

**Table 1.**

Income distribution mechanism ("DIM")	Type 1 DIM	Type 2 DIM	Type 3 DIM	Type 4 DIM
	the income <sup>#</sup> of the trust estate	The trustee can determine the amount that will be distributable but the default distributable amount will be <i>the income<sup>#</sup></i> of the trust estate	The trustee can determine the amount that will be distributable but the default distributable amount will be <i>*net income calculated in accordance with s 95</i>	The net income calculated in accordance with s. 95 <sup>+</sup>
Is this type of receipt included within the distributable income?				
Sales receipts / trading income	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Management fees	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Interest income	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Rental income	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Exempt Income	Yes	Yes unless trustee excludes	No unless trustee includes	No
Res Collective Investment Vehicle (CIV) distributions (other than capital gains or franked dividends)	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Foreign Income (excl than capital gains)	Yes	Yes unless trustee excludes	May depend on treaties but trustee could exclude	May depend on treaties
Dividends (unfranked)	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Dividends (fully franked excl franking credit)	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Dividends (partially franked excluding franking credit)	Yes	Yes unless trustee excludes	Yes unless trustee excludes	Yes
Franking credits	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Statutory income under Division 40 – Capital losses	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Statutory income under Section 70-90 - Trading stock	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Deemed dividends	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Forex realization gains	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Res CIV distributions of capital gains	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Foreign capital gains	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> May depend on treaties but trustee could exclude	<sup>F</sup> May depend on treaties
Pre cap gains	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> No unless trustee includes	No
100% Disregarded cap gains %	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes
Non discount cap gains (asset held less than 12 months)	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Discount cap gain – taxable %	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
Discount cap gain – non tax %	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> No unless trustee includes	No
CGT small business concessions – 50% taxable	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
CGT small business concessions – 50% disregarded portion	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> No unless trustee includes	No
CGT small business concession – 25% taxable (after second 50% concession)	No	<sup>F</sup> No unless trustee includes	<sup>F</sup> Yes unless trustee excludes	<sup>F</sup> Yes
CGT small business concession –after second 50% concession 75% non-taxable	No	No unless trustee includes	No unless trustee includes	No

N.B. <sup>#</sup> Some deeds arbitrarily modify what would be considered "income" - take care (see notes above).

N.B. <sup>+</sup> Some deeds arbitrarily modify s.95 income - take care (see notes above).

N.B. <sup>F</sup> Identifies receipts that might need to be considered in the context of the decision of the Full Court of the Federal Court in *Forrest v Commissioner of Taxation* [2010] FCFCA 6 (5 February) has passed largely un-remarked. The *Forrest* decision cannot be ignored in the context of deed amendments and is addressed at greater length in an Addendum to this article. (for further discussion see the addendum to this paper)

**Last but not least**

Last but not least - not all deeds provide for a power of amendment in which case it might be necessary to rely on the relevant trustee legislation.

It would be embarrassing for all concerned to suggest that a trustee have their deed amended only to later find that the deed either did not provide for any amendments, or if it made provision for amendments, it only provided for limited amendments. Unfortunately there are many examples of amendments made without regard to the amending clause or procedures.

When preparing a deed of amendment a good lawyer will generally, but not always, recite the entirety of both the amendment clause. They will also recite in similar fashion any consents required from appointors or guardians. Finally they will list all previous amendments.

If the lawyer doesn't recite the entirety of the amendment clause they will identify the location of the clause within the deed.

Table 3 The situation can be summarised as follows:

	Type 1 DIM	Type 2 DIM	Type 3 DIM	Type 4 DIM
<b>Deed contains a streaming provision</b>	An amendment to the <b>DIM</b> may need to be considered if the trust is likely to generate capital gains.  If an amendment is made consideration needs to be given to the unresolved tensions between a present entitlement and an absolute entitlement.  Assessable capital gains can only be distributed by a capital advance.	Only in the rarest circumstances will an amendment to the <b>DIM</b> be required  If an amendment is made consideration needs to be given to the unresolved tensions between a present entitlement and an absolute entitlement.	Only in the rarest circumstances will an amendment to the <b>DIM</b> be required.  The trustee is in a position to eliminate the difficulties created by tax losses.	An amendment to the <b>DIM</b> may need to be considered if the trust is likely to generate franking credits or capital gains.  Tax losses can create difficulties.  Non assessable capital gains can only be distributed by a capital advance.
<b>Deed does not contain a streaming provision</b>	An amendment to the <b>DIM</b> may need to be considered and, a streaming provision inserted, if the trust is likely to generate capital gains.  If an amendment is made consideration needs to be given to the unresolved tensions between a present entitlement and an absolute entitlement.  Assessable capital gains can only be distributed by a capital advance.	An amendment to include a streaming provision should be considered if the trust fund generates or is likely to generate either dividends or capital gains.  If an amendment is made consideration needs to be given to the unresolved tensions between a present entitlement and an absolute entitlement.	An amendment to include a streaming provision should be considered if the trust fund generates or is likely to generate either dividends or capital gains.  The trustee is in a position to eliminate the difficulties created by tax losses.	An amendment to the <b>DIM</b> may need to be considered, a streaming provision inserted, if the trust is likely to generate franking credits or capital gains.  Tax losses can create difficulties.  Non assessable capital gains can only be distributed by a capital advance.

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**Annexure (included for the sake of completeness)**

**A problem that has been ignored - the impact of the decision in Forrest**

In Forrest the Court considered the deductibility of interest incurred in relation to the acquisition of units in a trust. The beneficial interest in the trust fund was divided (at clause 3.2) into components:

- ◆ the Unit Component was held on trust for the Unit Holders (who held Ordinary Units) from time to time;
- ◆ the Discretionary Component generally held, at the trustee's discretion, for the discretionary beneficiaries.

A similar issue would arise in any trust in which one group of beneficiaries had entitlements in relation to the income of the trust and another group had entitlements in relation to the capital.

In Forrest the deed relevantly provided for the trustee to determine the Income of the trust:

**12 DETERMINATION OF INCOME**

12.1 The Trustee ...may at any time and from time to time determine whether:

- (a) (i) any amounts received or disbursed, or any amounts of income, profit or gain or loss;