

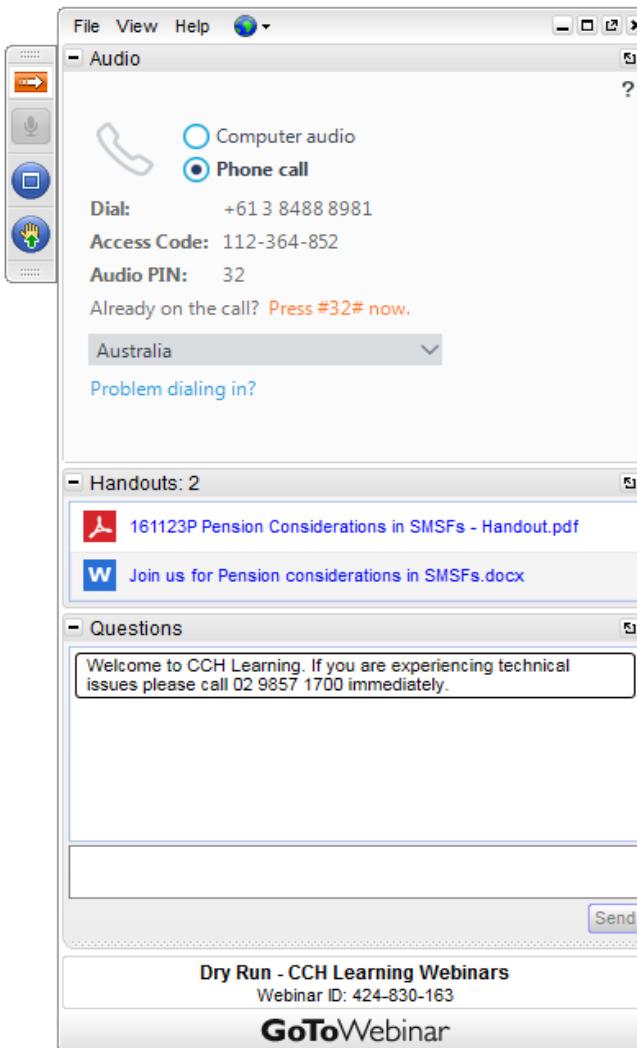
# Division 7A Advanced

Carlo Di Loreto

Tuesday 4 April 2023



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Susannah Gynther  
Moderator

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# Your Presenter

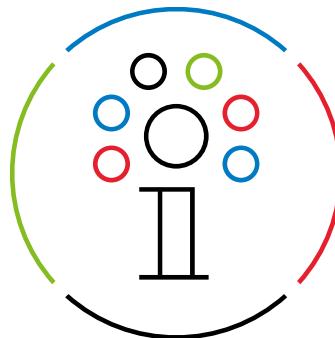


**Carlo Di Loreto**

Partner - Tax Advisory

*Crowe Australasia, an affiliate of Findex*

# Today's session will cover



'Division 7A Essentials' covered core detail & was a 'refresher' on the subject – 'Advanced' covers more advanced topics:

- the use of private company assets [s 109CA]
- loan back to trustee arrangements [s 109XA(1A)]
- payments & loans through interposed entities [s 109XF & s 109XG]
- entitlements to trust income through interposed trusts [s 109XI]
- the treatment of loan guarantees [s 109U]
- practical aspects of Commissioner's general relieving discretion [s 109RB]

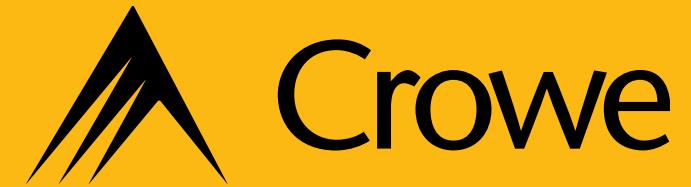
# Division 7A ITAA 1936

## Note:

2016/2017 Federal Budget proposed:

- self correction mechanism without penalty to voluntarily correct inadvertent triggering of Division 7A
- new safe harbour rules to provide certainty and simplified compliance
- moving to a single compliant loan duration of 10 years
- Were to have effect from 1 July 2018 no legislation has been introduced to give effect to this announcement





# Use of private company assets

# Use of private company assets – s 109CA

- concept of a ‘payment’ to an entity includes ‘provision of an asset for use by the entity’
- no definition of what is ‘provision of an asset for use by an entity’, but includes provision under lease or licence
- if provision of asset for use by entity constitutes a fringe benefit - FBT rules apply
- the provision targets more than actual use it extends to deem a payment when the asset is available for use
- the provision treats the use of the asset each year as a separate payment



# Use of private company assets – s 109CA

- The time of payment is the time the entity first:
  - uses the asset with permission of provider of the asset; or
  - has a right to use the asset at a time when provider of asset does not have a right:
    - to use the asset; or
    - to provide the asset for use by another entity.

## Note:

- When asset used by more than one entity simultaneously, necessary to consider whether use of asset should be attributed to particular entity or apportioned.



# Use of private company assets – s 109CA

## Minor benefits exception

- amount is not a payment under s 109CA if provision of asset would amount to a minor benefit under s 58P of the FBTAA 1986 [TR 2007/12]
- notional taxable value of benefit must be < \$300 & it would be unreasonable to treat it as a fringe benefit, that is, if:
  - benefit provided infrequently & irregularly
  - taxable value of minor benefit & other similar or identical benefits is low
  - likely total taxable value of minor benefit & other associated benefits is low
  - difficult to calculate taxable value of benefit & any associated benefits



# Use of private company assets – s 109CA

## Example

- Eric is a shareholder of Chainsaw Co Pty Ltd, a private company that hires chainsaws for \$100 per day. Eric is provided with a chainsaw for the day, to remove some trees from his garden.
- Eric is not an employee of the company. Because the value of his one-off use of the chainsaw is < \$300 & use would be treated as minor benefit under s 58P FBTAA if he was an employee, this is not a payment under 109CA.



# Use of private company assets – s 109CA

## Value of Payment

- s 109CA provides that the amount of the payment is determined by
  - considering what value parties dealing at arms length would pay
  - Less
  - any consideration actually given

## Note:

- The EM provides a fairly straightforward example being the provision of a holiday home for use by the taxpayer - value attributed to payment is the market value rent. where the asset type or usage departs from readily comparable benchmarks, the cost of compliance will increase.



# Use of private company assets – s 109CA

## Otherwise deductible exception

- amount not payment under s 109CA to extent that:
  - if the entity to whom the asset provided, had incurred & paid expenditure for the provision of the asset
  - a once-only deduction would have been allowable to the entity with respect to the expenditure

## Note:

- The rules allow for apportionment ('to the extent that'), meaning there may be a partial exclusion of what might otherwise be a payment under s 109CA.



# Use of private company assets – s 109CA

## Certain dwellings exception

- two exceptions to operation of s 109CA ITAA36 where dwelling provided by private company for use by an entity
  - the business connection exception
  - the main residence exception
- ‘dwelling’ has same meaning as for CGT main residence exemption & adjacent land provision of CGT main residence rules applies in same way



# Use of private company assets – s 109CA

## Dwellings - business connection exception

- Under this exception - rules does not apply to provision of a dwelling to an entity if:
- the entity (or an associate of the entity) carries on a business;
- the entity or associate:
  - uses; or
  - is granted or has a lease, licence or other right to use, land, water or a building for the purpose of carrying on the business; and
- the provision of dwelling to entity is connected with that use or with that lease, licence or other right



# Use of private company assets – s 109CA

## Example

- Bob & Mary Smith are shareholders in a private company called Bigfarm Pty Ltd & are beneficiaries of the Smith Family Trust. Bigfarm owns a property called Hugefield, where the Smith Family Trust runs a farming business.
- Bob & Mary live in a dwelling on Hugefield & do not make payments to Bigfarm for its use. Use is for private purposes & does not come within otherwise deductible exception. Use in connection with Smith FT using Hugefield to carry on a business - provision of dwelling by Bigfarm Pty Ltd is disregarded.
- Mary's brother Alex, who is also a shareholder of Bigfarm, prepares the accounts for Smith FT from his home in Melbourne. Bigfarm also owns this dwelling. Alex's use of dwelling is not connected to use of land, water or building on Hugefield & is not eligible for exception.



