



# ***PCG 2024/D1 - Section 99B of the Income Tax Assessment Act 1936 - ATO compliance approach***

 This cover sheet is provided for information only. It does not form part of *PCG 2024/D1 - Section 99B of the Income Tax Assessment Act 1936 - ATO compliance approach*

 For information about the status of this draft Guideline, see our [Advice under development program](#).



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## **Draft Practical Compliance Guideline**

# **Section 99B of the *Income Tax Assessment Act 1936* – ATO compliance approach**

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### **📌 Relying on this draft Guideline**

This Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

*This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.*

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### **What this draft Guideline is about**

1. With increasing globalisation and migration flows into and out of Australia, we have observed an increase in resident taxpayers who receive an amount of trust property (being a payment or a benefit) from non-resident trusts. The purpose of this draft Guideline<sup>1</sup> is to support taxpayers in complying with section 99B of the *Income Tax Assessment Act 1936*.
2. All legislative references in the Guideline are to the *Income Tax Assessment Act 1936*.
3. This Guideline provides you with guidance on our approach to section 99B in respect of arrangements where property of a non-resident trust (or trust property accumulated

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<sup>1</sup> For readability, all further references to 'this Guideline' refer to the Guideline as it will read when finalised. Note that this Guideline will not take effect until finalised.

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while the trust was a non-resident) is paid to or applied for the benefit of a resident beneficiary. This Guideline aims to provide clarity on:

- common scenarios where section 99B may need to be considered
- the practical aspects of record keeping evidencing that an exception in subsection 99B(2) applies to reduce the amount that section 99B would otherwise include in assessable income
- our compliance approach to distributions and benefits which we consider to be low risk, and the record keeping expected to substantiate this.

4. Where your arrangement does not meet the low-risk criteria outlined in this Guideline, we may engage with you to better understand your arrangement. It does not mean of itself that section 99B necessarily applies.

5. This Guideline does not replace, alter or affect the ATO's interpretation of the law in any way.

### **Scope of this Guideline**

6. This Guideline applies to trust property accumulated by a trust during any period that it was a non-resident of Australia for tax purposes. Under this Guideline, we will consider section 99B in respect of a payment or benefit to a resident beneficiary from a trust that accumulated property while the trust was a non-resident of Australia for tax purposes.<sup>2</sup>

7. Unless otherwise stated, all references in this Guideline to a trust are to a non-resident trust, which for the purposes of this Guideline is taken to include a resident trust to the extent that it is dealing with amounts accumulated during a period while the trust was a non-resident of Australia.

### **Date of effect**

8. When finalised, this Guideline is proposed to apply both before and after its date of issue.

### **Background**

9. Section 99B may apply where a resident beneficiary receives an amount of trust property from a non-resident trust estate, including:

- distributions paid by the trustee to a beneficiary
- assets transferred by the trustee to a beneficiary
- use of trust property by a beneficiary
- loans to a beneficiary by the trustee, or
- amounts received from a deceased estate.

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<sup>2</sup> A trust is a non-resident trust when the trustee (or executor of a deceased estate) is a non-resident of Australia.

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10. The amount of trust property paid to, or applied for the benefit of, the resident beneficiary is included in that beneficiary's assessable income unless an exception applies. Subsection 99B(2) sets out a number of exceptions that operate to reduce the amount included by subsection 99B(1) in assessable income. The exceptions include amounts representing:

- corpus of the trust, except to the extent it is attributable to amounts derived by the trust that, if they had been derived by a taxpayer being a resident, would have been included in the assessable income of that taxpayer (paragraph 99B(2)(a))
- an amount that if it had been derived by a taxpayer, being a resident, would not have been included in their assessable income (paragraph 99B(2)(b))
- an amount that is or has already been included in the beneficiary's assessable income under section 97, or assessed to the trustee under section 98, 99 or 99A (paragraph 99B(2)(c)).

#### **Application of section 99B – common scenarios**

11. Section 99B may need to be considered in the following common scenarios. In each scenario, information and documentation would need to be obtained where the resident beneficiary wants to determine if one of the exceptions in subsection 99B(2) applies to reduce the amount included by paragraph 99B(1) in assessable income.

