense. Moreover, the Commissioner accepts the correctness of the decision in Soubra. Further, there is a legislative definition of employee share scheme security for these purposes. It would not extend to arrangements that do not provide employee share scheme securities, and therefore does not extend to the arrangements covered by TR 2017/D5. Consideration will be given to providing further guidance focussing on the way the law applies to particular examples if the need is identified.

[43] (1992) 37 FCR 178 at 192; (1992) 23 ATR 236 at 248-249; 92 ATC 4192 at 4202-4203.
[44] *Income tax: capital gains: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997.*
[45] [2009] AATA 775; 2009 ATC 10-113; (2009) 77 ATR 946.

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	subsection having no practical effect if it excludes access to franking credits during the vesting period. There is no barrier preventing the Commissioner from making a 'retrospective' finding that an employee held a vested and indefeasible interest in the corpus of the trust if the employee's interest subsequently vests absolutely and the employee is given the benefit of the dividend once the employee meets all of the vesting conditions. The Commissioner should consider this possibility. Employee share trusts The Ruling should consider that the definition of 'employee share scheme security' in former section 160APHD of the ITAA 1936 and the application of former paragraph 160APHL(10)(c), ensure that shares held by employees through the employee share trust are held sufficiently at risk. The Ruling should accept that an ERT is treated the same as an ESS security so that franking credits can flow through a trust which meets the requirements of the current ESS rules. Examples The Ruling should provide examples regarding when an interest in an ERT will be considered to be vested and indefeasible and, in turn, when an employee beneficiary will be entitled to franking offsets.	
Examples		
37	**Examples 3 and 4– ESS arrangements** Examples 3 and 4 of TR 2014/D1 could be an ESS arrangement, in which case the conclusions reached could be wrong or misleading.	TR 2017/D5 carves out ESS arrangements from its scope. See paragraphs 1 and 3.
Date of Effect		
38	**Proposed retrospective application of Ruling** It is currently unclear whether date of issue refers to the issue date of the Draft or final Ruling. The Ruling should apply only prospectively (and/or provide transitional relief) from the issue date of the final Ruling,	The Date of effect has been amended to provide clarity. The Commissioner will not undertake active compliance action in respect of whether a contribution made by an employer to the trustee of an ERT is deductible under section 8-1 of the ITAA 1997 where that

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	once the Commissioner's final position is certain, providing companies with a reasonable amount of time to make any necessary adjustments to the operation of their ERT arrangement. There are inconsistencies between the approach adopted at paragraph 163 of TR 2014/D1 and that expressed in TR 2014/D2[46] at paragraph 52 in relation to the retrospective application of the ATO's general administrative practice. The views expressed in the Ruling should only apply retrospectively where there is fraud or evasion, having regard to the position articulated at paragraph 36 of PS LA 2011/27.[47] <u>Division 7A, FBT and franking credits</u> The absence of the ATO raising Division 7A previously as an issue for ERTs evidences an administrative practice that should not be overturned retrospectively and a similar approach adopted to that in Taxation Ruling TR 2010/3.[48] Retrospective application in relation to franking credits should be limited to ERTs that fail to be fixed trusts.	contribution is made before the issue date of Draft Ruling TR 2014/D1, 5 March 2014. This achieves in practical terms a prospective application in respect of that issue and is consistent with the Commissioner's undertaking in PS LA 2011/27. The mechanism for achieving such prospective application is by exercise of the Commissioner's general powers of administration under section 1-7 of the ITAA 1997 and section 8 of the ITAA 1936. The parameters of that power were recently considered in *Macquarie Bank Limited v. Federal Commissioner of Taxation*[49] and the approach taken by the Commissioner is in accordance with statements made by the Full Court in that case. There is no evidence of a contrary prior general administrative practice in respect of Division 7A and franking credits. The Commissioner has consistently followed and applied the positions articulated in TR 2014/D1 and TR 2017/D5 in respect of franking credits and successfully defended those views in *Soubra*.

[46] Taxation Ruling TR 2014/D2 *Income tax: the application of the foreign income tax offset limit under section 770-75 of the Income Tax Assessment Act 1997 to foreign currency hedging transactions.*
[47] Law Administrative Practice Statement PS LA 2011/27 *Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively*.
[48] Taxation Ruling TR 2010/3 *Income tax: Division 7A loans: trust entitlements.*
[49] [2013] FCAFC 119; (2013) 89 ATR 262.

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39	**Arrangements that have a private ruling** The Ruling should provide clarity on how it affects those taxpayers that have obtained a private ruling in relation to an ERT, in particular, employers that have a private ruling noting that they can claim a deduction for contributions to the ERT. The date of effect causes uncertainty as it is not clear if the ATO will undertake compliance activities applying the ATO view set out in TR 2014/D1 to any ERT arrangement that does not have a private binding ruling in respect of contributions made prior to the release of TR 2014/D1.	The effect of inconsistent rulings is articulated in Taxation Ruling TR 2006/11[50] at paragraphs 42 to 48. There are some limitations to the protection offered by a private ruling. Usually the private ruling applies only to the entity in respect of whom the application was made. Furthermore, if the scheme is not implemented in the way set out in the private ruling, or material facts were omitted from the private ruling application, or misleadingly or inaccurately stated, the private ruling does not bind the Commissioner. Law Administration Practice Statement PS LA 2011/27[51] provides the Commissioner's approach to determining whether the ATO should not take action to apply its view of the law in past years or periods. On the basis of the approach in PSLA 2011/27, compliance action in relation to the deductibility of contributions to an ERT consistent with the views in TR 2014/D1 will only be prospective from the publication date of TR 2014/D1 (ie. 5 March 2014).

[50] Taxation Ruling TR 2011/6 *Private Rulings.*
[51] *Law Administration Practice Statement* PS LA 2011/27 Determining whether the ATO's views of the law should be applied prospectively only.