# Use of private company assets – s 109CA

## Dwellings - main residence exception

- Under this exception, rule does not apply to provision of a dwelling to an entity if:
- the dwelling is the main residence of the entity
- the provider of the dwelling is a private company
- the private company acquired the dwelling before 1 July 2009



# Use of private company assets – s 109CA

## Dwellings - main residence exception

- private company would meet the COT for beneficial ownership of shares on the assumption that relevant period for applying COT:
  - started when company acquired dwelling &
  - ended at time of payment
- provided private company acquired dwelling before 1 July 2009 & required continuity of beneficial ownership maintained - main residence exception potentially available



# Use of private company assets – s 109CA

## Company title flats and home units exception – applies where:

- provider of dwelling is company that owns legal / equitable interest in the land on which the complex is erected
- there is more than one share in the company & each share gives relevant shareholder right to occupy a flat or home unit in complex
- each flat or home unit in complex is covered by a share, or a parcel of shares, in the company
- dwelling provided to entity because shareholder holds such a share, or parcel of shares



# Use of private company assets – s 109CA

## Company title flats and home units exception

- company does not have legal or equitable interests in any assets other than legal or equitable interests in:
  - the complex and the land on which it is erected
  - any related land and buildings
  - any related plant, machinery, equipment, furniture or fittings
  - any assets relating to the management and maintenance of the complex
- the assessable income of the company is derived predominantly from:
  - managing & maintaining the complex
  - interest & dividends relating to income derived from managing & maintaining complex



# Use of private company assets – s 109CA

## Restructure

- consider restructuring to eliminate the ongoing cost of owning personal use assets through a company
- need to consider the costs of restructure:
  - income tax
  - GST
  - duty
- tax impact may be less:
  - assets may not be subject to duty
  - small business CGT concessions may apply
  - assets may be pre-CGT

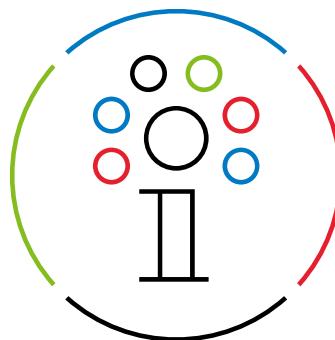


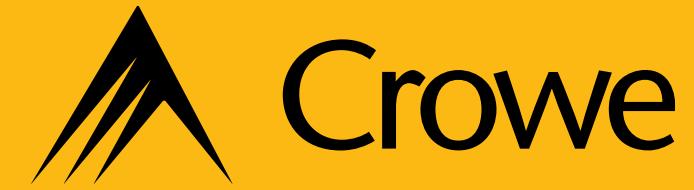
# Poll

## Question 1

A dwelling owned by a private company and used as a main residence by a shareholder is NOT a ‘payment’ if the dwelling was acquired before 1 July 2009.

- TRUE
- FALSE





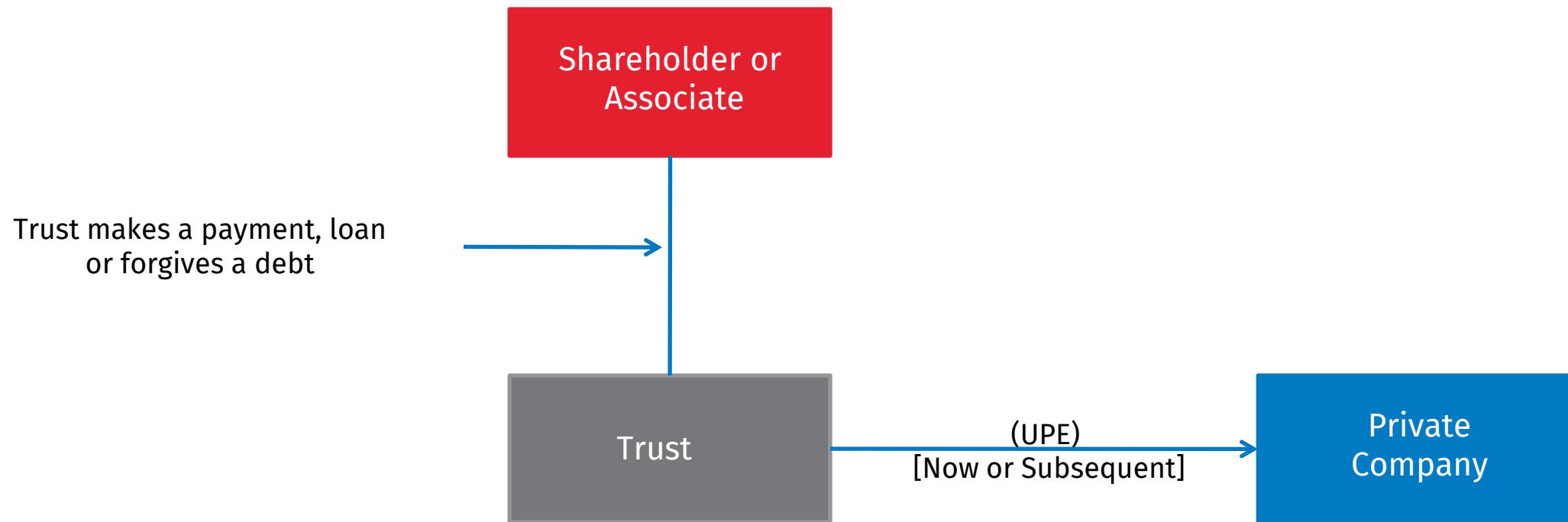
# Subdivision EA

# Reminder: Subdivision EA

- subdivision EA [s 109XA – s 109XC] replaced s 109UB
- trust confers a present entitlement (PE) to net income to a private company & trust:
  - makes a payment to
  - makes a loan to
  - forgives a debt owing by
- a shareholder in the private company, or an associate



# Reminder: Subdivision EA



## Reminder: Subdivision EA

- there does not need to be a PE owing to a company at the time the payment/loan/forgiveness happens
- subdivision EA will apply if a PE is conferred to a company any time between:
  - the payment, loan or forgiveness is made by the trust in respect of a shareholder or associate of the company; and
  - the trust lodgement date for the year in which the payment, loan or forgiveness occurs



## Reminder: Subdivision EA

- rules apply to arrangements attempting to circumvent Division 7A, where trustee creates UPE to trust income in private company & distributes underlying cash
- distribution to shareholder / associate by way of a payment or a loan, or by forgiving a debt
- where transaction is one of the kinds of ‘actual transaction’ defined in s 109XA, then s 109XB includes deemed dividend in assessable income of shareholder / associate
- amount included in the assessable income is amount of actual transaction (the payment, loan or forgiven debt), subject to private company’s distributable surplus



## Subdivision EA - Payments [s 109XA(1)]

- The rules apply to a distribution in the form of a payment if:
- a trustee makes a payment to a shareholder / associate of private company
- payment discharges or reduces a PE of shareholder / associate that is wholly or partly attributable to an amount that is an unrealised gain
- private company is or becomes presently entitled to an amount of the net income of the trust, and
- some or all of amount remains unpaid before due / actual date for lodgment of trustee's ITR for income year in which actual transaction takes place