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#### **Example 1 – non-resident migrates to Australia**

12. *Marty migrates to Australia during the year ended 30 June 2024. After migrating to Australia, Marty begins the process of winding up his overseas interests, including a non-resident trust which holds listed shares. The trust continues to be a non-resident trust as the trustee is a non-resident of Australia.*

13. *Since the establishment of the trust, all income earned from the listed shares has been accumulated and reinvested in further shareholdings. During the year ended 30 June 2025, the trustee of the non-resident trust, distributes the listed shares to Marty.*

14. *As Marty is a resident beneficiary who has received trust property from a non-resident trust, he needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.*

#### **Example 2 – resident beneficiary receives a distribution**

15. *Alice is an Australian-resident taxpayer and requires funds to assist in buying a house. Her non-resident parents agree to provide financial assistance.*

16. *During the year ended 30 June 2025, Alice's parents, in their capacity as trustees of a non-resident trust, appoint an amount totalling \$500,000 to Alice. The trustees advise Alice that she is a beneficiary of the trust and that the amount has been paid from the trust and sourced from accumulated profits.*

17. *As Alice has received a distribution from a non-resident trust, she needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.*

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**Example 3 – resident beneficiary receives a gift**

18. Jack is a resident of Australia and during the year ended 30 June 2025, receives \$200,000 from a non-resident trust estate controlled by his grandmother who resides overseas.

19. As Jack has received an amount from a non-resident trust, he needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.

**Example 4 – resident beneficiary receives a loan**

20. Vicky is an Australian-resident taxpayer and needs funds to renovate her property. During the year ended 30 June 2025, Vicky receives a \$500,000 loan from her father, a non-resident of Australia.

21. The funds have been lent by Vicky's father as trustee of a non-resident trust of which Vicky is a beneficiary.

22. As Vicky has received a benefit from a non-resident trust, she needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.

**Example 5 – trustee allows resident beneficiary to use non-resident trust property**

23. A non-resident trust has a rare artwork collection. Adam is a resident of Australia, and his uncle controls the non-resident trust. Adam asks his uncle to borrow one of the pieces to hang in his business for a 2-year period.

24. Adam's uncle agrees, and the trustee allows Adam to borrow the artwork. Adam's uncle also advises him that he is a beneficiary of the trust.

25. As Adam has received a benefit from a non-resident trust, he needs to consider the application of section 99B, including whether one of the exceptions applies.

**Example 6 – beneficiary receives amount from a deceased estate**

26. Amanda is a resident beneficiary of a non-resident deceased estate. Amanda's grandfather was a non-resident and recently passed away.

27. At the time of her grandfather's death, the assets included in his estate consisted of cash and listed shares. During the 2025 income year, the non-resident trustee (executor), as permitted by the will, liquidates the listed shareholdings, and makes a payment in US dollars to Amanda.

28. As Amanda has received an amount of trust property from a non-resident trust, she needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.

**Example 7 – resident beneficiary receives a loan which is later forgiven**

29. Tom is a resident of Australia and needs funds to pay for university. Tom's grandmother agrees to help him.

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30. Tom receives a loan of \$100,000 during the 2025 income year, from a non-resident trust of which he is a beneficiary, and which is controlled by his non-resident grandmother. After Tom completes his first semester of university, his grandmother, acting in her capacity as trustee, decides to forgive the loan, and allows Tom to retain the funds to pay his university fees.

31. As Tom has received a benefit from a non-resident trust, he needs to consider the application of section 99B with respect to the 2025 income year, including whether one of the exceptions applies.

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### **Record keeping for the hypothetical resident taxpayer tests**

32. Evidence is required to substantiate that an exception in paragraph 99B(2)(a) or (b) applies.

33. For the 'corpus' exception in paragraph 99B(2)(a), Draft Taxation Determination TD 2024/D2 *Income tax: factors taken into account in applying the exceptions to section 99B of the Income Tax Assessment Act 1936 contained in paragraphs 99B(2)(a) and (b)* provides that trust corpus refers to trust capital represented by the assets of the trust, as distinct from current year trust income.<sup>3</sup>

34. The corpus exception excludes an amount representing corpus from the amount assessed under subsection 99B(1), except to the extent to which it is attributable to amounts derived by the trust that, if they had been derived by a hypothetical resident taxpayer, would have been included in the taxpayer's assessable income. This is referred to as the hypothetical resident taxpayer test.

35. In most instances, the capitalised income or gains accumulated by the trust may be taxed under subsection 99B(1) because of the application of the hypothetical resident taxpayer test.

36. Similarly, the 'non-taxable' exception in paragraph 99B(2)(b) excludes amounts derived by the trust from being assessed under subsection 99B(1), but only to the extent that they would not have been assessed to a hypothetical resident taxpayer if they had instead been derived by such a taxpayer.

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### **Example 8 – identification of amounts removed by the hypothetical resident taxpayer tests**

37. The trustee of a non-resident trust purchases a property for \$1 million. This is funded by \$100,000 from the settled trust sum and borrowings of \$900,000. The trustee sells this property several years later for \$1.1 million. Following the sale of the property and pursuant to a power in the trust deed, the trustee appoints and pays \$1.1 million to Chris, a resident of Australia and beneficiary of the non-resident trust.

