

# Update: 24 January 2008 Trust cloning: Harder than we thought?



**Fleming Muntz**  
Solicitors



## Summary

The CGT exemption for assets passing to a cloned trust has always seemed too good to be true.

A recent ATO document signals that the Office is setting a very high standard for the exemption that, in many cases, may be impossible to satisfy.

## What's changed?

In December 2007, the ATO released an informal note in the Tax Professionals section of its website entitled simply 'Trust Cloning'.

The document draws attention to the critical importance of the two trusts having beneficiaries and terms that are absolutely identical *in effect*, not just in language.

## What are the problems?

The ATO document identifies two common pitfalls.

First, if the original trust excludes 'the trustee' as a beneficiary, the cloned trust must exclude the same person or company from benefitting; merely excluding 'the trustee' from the cloned trust will not work if there are different trustees.

Second, in the common case where the beneficiaries include 'the trustee of any trust in which a named beneficiary has an interest', the ATO argues that the original and cloned trusts end up with each other as beneficiaries. This means that the beneficiaries are not identical and the CGT exemption will not apply.

## What are the solutions?

In most cases, the first issue can be managed by careful drafting, but the second is more difficult and may require alterations to the original deed before cloning – with the ever-present threat of triggering a resettlement.

The Commissioner is currently considering representations by trust practitioners on the issue and we hope that a less restrictive position will result. In the meantime, a private ruling remains the best way to manage the risk if cloning is an essential part of any strategy.

## How can Fleming Muntz help?

Fleming Muntz has experienced trust lawyers who are familiar with recent developments in all aspects of trust law. We can advise on complex trust restructuring, vesting and resettlement issues, together with the compliance aspects of any trust transaction.

### Important fine print

**This update is for general information only. It is not a complete guide to the area of law. Competent advice should be obtained before taking any action.**

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