# Subdivision EA - Payments [s 109XA(1)]

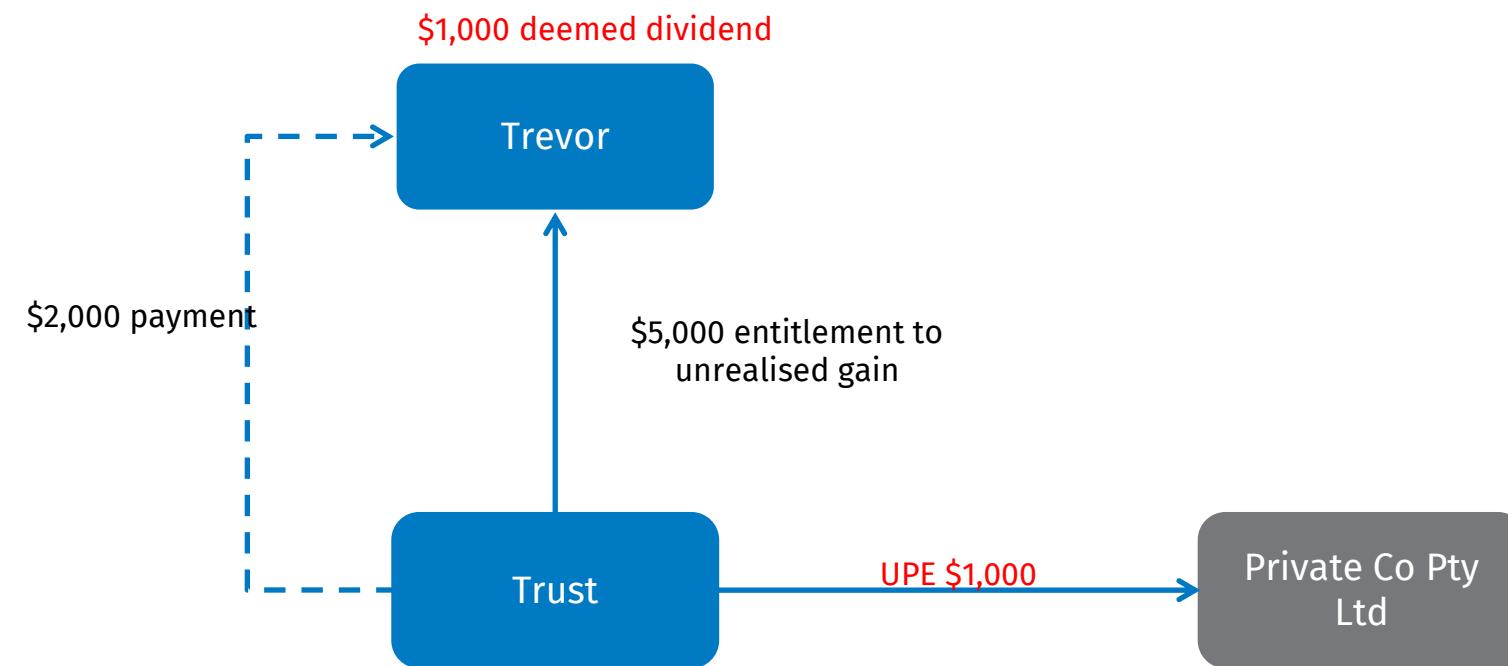
## Example

- A private company has a present entitlement to \$1,000 of accounting income of a trust estate that remains unpaid.
- The trustee creates an entitlement to an unrealised gain to Trevor, a shareholder of the private company, of \$5,000. The trustee then makes a payment of \$2,000 to Trevor, in satisfaction of his entitlement to the unrealised gain.
- The payment meets the conditions of s 109XA(1) and attracts the operation of Subdivision EA. Subject to the operation of the other rules in Subdivision EA and Division 7A (such as the “distributable surplus” limitation in s 109Y), a deemed dividend of \$1,000 will arise in Trevor’s hands.



# Subdivision EA - Payments [s 109XA(1)]

## Example



## Subdivision EA - Loans [s 109XA(2)]

- The rules apply to a distribution in the form of a loan if:
- trustee makes a loan to shareholder / associate of private company
- private company is or becomes presently entitled to an amount of the net income of the trust; and
- some or all of the amount remains unpaid before earlier of due /a actual date for lodgment of trustee's tax return for year which transaction takes place



# Subdivision EA - Loans [s 109XA(2)]

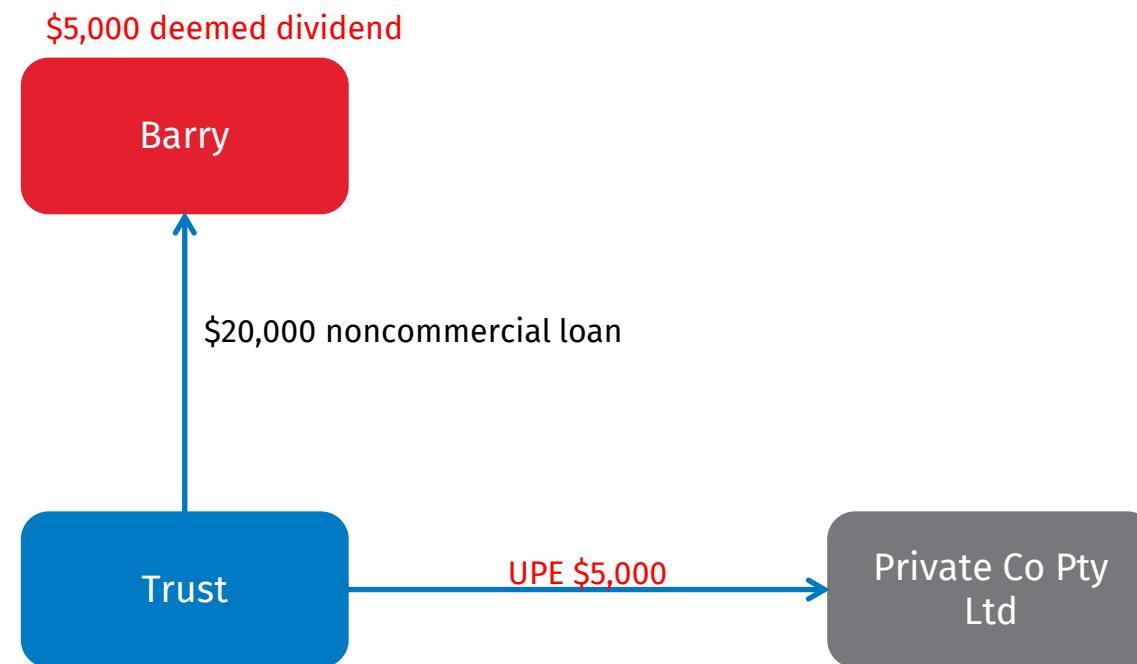
## Example

- A private company has a present entitlement to \$5,000 of accounting income of a trust estate that remains unpaid. The trustee makes a non-commercial loan to Barry, a shareholder of the private company of \$20,000.
- The loan is not repaid by the earlier of the due date for lodgment and the actual date of lodgment of the trustee's return of income for the trust in the year in which the loan was made.
- The loan meets the conditions of s 109XA(2). Subject to the operation of the other rules in Subdivision EA and Division 7A, a deemed dividend of \$5,000 arises in Barry's hands.