38. Upon receiving the funds from the non-resident trust, Chris obtains confirmation from the trustee that the amount paid was sourced entirely from the sale of the property.

39. The \$1.1 million amount distributed to Chris is corpus. However, in applying the hypothetical resident taxpayer tests, \$100,000 is excluded from both the corpus exception and the non-taxable exception and will be assessed under subsection 99B(1).

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<sup>3</sup> See paragraph 19 of TD 2024/D2.

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40. We recognise that it can be challenging to obtain the relevant documents and information from a non-resident trustee to evidence or substantiate that an amount or benefit received from a non-resident trust satisfies the corpus exception or non-taxable exception (including that the hypothetical resident taxpayer tests do not remove the amount from paragraph 99B(2)(a) or preclude the exception in paragraph 99B(2)(b)).

41. We also acknowledge that the ability for a resident beneficiary to obtain documents and information from a non-resident trustee can be hindered depending on the relationship between the resident beneficiary and the non-resident trustee, and the relevant laws in the overseas jurisdiction.

42. However, the onus is on the resident beneficiary to provide information and documentation to us to evidence that a relevant exception is satisfied. Where the onus is not discharged, we may have cause to apply compliance resources to determine whether the amount is taxable under subsection 99B(1).

43. The core documents and information that a resident beneficiary should obtain to demonstrate that the source of an amount received from a non-resident trust is attributable to corpus and which satisfies the corpus exception includes:

- the signed and executed trust deed or will of the deceased
- the signed trustee minutes, resolutions or distribution statements confirming an amount was paid or applied for the benefit of a beneficiary from the trust's corpus
- copies of the trust's financial accounts for the relevant years, prepared in accordance with the accounting principles of the relevant country.

44. Further documentation and information required to support that the corpus exception or non-taxable exception applies will be determined on a case-by-case basis and includes, but is not limited to, any one or more of the following:

- records detailing the property used to settle the trust, such as payment records or documents demonstrating the transfer of property
- for a deceased estate, a document setting out the assets owned by the deceased at their date of death, or a valuation of their assets at the date of death
- documents showing property being contributed to the trust
- other records or working papers prepared by the trustee or their professional advisers, for example, accounting working papers
- bank statements or payment records
- copies of all trustee minutes, resolutions or distribution statements confirming the payment of capital amounts
- accounting records, for example, general ledgers
- correspondence from the executors or their legal advisers setting out the terms of the will
- advice from professional advisers, including foreign advisers, to support the evidence provided
- foreign legal advice
- tax distribution statements



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- foreign country tax returns of the beneficiary where the beneficiary is required to lodge in the foreign jurisdiction
- foreign resident withholding tax statements from the foreign jurisdiction.

45. All information and documentation provided to us should be in English or be accompanied with an English translation.

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**Example 9 – records to substantiate the corpus exception**

46. *A non-resident trust is settled with \$500,000 cash. Shares are acquired for \$100,000 and real property is acquired for \$400,000.*

47. *At this date, the trustee makes a resolution to transfer the shares to a resident beneficiary, Steven, who is the son of the controller of the non-resident trust.*

48. *Upon receiving the shares, Steven obtains the following documents from the trustee:*

- *the signed trustee resolution to transfer the shares*
- *a copy of the trust deed which confirms the trustee can distribute corpus to the resident beneficiary*
- *a copy of the trust's financial accounts for the relevant year confirming the historic cost and allocation of the shares and the subsequent change to the net assets of the trust*
- *copies of bank statements confirming the purchase of the shares using the trust's settled funds, and*
- *a copy of the share transfer forms or agreements and evidence of the market value at the date of transfer.*

49. *In this example, Steven is able to provide documents that evidence the amount he receives is sourced from the trust corpus and that the corpus exception is satisfied.*

**Example 10 – records to substantiate the corpus exception**

50. *The ATO receives information from AUSTRAC that Lisa, a resident of Australia, has received funds totalling \$300,000 from an overseas source. Upon commencing our review of Lisa's affairs, Lisa informs us that the amount is a payment sourced from trust corpus of a non-resident deceased estate and that she has received the amount as a beneficiary under the will. The trustee (executor) of the deceased estate is an independent third party.*

51. *Lisa advises us that she is a distant relative of the deceased and cannot obtain all the core documents listed in paragraph 43 of this Guideline from the independent trustee (executor). Lisa provides us with evidence of the communications with the independent trustee (executor) as well as a letter from the executor confirming the amount of the bequest, and a copy of the deceased estate's financial accounts confirming that the amount has not been paid from income or gains made on the realisation of assets.*

52. *In this example, Lisa is taken to have provided sufficient evidence that the amount she receives is from trust corpus and that the corpus exception applies.*

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**Example 11 – insufficient records to substantiate a relevant exception**