# Subdivision EA - Loans [s 109XA(2)]

## Example



## Subdivision EA - Loans [s 109XA(2)]

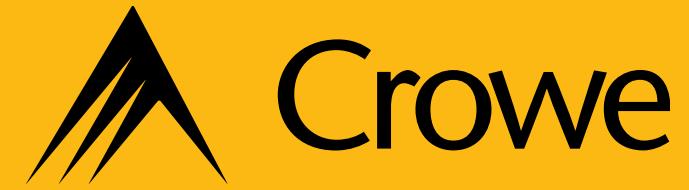
- The provision will not apply if:
  - loan is to another company (and interposed entity rule does not apply)
  - loan is repaid; or
  - a Division 7A written loan agreement
- by the earlier of the actual lodgement of the trust tax return or its due date



## Subdivision EA - Debt Forgiveness [s 109XA(3)]

- The rules apply to a distribution in the form of a debt forgiveness if:
  - all or part of a debt owed to trustee by a shareholder / associate of private company forgiven
  - the private company is or becomes presently entitled to an amount of the net income of the trust; and
  - some or all of that amount remains unpaid before the earlier of the due / actual date for lodgment of trustee's tax return for the income year which the debt is forgiven





# Loan back to trustee arrangements

# Loan back to trustee of excess – s 109XA(1A)

## Anti-avoidance Measure

- s 109XA amended by s 109XA(1A) & 109XA(1B) to attack a specific arrangement aimed at exploiting rule in s 109XA(4)
- s 109XA(4) limits amount that can be taken to be subject to s 109XA (and therefore included in the assessable income of a shareholder / associate)
- limited to UPE of private company
- amendment applies to loans made by shareholder or associate to a trustee on or after 1 July 2009 under arrangements to which s 109XA applies



# Loan back to trustee of excess – s 109XA(1A)

## Example

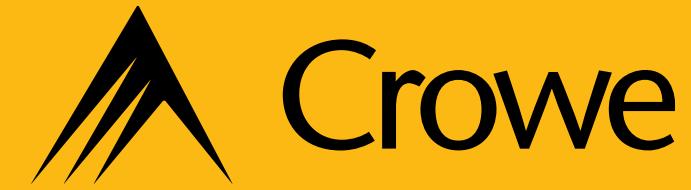
- Trust revalues \$500K of real property to \$1.0 million & unrealised profits reserve of \$500K distributed to Beneficiary as Trust capital.
- Year 1 - \$100K of trust net income distributed but not paid to Beneficiary Co Pty Ltd. \$100K is paid to Beneficiary in part satisfaction of Beneficiary's present entitlement to the Trust capital.
- The \$400K outstanding from Trust to Beneficiary is paid to Beneficiary & is in turn lent back by Beneficiary to the Trust.
- A payment by the Trust of a further \$100K to Beneficiary in Year 2 as a further repayment of the new loan not in satisfaction or part satisfaction of any outstanding PE of Beneficiary

# Loan back to trustee of excess – s 109XA(1A)

## Example

- this resulted in s 109XA(1) not applying to the \$100,000 Year 2 payment because repayment neither a loan [s 109XA(2)] or payment in discharge of a PE attributable to unrealised gain [s 109XA(1)(b)]
- s 109XA(1A) addresses this scenario by not requiring the repayment of the \$100,000 Year 2 repayment to be referable to the discharge of a PE referable to an unrealised gain





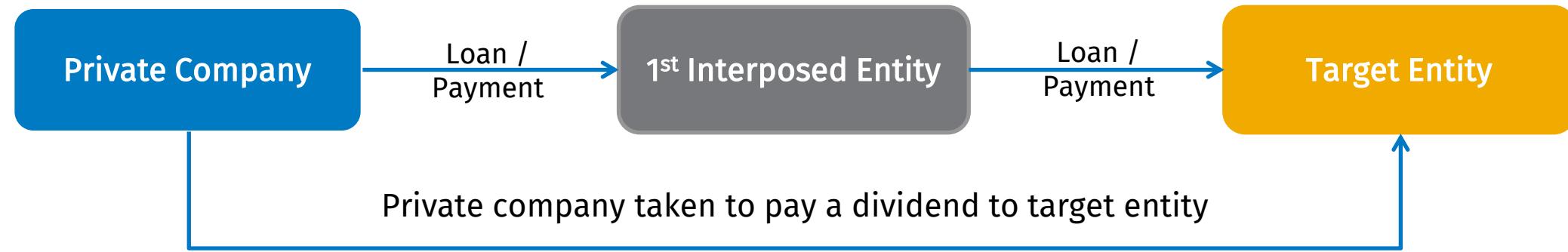
# **Payments and loans through interposed entities**

# Payments & loans through interposed entities – s 109T

- a private company can be taken to make a payment or loan to an entity (the target entity) through one or more interposed entities
- the interposed entity rules usually triggered with transactions where a private company is the interposed entity or the first interposed entity
- this is because the company payment & loan rules do not apply where the payee or borrower is another company
- also apply where any other kind of interposed entity is likely to be an associate of a shareholder



# Payments & loans through interposed entities – s 109T



# Payments & loans through interposed entities – s 109T

- The interposed entity rules operate to treat a private company as making a payment or loan to an entity (the ‘target entity’) if:
  - the private company makes a payment or loan to another entity (the ‘first interposed entity’) that is interposed between private company & target entity
  - a reasonable person would conclude private company made payment or loan solely or mainly as part of an arrangement involving a payment or loan to target; and
  - either the first interposed entity, or another interposed entity, makes a payment or loan to the target entity



# Payments & loans through interposed entities – s 109T

## Example

- Pay Co Pty Ltd, a private company, pays \$40,000 to Middle Co Pty Ltd under an arrangement that Middle Co pays \$38,000 to Mrs Smith. Middle Co is neither a shareholder of Pay Co nor an associate of a shareholder. Middle Co earns \$2,000 as a fee for the arrangement.
- Assume that s 109T applies so that Pay Co is taken to make a payment to Mrs Smith. Under s 109V, Pay Co is taken to pay the amount of \$38,000 to Mrs Smith, when she was paid by Middle Co.
- If Mrs Smith is or was a shareholder of Pay Co or an associate of a shareholder, s 109C may treat the \$38,000 paid to her as a dividend.



# Payments & loans through interposed entities – s 109T

## Example



# Payments & loans through interposed entities – s 109T

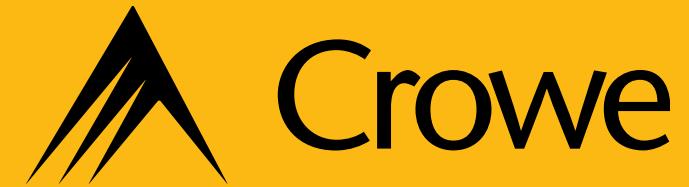
- the words ‘payment’ & ‘loan’ take on the defined meanings under Division 7A
- ‘arrangement’ defined in wide terms to mean any:
  - arrangement
  - agreement
  - understanding
  - promise
  - undertaking



# Payments & loans through interposed entities – s 109T

- if the interposed entity rules apply & target entity paid an amount by the interposed entity:
  - private company taken to have paid the amount (if any)
  - determined by Commissioner to target entity
  - on date when interposed entity paid target
- a complying loan agreement between interposed entity & target treated as loan agreement between private company & target for Division 7A purposes
- this means that the notional loan can be treated as an excluded loan





# Indirect trust payments and loans

# Indirect trust payments - s 109XF

- The trust interposed entity rules can operate to treat a trustee as making a payment to a shareholder (or associate) - called the ‘target entity’ of a private company if:
  - the trustee makes a payment or loan to another entity (called the ‘first interposed entity’) that is interposed between the trustee and the target entity;
  - a reasonable person would conclude that trustee made payment or loan solely or mainly as part of an arrangement involving a payment to target entity; and
  - either the first interposed entity, or another entity interposed between trustee & target entity, makes a payment to target entity