53. *The ATO receives a private ruling request. The particulars of the request include that John, a resident of Australia, has received funds totalling \$500,000 from a non-resident trust, of which he is a beneficiary. John also informs us that the non-resident trust is controlled by his grandmother and that the amount is a payment sourced from trust corpus.*

54. *John provides us with a copy of the trustee resolution which confirms that an amount of \$500,000 is to be paid to him from trust corpus.*

55. *John advises us that he is unable to obtain additional records from the trustee, including a copy of the trust deed or relevant financial accounts, and that no further documentation or information can be provided.*

56. *John is unable to provide enough evidence to confirm that the amount he receives from the non-resident trust is attributable to trust corpus which is not removed by the hypothetical resident taxpayer test, or that the non-taxable exception applies.*

**Example 12 – insufficient records to substantiate a relevant exception**

57. *The ATO receives information from AUSTRAC that Kate, a resident of Australia, has received \$800,000 from an overseas source. Upon commencing our review of Kate's affairs, Kate informs us that the amount is a payment sourced from trust corpus of a non-resident trust, of which she is a beneficiary. Kate also confirms that the controller of the non-resident trust is her brother.*

58. *Kate provides us with a copy of the trustee resolution which confirms that an amount of \$800,000 was to be paid to her from trust corpus. Kate also provides a copy of the trust deed and the trust's financial statements to support her assertion. However, the financial statements are prepared in a manner that do not clearly identify the source of the payment.*

59. *Kate advises us that she is unable to obtain additional records from the trustee, such as general ledger accounts, bank statements or information showing the property used to settle the trust, and that no further documentation or information can be provided.*

60. *Kate is unable to provide enough evidence to confirm that the amount she receives from the non-resident trust is attributable to trust corpus which is not removed by the hypothetical resident taxpayer test, or that the non-taxable exception applies.*

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**Compliance approach for low-risk arrangements**

61. Our compliance approach considers 2 common scenarios where section 99B may apply. Where an arrangement meets the outlined criteria, that arrangement will be considered low risk.

62. Where your arrangement does not meet the outlined criteria, this does not mean that section 99B applies, but we may engage with you to better understand your arrangement, including whether an exception to section 99B applies.

63. Where your arrangement satisfies the outlined criteria and is considered low risk, we will not have cause to dedicate compliance resources to consider the application of section 99B, other than to confirm that the low-risk features of the relevant arrangement are present in your circumstances.

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64. To confirm that your arrangement meets the criteria outlined in each low-risk arrangement detailed, you will need to provide to us the information and documentation outlined for those criteria.

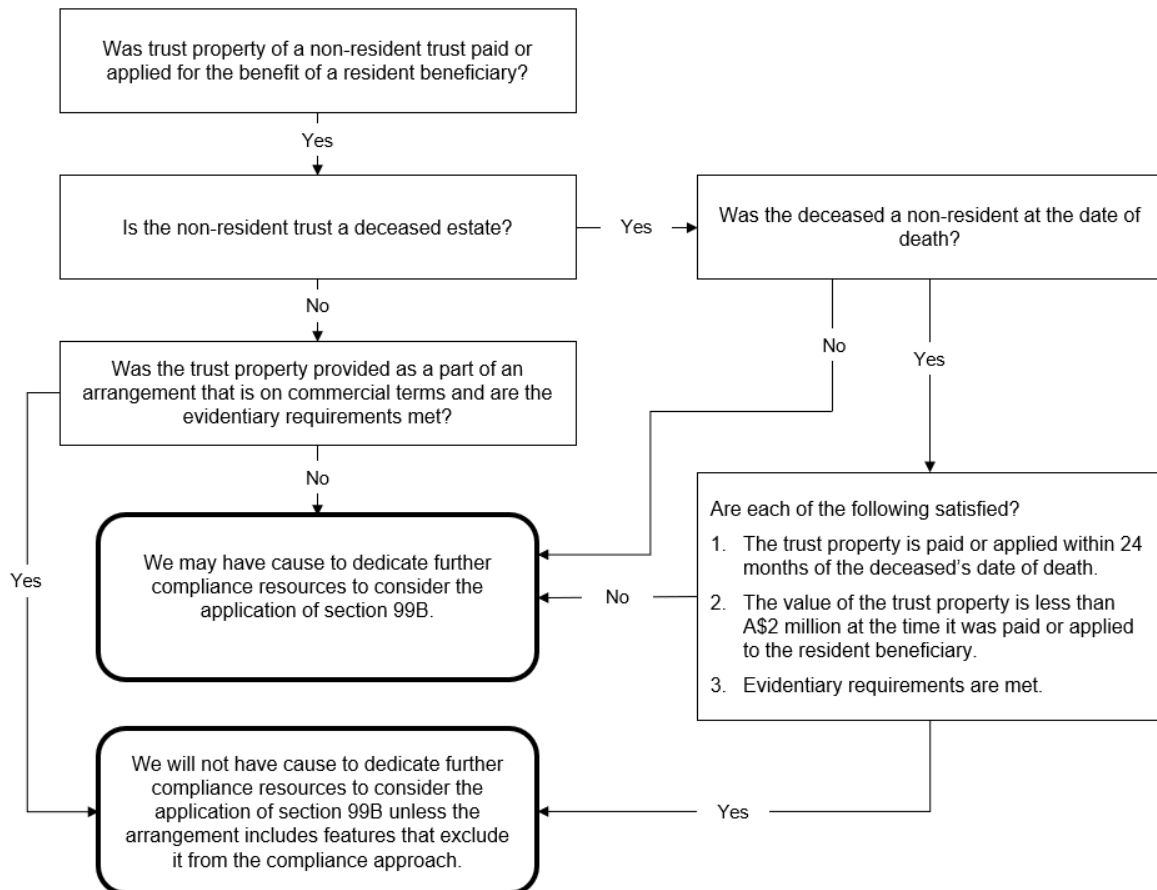
65. Where you cannot provide the required information and documentation, this does not mean that section 99B applies, but your arrangement will not be considered low risk, and further compliance resources may be dedicated to understanding your arrangement.