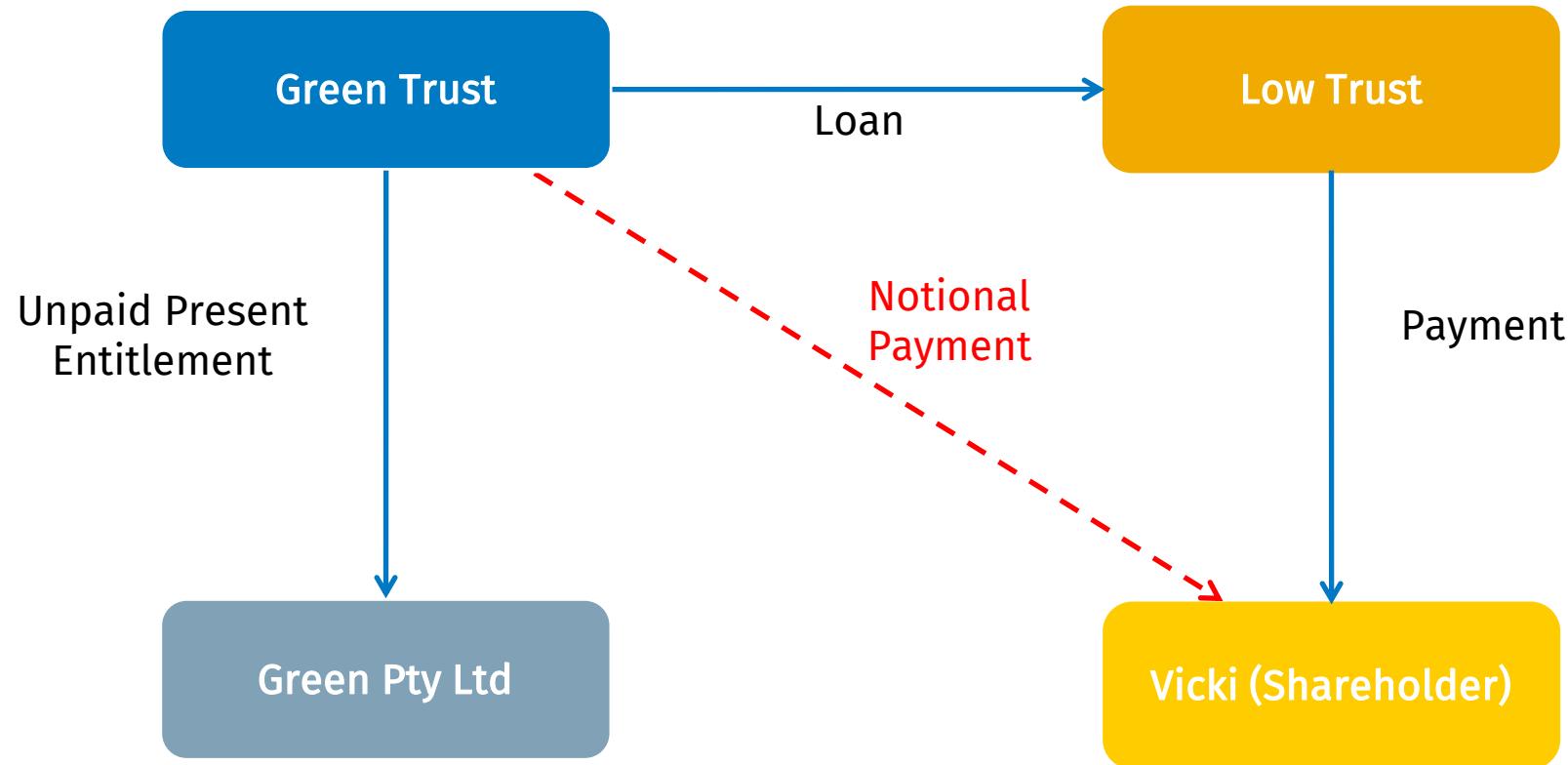
# Indirect trust payments - s 109XF

## Example

- Green Pty Ltd enters into an arrangement involving, Green Trust, Low Trust and Vicki, who is a shareholder of Green Pty Ltd.
- Under this arrangement, the Green Trust declares a present entitlement of \$100,000 to Green Pty Ltd. The present entitlement remains unpaid.
- Green Trust then loans \$100,000 to Low Trust who makes a \$100,000 payment to Vicki. The \$100,000 payment to Vicki is a discharge of a present entitlement attributable to an unrealised gain in Low Trust.
- The effect of s 109XF is that, for the purposes of paragraph 109XA(1)(a), Green Trust has made a payment to Vicki.

# Indirect trust payments - s 109XF

## Example



**Note:** Arguably s 109XA would have deemed a loan from Green Pty Ltd to Low Trust.



## Indirect trust loan - s 109XG

- The trust interposed entity rules can also operate to treat a trustee as making a loan to a shareholder (or an associate) - called the 'target entity' of a private company if:
  - the trustee makes a payment or loan to another entity (called the 'first interposed entity') that is interposed between the trustee and the target entity;
  - a reasonable person would conclude that the trustee made the payment or loan solely or mainly as part of an arrangement involving a loan to the target entity; and
  - either the first interposed entity, or another entity interposed between the trustee and the target entity, makes a loan to the target entity



# Indirect trust loan - s 109XG

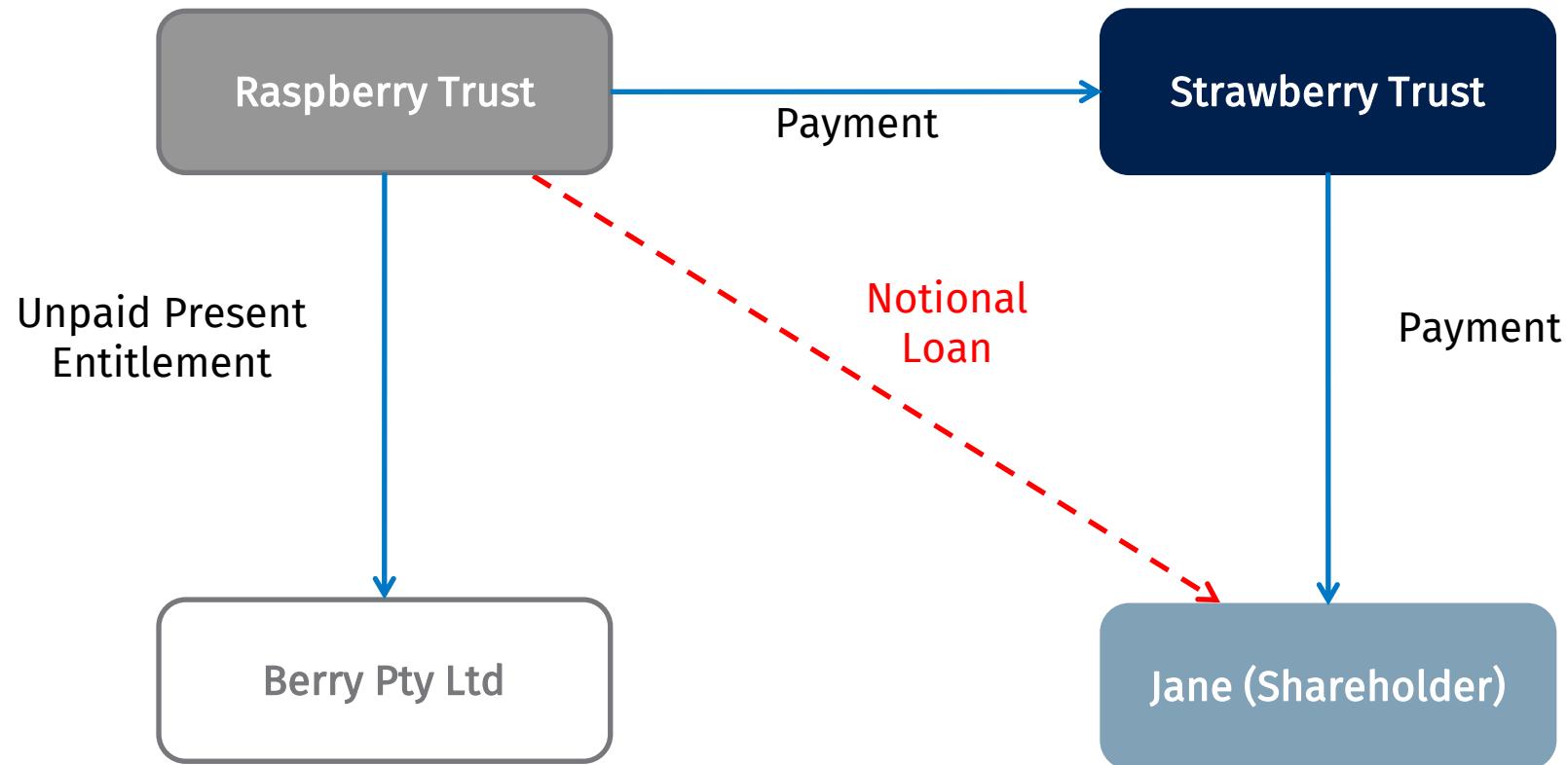
## Example

- Berry Pty Ltd has a UPE from Raspberry Trust.
- Raspberry Trust makes a payment to Strawberry Trust, who then makes a loan to Jane, who is a shareholder of Berry Pty Ltd.
- The notional transaction between Raspberry Trust & Jane is treated as a loan, because the transaction between Jane & strawberry Trust is a loan.



# Indirect trust loan - s 109XG

## Example



# Indirect trust payments & loans

- if interposed entity rules apply - trustee taken to have paid or lent target entity amount (if any) determined by the Commissioner
- amount taken as paid or lent by trustee when payment or loan to target entity made
- when determining amount of payment or loan by trustee, Commissioner must take into account:
  - the amount that interposed entity paid or lent target entity; and
  - how much (if any) of that amount Commissioner believes represented consideration payable to target entity by trustee or any of the interposed entities for anything.



# Indirect trust payments & loans

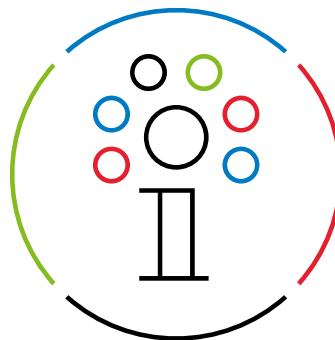
- unclear whether payments under these rules are capable of being ‘converted’ to loans & Commissioner’s view unknown
- if target entity makes a repayment of loan from interposed entity, target entity is taken as having repaid an amount of notional loan from the trustee
- under written loan agreement provisions - agreement under which loan by interposed entity was made to target entity (the ‘actual loan’) treated as being the agreement under which notional loan made
- in the previous example the loan agreement needs to be between the Strawberry trust and Jane
- for notional loan made by a trustee under interposed entity rules, operation of Division 7A may be negated by a valid written agreement under s 109N

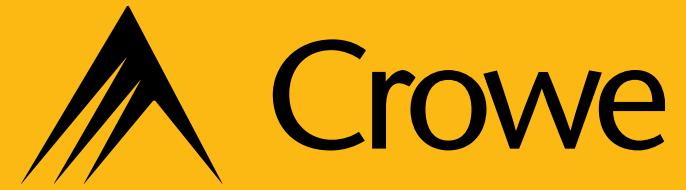


# Poll Question 2

Can a deemed dividend arise under s109T if a private company is the target entity?

- Yes
- No





# Indirect present entitlement

# Indirect present entitlement - s 109XI

- interposing one or more trusts between private company & trust that makes payment or loan to shareholder / associate circumvented operation of Subdivision EA [s 109XA(1) &(3)]
- under s 109XI(1), private company treated as having a PE to an amount from the net income of 'target trust' where:
  - one or more trusts interposed between private company & target trust (trust making payment to shareholder / associate of private company); and
  - reasonable person would conclude private company is, or becomes, entitled to an amount from the net income of interposed trust, solely or mainly as part of an arrangement involving an entitlement to an amount from target trust .



# Indirect present entitlement - s 109XI

## Example: TD 2011/15

- Judy is the trustee of Green Discretionary Trust and White Discretionary Trust.
- Green Discretionary Trust is a beneficiary of White Discretionary Trust. On 30 June 2016, Judy, as trustee of White Discretionary Trust, exercises her discretion and resolves to distribute (but does not pay) \$10,000 net income to Green Discretionary Trust for the 2015-16 income year.
- Diamond Pty Ltd is a beneficiary of Green Discretionary Trust. On 30 June 2016, Judy, as trustee of Green Discretionary Trust, exercises her discretion and resolves to distribute (but does not pay) \$7,000 net income to Diamond Pty Ltd for the 2015-16 income year.
- Other relevant circumstances are such that a reasonable person would conclude that Diamond Pty Ltd became presently entitled to the amount of \$7,000 solely or mainly as part of an arrangement involving an entitlement to an amount from White Discretionary Trust.



# Indirect present entitlement - s 109XI

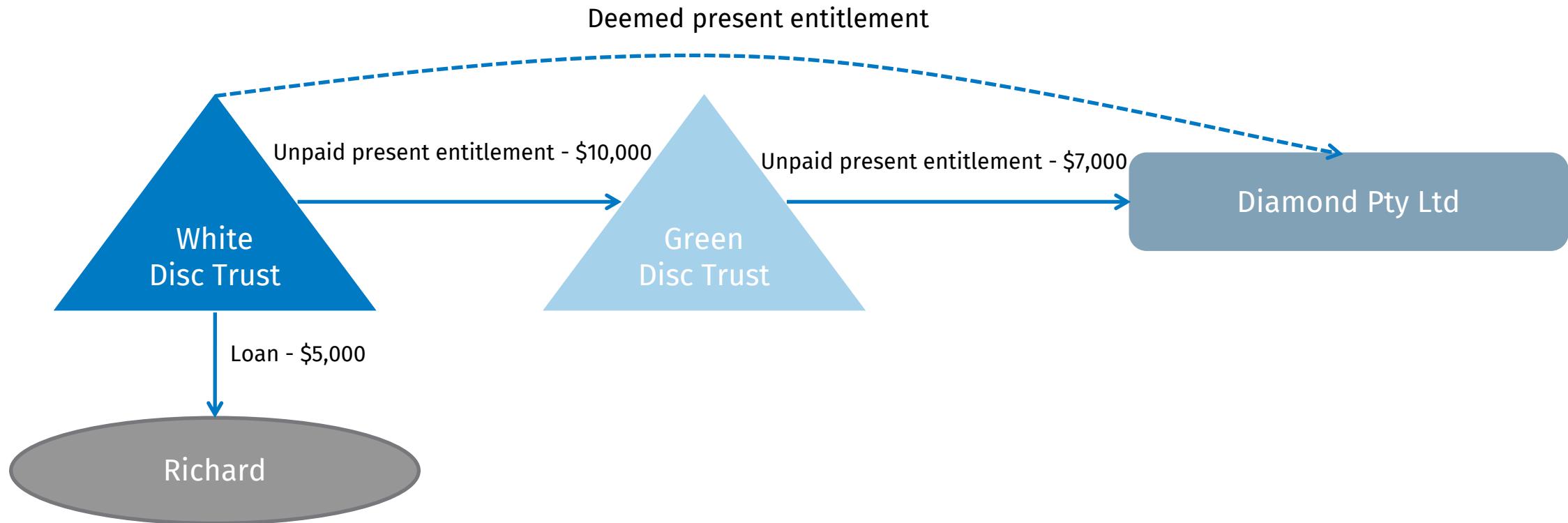
## Example: TD 2011/15

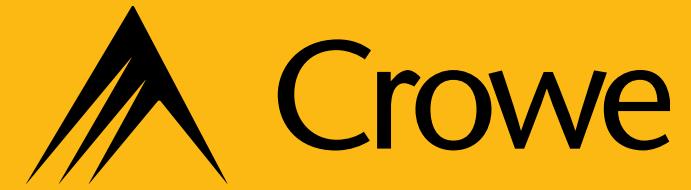
- On 31 March 2016 Judy, as trustee of White Discretionary Trust made an interest free loan of \$5,000 to Richard, a shareholder of Diamond Pty Ltd, which he used for private purposes.
- During the 2015-16 income year there were no other payments or loans to, or debts forgiven of, any other shareholders (or associates of shareholders) of Diamond Pty Ltd, and Diamond Pty Ltd's distributable surplus (as defined in subsection 109Y(2)) for the year was well in excess of \$10,000.
- Because a reasonable person would conclude that Diamond Pty Ltd became entitled to \$7,000 from Green Discretionary Trust as part of an arrangement involving Green Discretionary Trust's entitlement to \$10,000 from White Discretionary Trust, Diamond Pty Ltd will be taken to have an entitlement to an amount from the net income of White Discretionary Trust under section 109XI.