66. Your arrangement will not be considered low risk where:

- There are elements of a contrived nature that seek to enable a taxpayer to fall within the compliance approach.
- The arrangement was entered into for the purpose of enabling the resident beneficiary to provide a benefit to another resident beneficiary of the trust.

67. Diagram 1 of this Guideline provides an outline of the compliance approach for low-risk arrangements.

*Diagram 1: Compliance approach for low-risk arrangements*



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**Compliance approach – deceased estates**

68. The corpus of a non-resident deceased estate is typically comprised of the assets that have been owned by the deceased individual. Section 99B may apply to distributions or benefits provided from the deceased estate where the estate has derived income and gains after the date of death.

69. We acknowledge that a period of time is required to properly administer a deceased estate. Where a short amount of time has lapsed between the date of death and the distribution being paid or applied for the benefit of a resident beneficiary, we will consider the arrangement to be low risk provided that the requirements in paragraph 70 of this Guideline are met.

70. An arrangement will be considered low risk where the trustee (executor) distributes an amount or benefit of trust property from a non-resident deceased estate of a deceased who was a non-resident at their date of death, to a resident beneficiary and each of the following criteria are satisfied:

- The trust property, including cash or proceeds from the sale of trust assets is distributed to the resident beneficiary within 24 months of the date of death.
- The total value of trust property received, whether in multiple payments or in one lump sum payment, by the resident beneficiary does not exceed A\$2 million at the time the amount is paid or applied to the resident beneficiary.

71. The compliance approach outlined in this Guideline is confined to a non-resident deceased estate of a non-resident deceased and does not extend to any testamentary trust established under the will of the deceased.

72. The beneficiary should obtain all relevant information and documentation to evidence that the amount received meets the criteria in paragraph 70 of this Guideline. The type of documentation and information that may be provided to substantiate the criteria includes:

- a document confirming the date of the deceased's death
- the will of the deceased, letter of wishes or correspondence from executors or their legal advisors stating the terms of the will
- documentation confirming that the assets were owned or held by the deceased at the time of death
- documentation setting out the distribution to the Australian-resident beneficiary and the assets of the deceased used to fund this distribution.

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**Example 13 – beneficiary receives amount from a deceased estate that is within scope of the compliance approach**

73. *Simon is a resident beneficiary of a non-resident deceased estate. Simon's father is a non-resident and passes away on 1 December 2023. Upon his death, the assets included in his estate are cash, shares in listed entities and artwork. On 1 September 2025, the non-resident trustee (executor), as permitted by the will, sells the listed shares and transfers the proceeds to Simon.*

74. *Simon obtains a copy of a document which confirms the date of death of his father and the will which confirms Simon's entitlement to the proceeds from the sale of the listed shares. These documents meet the evidentiary requirements outlined in paragraph 72 of this Guideline.*

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75. *The proceeds from the sale of the shares are equal to A\$950,000.*

76. *This arrangement is considered low risk under the compliance approach as the transfer of trust property from the non-resident deceased estate occurs within 24 months of the death of Simon's non-resident father, and the value of the property received by Simon is less than A\$2 million.*

**Example 14 – multiple beneficiaries receive an amount from a deceased estate that is within scope of the compliance approach**

77. *Three resident individuals, Tim, Sally and Leo, are beneficiaries of a non-resident deceased estate. Their mother is a non-resident and passes away on 1 March 2023. At the time of her death, the assets included in her estate consist of cash and real property in Italy. On 30 July 2024, the non-resident trustee (executor), as permitted by the will, makes separate payments in euros to Tim, Sally and Leo.*

78. *Tim, Sally and Leo obtain all the relevant information and documentation to substantiate that they meet the evidentiary requirements outlined in paragraph 72 of this Guideline.*

79. *Tim, Sally and Leo each receive a payment equal to A\$800,000 from the deceased estate.*

80. *This arrangement is considered low risk under the compliance approach as each beneficiary receives an amount from the non-resident deceased estate within 24 months of the death of their non-resident mother and the amount received by each resident beneficiary is below A\$2 million.*

**Example 15 – multiple beneficiaries receive an amount from a deceased estate that is outside the scope of the compliance approach**

81. *Catherine, Harry and their 2 children, George and Sophia, are beneficiaries of a non-resident deceased estate. Harry's mother is a non-resident but passes away on 1 July 2022. At the time of her death, the assets in her estate consist of substantial real estate in America and England as well as listed shares and cash. As permitted by the will, the non-resident trustee (executor) sells the assets in the estate and makes a substantial gain.*

82. *On 1 February 2023, the non-resident trustee (executor), as permitted by the will, makes separate payments of A\$2 million each to Catherine, Harry, George and Sophia. The beneficiaries obtain all the relevant information and documentation to substantiate that they meet the evidentiary requirements outlined in paragraph 72 of this Guideline.*

83. *During an ATO review, we identify that upon receiving the payments from the deceased estate, both George and Sophia have transferred their payment to their parent's joint bank account. The funds were then used at the discretion of Catherine and Harry.*

84. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. The overall arrangement is contrived to provide a benefit to Catherine and Harry that is in excess of A\$2 million.*

**Example 16 – beneficiary receives amount from a deceased estate more than 24 months after the date of death**

85. *Jason is a resident beneficiary of a non-resident deceased estate. Jason's aunt is a non-resident and passes away on 30 July 2022. At the time of her death, the assets*

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*included in her estate consist of cash and real property in Spain. Following her death and as permitted by the will, the non-resident trustee (executor) sells the property, invests the cash and proceeds from the sale and makes a substantial profit. On 30 June 2025, the non-resident trustee (executor), as permitted by the will, makes a payment in euros to Jason.*

86. *Jason obtains the relevant information and documentation to confirm the date of death of his aunt, that the payment is sourced from funds and the realisation of assets held by his aunt at the time of death, and that the distribution has been paid in accordance with the will out of the assets of the deceased.*

87. *The amount received by Jason from the deceased estate is equal to A\$750,000.*

88. *The arrangement does not meet the criteria to be considered low risk under the compliance approach. The transfer of trust property from the non-resident deceased estate occurs more than 24 months after the death of Jason’s aunt. We may dedicate compliance resources to consider section 99B.*

**Example 17 – beneficiary receives amount from a deceased estate, and evidentiary requirements not met**

89. *Mary is a resident beneficiary of a non-resident deceased estate. Mary’s brother is a non-resident and passes away on 1 August 2023. On 1 May 2024, the non-resident trustee (executor) as permitted by the will, makes a payment in US dollars to Mary.*

90. *Mary advises us that she can only obtain a letter from the executor outlining her entitlement. No other information or documentation can be obtained to confirm the date of death of Mary’s brother, or whether the payment was sourced from assets owned by her brother at the date of his death.*

91. *The amount received by Mary from the deceased estate is equal to A\$500,000.*

92. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. Mary cannot obtain the relevant information and documentation required to substantiate that the arrangement falls within the compliance approach. We may dedicate compliance resources to consider section 99B.*

**Example 18 – beneficiary receives amount from a deceased estate in excess of A\$2 million**

93. *Denise is a resident beneficiary of a non-resident deceased estate. Denise’s aunt is a non-resident and passes away on 1 February 2023. At the time of her death, the only asset included in her estate is real property in Italy. Following her death, and as permitted by the will, the non-resident trustee (executor) sells the property, invests the proceeds and makes a substantial profit. On 1 January 2025, the non-resident trustee (executor), as permitted by the will, makes a payment in euros to Denise.*

94. *Denise obtains all the relevant information and documentation to evidence that she meets the evidentiary requirements outlined in paragraph 72 of this Guideline.*

95. *The amount received by Denise from the deceased estate is equal to A\$2,500,000.*

96. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. The trust property received by Denise exceeds A\$2 million. We may dedicate compliance resources to consider section 99B.*

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**Example 19 – multiple payments from a deceased estate in excess of A\$2 million**