# Indirect present entitlement - s 109XI

Example TD 2011/15





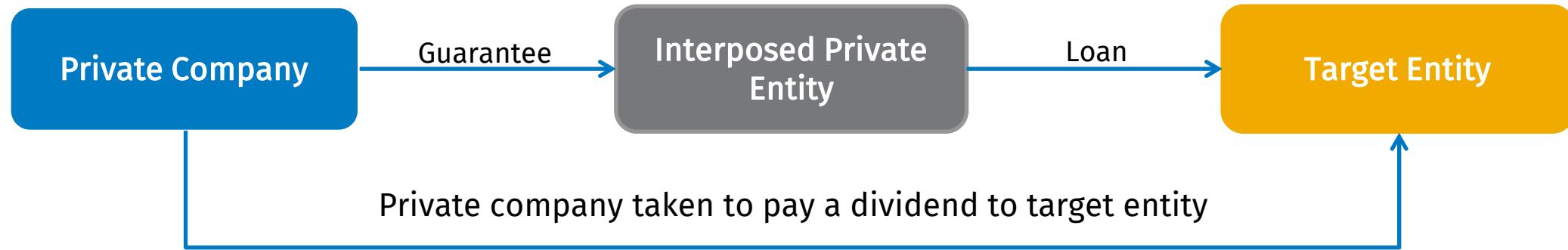
# Loan guarantee rules

# Loan guarantees

- Two provisions can operate to trigger a deemed dividend where a private company guarantees a loan - designed to prevent the interposed entity rules from being circumvented.
  - s 109U aimed at preventing use of a guarantee of a loan made by a private company with a nil or low distributable surplus
  - s 109UA applies where private company guarantees a loan by a third party & private company's liability under guarantee is activated



# Loan guarantees – s 109U



# Loan guarantees – 109U

- Private company taken to make a payment to target entity if all of the following four conditions apply:
  - during income year: private company guarantees loan made by an interposed entity
  - reasonable person would conclude private company gave guarantee solely or mainly as part of arrangement involving a payment or loan to target entity
  - either:
    - first interposed entity is private company that makes a loan to target entity; or
    - further interposed entity that is a private company makes a payment or loan to target entity.
  - amount of payment or loan greater than distributable surplus of interposed private company that made the payment / loan to target less any dividends that company is taken to pay under Division 7A

## Note:

- A private company is taken to make the payment to the target entity at the same time the interposed private company makes the payment or loan to the target company.



# Loan guarantees – 109U

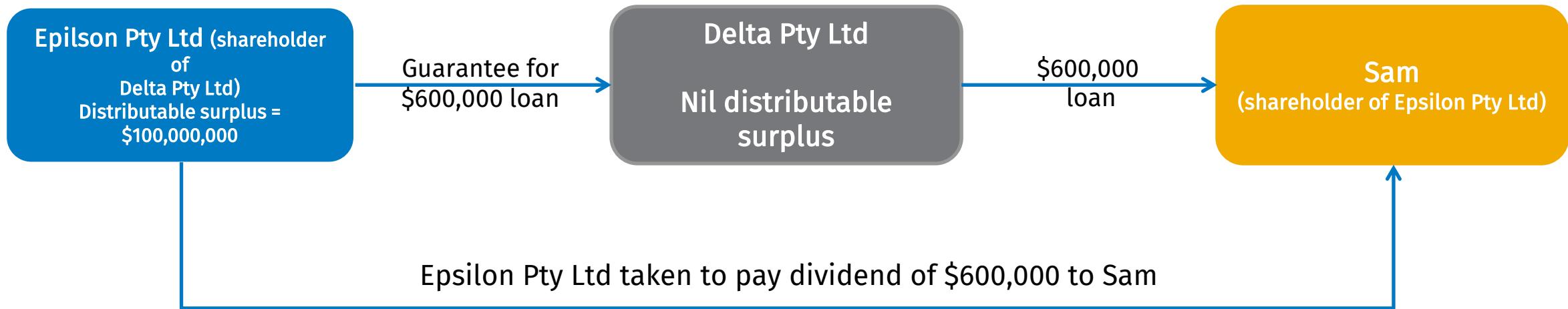
## Example

- On 12 May 2016, Epsilon Pty Ltd guarantees a loan of \$600,000 that its subsidiary Delta Pty Ltd makes to Sam, a majority shareholder of Epsilon Pty Ltd.
- The guarantee is part of an arrangement involving the loan by Delta Pty Ltd to Sam. There is no written agreement outlining the terms of the loan.
- For the 2015-16 income year, Epsilon Pty Ltd has a distributable surplus of \$1,000,000 and Delta Pty Ltd has a nil distributable surplus.



# Loan guarantees – 109U

## Example



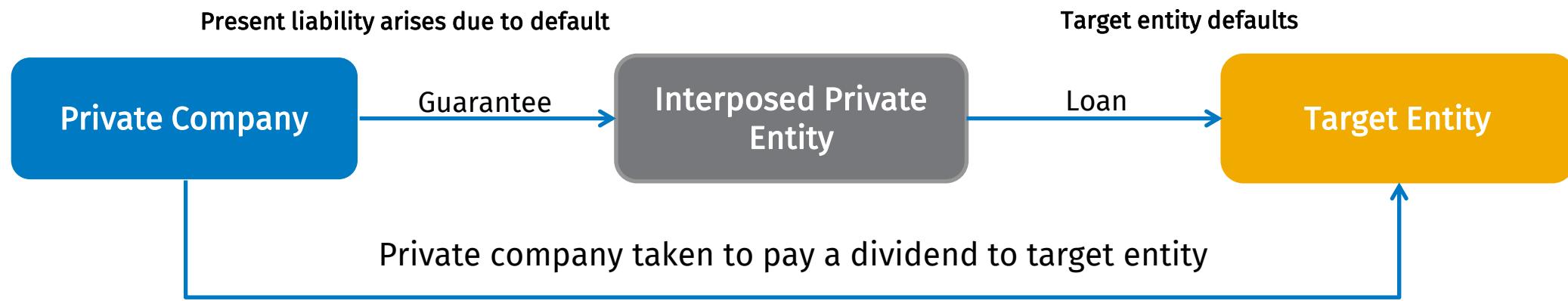
# Loan guarantees – 109U

## Example

- Epsilon Pty Ltd is taken to pay a dividend to Sam because, as part of an arrangement, it guaranteed a loan that another private company (Delta Pty Ltd) made to Sam.
- All four conditions are satisfied for Epsilon Pty Ltd to be taken to make a payment to Sam (the target entity).
- Epsilon Pty Ltd is taken to pay Sam \$600,000, being the amount Delta Pty Ltd loaned Sam less Delta Pty Ltd's distributable surplus (that is \$600,000 less nil).
- On 30 June 2016, Epsilon Pty Ltd is taken to pay a dividend of \$600,000 to Sam.