97. *Arthur is a resident beneficiary of a non-resident deceased estate. Arthur's sister is a non-resident and passes away on 2 April 2024. At the time of her death, the assets include real property, listed shares and cash. As permitted by the will, Arthur is entitled to receive the proceeds from the sale of the listed shares and cash. The non-resident trustee (executor) as permitted by the will, sells the listed shares and makes a substantial gain. The proceeds from the sale of the shares are equal to A\$2,500,000 and the cash is equivalent to A\$1,500,000.*

98. *As permitted by the will, the non-resident trustee (executor) transfers the amount to Arthur in multiple payments, within 24 months of the deceased's date of death. Each payment is less than A\$2 million.*

99. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. Arthur receives an aggregated amount or benefit in excess of A\$2 million. This is despite it being received within the 24 months following the death of Arthur's non-resident sister. We may dedicate compliance resources to consider section 99B.*

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**Compliance approach – provision of trust property on commercial terms**

100. Section 99B may apply where a trustee of a non-resident trust allows a resident beneficiary to use or borrow trust property, including loans of monetary amounts.

101. Examples include where a resident beneficiary has a short-term agreement to use real property owned by the trust or borrow an amount from the trust.

102. We will consider an arrangement to be low risk where the non-resident trust provides trust property to a resident beneficiary as part of an agreement for the beneficiary to borrow, hire or use that property on commercial terms and each of the following are satisfied:

- The borrowing, hire or use of the trust property is subject to an agreement, whether written or verbal.
- The agreement is made on commercial terms.
- The resident beneficiary makes a physical payment to the trustee equal to the interest, hire or use per the commercial terms.

103. We will accept that an agreement is on commercial terms where the resident beneficiary is able to provide documentation objectively evidencing that at the time of entering the agreement:

- the rate applied for the interest, use or hire is consistent with market rates in the same or similar circumstances, and
- the terms of the agreement are consistent with terms available in the market in the same or similar circumstances.

104. For monetary amounts loaned from a non-resident trust, we will also accept that an agreement is on commercial terms where:

- the rate applied for the interest is consistent with the benchmark rate as prescribed for Division 7A purposes in subsection 109N(2), and
- the terms of the agreement are consistent with terms prescribed for Division 7A purposes in subsection 109N(3).

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105. The beneficiary should retain all contemporaneous evidence that an agreement exists, which may include:

- written agreements
- written or electronic correspondence between the beneficiary and the trustee, including emails and electronic messaging
- memorandums
- trustee minutes.

106. Where a beneficiary and trustee only have a verbal agreement, evidence to substantiate the commercial terms of the agreement will still be required. This can include:

- bank statements or payment transfer documents confirming the amounts paid to the trustee
- contemporaneous relevant market data and information
- calculations of repayments identifying the terms applied to the arrangement.

107. The beneficiary should also retain any other documentation to evidence that the agreement was made on commercial terms, and that they have complied with those terms. This includes supporting documentation to evidence the payment of the interest, hire or use amount to the trustee of the non-resident trust in each of the relevant income years during the agreement period.

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**Example 20 – renting a house owned by the trust as part of an agreement on commercial terms**

108. *Chris is a beneficiary of a non-resident trust. The trustee allows Chris to occupy a house owned by the trust for an 18-month period. The trustee enters into a written agreement with Chris, on commercial terms.*

109. *Chris provides a copy of the written agreement, a copy of the market rental appraisal from a local licenced real estate agent confirming the rent included under the agreement is market rent, and bank statements to confirm the rental amount is paid to the trustee.*

110. *This arrangement is considered low risk under the compliance approach. The agreement is on commercial terms and the rent on the property is fully paid to the trustee of the non-resident trust.*

**Example 21 – loan from a trust as part of an agreement on commercial terms**

111. *Anthony is a beneficiary of a non-resident trust. The trustee allows Anthony to borrow \$500,000 from the trust for a 5-year period. The trustee and Anthony enter into a verbal agreement on commercial terms.*

112. *Anthony provides evidence confirming the rate included under the verbal agreement is equal to the benchmark interest rate prescribed under Division 7A and a repayment schedule confirming the agreement is consistent with the terms prescribed for Division 7A. Anthony also provides bank statements to confirm the interest amount is paid to the trustee.*

113. *This arrangement is considered low risk under the compliance approach. Although a verbal agreement was made between Anthony and the trustee, Anthony is able to provide evidence that the agreement is on commercial terms. An amount of interest, equal*



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to interest calculated using Division 7A rates, is also paid to the trustee of the non-resident trust.

**Example 22 – use of trust property as part of an agreement on commercial terms**

114. *Belinda is a beneficiary of a non-resident trust. The property of the trust includes a rare collection of artworks. The trustee allows Belinda to hang the artwork in her place of business for a 3-year period.*

115. *The trustee and Belinda enter into an agreement on commercial terms where the hire amount is equivalent to the rate the trustee could obtain from leasing the artwork to an independent third party. Belinda pays the hire amount to the trustee.*

116. *Belinda provides a copy of the trustee minute evidencing the agreement to hire the artwork, documentation from artwork dealers confirming the hire rate applied, and bank statements to confirm the hire amount is paid to the trustee.*

117. *This arrangement is considered low risk under the compliance approach. The agreement is on commercial terms and the amount equal to the hire of the artwork is paid to the trustee of the non-resident trust.*

**Example 23 – use of trust property outside of an agreement on commercial terms**

118. *Andrew is a beneficiary of a non-resident trust. The property of the trust includes a yacht. The trustee allows Andrew to hire the yacht for a period of 6 months.*

119. *The trustee and Andrew enter into an agreement on commercial terms where the hire amount is equivalent to the rate the trustee can obtain from leasing the yacht to an independent third party. Andrew pays the hire amount to the trustee.*

120. *The yacht is ordinarily moored at a marina near Andrew's home. At the conclusion of the lease period, the beneficiary continues to have control of and access to the yacht for his enjoyment.*

121. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. The trust property continues to be available for the benefit of the beneficiary outside of the agreed hire period and no hire amount is paid to the trustee for the period beyond the agreed hire period.*

**Example 24 – record keeping insufficient to evidence a commercial arrangement**

122. *Sarah is a resident of Australia and receives \$10,000 from the property of a non-resident trust estate, of which she is a beneficiary. The trustee documents a written resolution setting out the decision to lend the \$10,000 to Sarah. Sarah asserts that payments are made as and when funds permit but has no records to substantiate her claims.*

123. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. There is no evidence confirming that an agreement on commercial terms has been put in place and complied with.*

**Example 25 – artwork valued below market value**

124. *Rachel is a beneficiary of a non-resident family trust. The property of the trust includes an artwork. The trustee allows Rachel to display the artwork at her place of residence for a period of 12 months.*

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125. *The trustee and Rachel enter into a written lease agreement. The lease agreement is not on commercial terms as the lease payments are below commercial rates due to the artwork being undervalued.*

126. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. The terms of the lease agreement are not commercial.*

**Example 26 – forgiveness of loan due to extenuating circumstances**

127. *Charlotte is a resident and receives \$10,000 from the property of a non-resident trust estate, of which she is a beneficiary.*

128. *Charlotte has supporting documentation to confirm that the payment of \$10,000 from the trust is a loan and all relevant loan terms are consistent with it being on commercial terms.*

129. *During an ATO review, we identify that the loan is subsequently forgiven by the non-resident trust as Charlotte is unable to repay it due to extenuating circumstances.*

130. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. Charlotte’s obligation to pay the debt is released or waived or is otherwise extinguished other than by repaying the debt in full.*

**Example 27 – loan to a beneficiary with interest payments returned to the beneficiary**

131. *Louis is a beneficiary of a non-resident family trust. The trustee allows Louis to borrow \$500,000 from the trust for a 5-year period.*

132. *The trustee and Louis enter into a written agreement on commercial terms. Apart from the written agreement, Louis has evidence confirming the interest rate is the market rate, and bank statements to confirm the interest amount is paid to the trustee.*

133. *During an ATO review, we identify a round robin arrangement whereby the trustee applies the funds received in respect of the interest to make payments back to Louis. The payments to Louis are not treated by the trustee or Louis as a trust distribution. The effect of this is that no interest is being paid in accordance with the written agreement.*

134. *This arrangement does not meet the criteria to be considered low risk under the compliance approach. There are elements of a contrived nature that seek to enable the resident beneficiary to fall within the compliance approach.*

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**Commissioner of Taxation**

31 July 2024

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## Your comments

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135. You are invited to comment on this draft Guideline, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

136. A compendium of comments is prepared when finalising this Guideline, and an edited version (names and identifying information removed) may be published to our Legal database on ato.gov.au.

137. Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 28 August 2024  
**Contact officer:** Amy James-Velagic  
**Email:** Amy.James-Velagic@ato.gov.au  
**Phone:** 08 9268 5916

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## References

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*Related Ruling/Determination:*

TD 2024/D2

- ITAA 1936 99B
- ITAA 1936 99B(1)
- ITAA 1936 99B(2)

*Legislative references:*

- ITAA 1936 Div 7A
- ITAA 1936 97
- ITAA 1936 98
- ITAA 1936 99
- ITAA 1936 99A

- ITAA 1936 99B(2)(a)
  - ITAA 1936 99B(2)(b)
  - ITAA 1936 99B(2)(c)
  - ITAA 1936 109N(2)
  - ITAA 1936 109N(3)
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ATO references

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