# Loan guarantees – 109UA



# Loan guarantees – 109UA

- Under an arrangement, private company guarantees a loan an interposed entity makes to the target entity & target entity defaults.
- Private company has present liability under guarantee & is taken to make a payment to target entity. Private company will be taken to make a payment to target entity if all three conditions apply:
  - it guarantees a loan the interposed entity makes to the target entity
  - under guarantee, private company has liability to make payment to interposed entity.
  - reasonable person would conclude private company gave guarantee solely (or mainly) as part of an arrangement involving a loan to the target entity

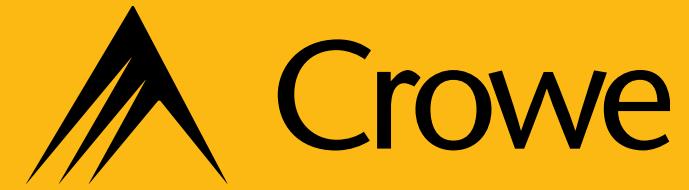


# Loan guarantees – 109UA

## Example

- ABC Bank Pty Ltd has made a loan to Mary, who is a shareholder of XYZ Pty Ltd, which guarantees Mary's bank loan. The loan was made in March 2016. However, Mary defaults on the bank loan and XYZ Pty Ltd becomes liable to make a payment to the bank.
- This liability, which is not a contingent liability, may cause XYZ Pty Ltd be taken to make a payment to Mary, unless XYZ Pty Ltd and Mary enter into a loan agreement (in respect of the common law debt) that is in writing and meets the minimum interest rate and maximum term criteria for the loan to be an excluded loan.
- To avoid a deemed dividend in subsequent years, the required minimum yearly repayments will need to be made by Mary.





# Commissioner's discretion – s 109RB

# Commissioner's discretion – s 109RB

- the Commissioner has a discretionary power that may be exercised in certain circumstances
- the Commissioner may make a decision where:
  - Division 7A operates to cause a deemed dividend to arise; and
  - the operation of Division 7A arises because of an honest mistake or inadvertent omission by any of the following:
    - the entity assessed by the deemed dividend
    - the company
    - any other entity whose conduct contributed to Division 7A being triggered



# Commissioner's discretion – s 109RB

- the Commissioner may decide that:
  - the deemed dividend should be disregarded
  - the deemed dividend may be franked at the company's benchmark franking percentage
  - if the company does not have a benchmark franking percentage for the year, it is taken to be 100%
  - discretion to allow a dividend to be franked only applies for a shareholder
- decision can be made retrospectively to deemed dividends arising in the 2001/02 or later years



# Commissioner's discretion – s 109RB

## TR 2010/8

- Provides guidance on what constitutes an "honest mistake" or "inadvertent omission":
  - honest mistake means an incorrect view, opinion or understanding on how Division 7A operates & the facts or other matters relevant to its operation
  - inadvertent omission means the inadvertent failure to take action that is relevant to or affects the operation of Division 7A
  - ignorance of Division 7A must have led to the relevant honest mistake or inadvertent omission & that the result its operation arose because of it



# Commissioner's discretion – s 109RB

## TR 2010/8

- acts or omissions made to circumvent Division 7A do not satisfy the requirements
- the above rules apply to the mistakes & omissions of third parties
- recurrent mistakes or omissions will qualify if it has occurred for the same qualifying reasons as the original mistake or omission

## Note:

- Commissioner requires direct nexus between mistake or omission & the Division 7A consequence
  - vital identify source/cause of consequence.



# Commissioner's discretion – s 109RB

## PS LA 2011/29

- ATO has also issued Practice Statement Law Administration PS LA 2011/29 on exercise of Commissioner's discretion under s 109RB
- provides guidance to tax officers on when s 109RB(1) satisfied & matters that Commissioner must have regard to in making a decision under s 109RB(2)



# Questions?



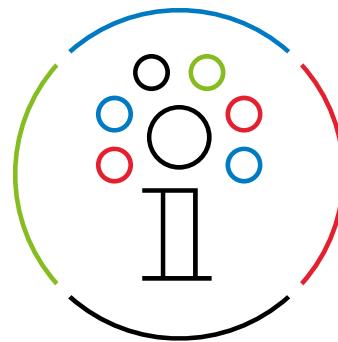
Susannah Gynther,  
Moderator



Type your  
question and hit  
'Send'

A screenshot of the GoToWebinar software interface. At the top, there's a toolbar with File, View, Help, and a globe icon. Below it is a sidebar with sections for Audio (selected), Handouts (1), and Questions. The Audio section shows 'Computer audio' selected, a muted microphone icon, and a dropdown for Microphone (Webcam C170). The Handouts section shows a PDF titled 'Webinar Workbook.pdf'. The Questions section is highlighted with a red rectangle and contains a text input field with placeholder text '[Enter a question for staff]' and a 'Send' button. A red arrow points from the 'Send' button towards the 'Questions' section. At the bottom of the window, there's a message: 'This is a CCH Learning Sample Webinar ID: 496-268-987' and the 'GoToWebinar' logo.

# Upcoming Webinars



- 5 April – Clients Downsizing? Deliver Quality Aged Care Advice
- 6 April – Responding to Leadership Challenges
- 6 April - The New IFRS S1 re General Sustainability-related Disclosures
- 12 April - Putting a Cap on Contributions and Benefits - Don't get Caught Out
- 26 April - ATO - Income Tax Anti-Avoidance Rules - When, Why & How?
- 26 April – The Tips and Traps and the Foreign Income Tax Offset

# Questions



**Carlo Di Loreto**

Partner - Tax Advisory

*Crowe Australasia, an affiliate of Findex*

# Next steps

Please complete the Feedback Survey when the webinar ends

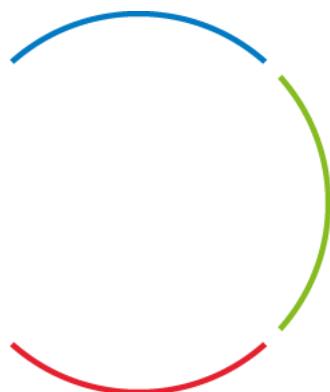
Within 24-48 hours you will be enrolled into the E-Learning which includes:



- a PDF of the PowerPoint
- a verbatim Transcript
- any supporting documentation
- a CPD Certificate

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# Thank you for attending



# Mandatory Starter Questions for Q&A

1. How is the Commissioner's discretion in sec 109RB requested?
2. Is subdiv EA still applicable after taxation determination TD 2022/11?

Please plan your content leaving 5 minutes spare for Q&A at the end

Provide at least 2 mandatory questions to kick off the Q&A. These will encourage the audience to ask further questions and they can also highlight specific points.

CCH Learning will hide this slide.



# Mandatory - 3 Multiple Choice Quiz Q's – for E-Learning Recording

- A deemed dividend arises under sec 109U whereby a guarantee is provided by a private company to an interposed entity, only if the interposed entity is a private company.
- TRUE
- FALSE

Please Highlight the correct answer

These questions are for the E-learning recording due to CPD requirements.

CCH Learning will hide this slide.

- A payment may arise under sec 109CA where a private company provides which of the following to a shareholder or associate:
- Lease of an asset
- Licence of an asset
- Use of an asset
- All of the above
- None of the above

Please Highlight the correct answer

- Which of the following is NOT considered a mistake or omission for the purposes of sec 109RB?
- Misunderstanding meaning of 'associate'
- Misuse of company cheque book
- Loan agreement incorrectly executed
- Deliberate indifference

Please Highlight the correct answer

