

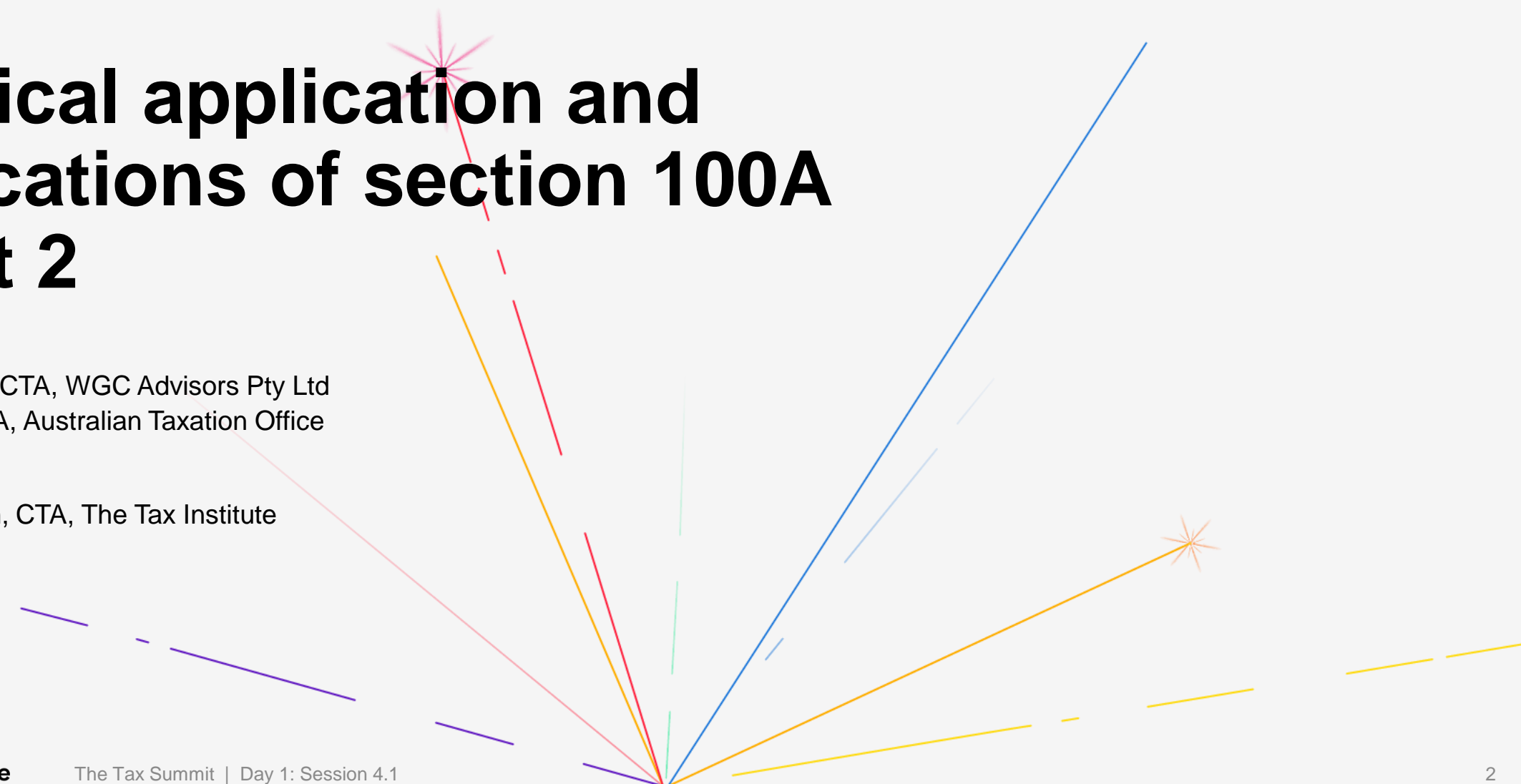
5–7 September 2023

MCEC Melbourne

20 CPD Hours

Spark change

Practical application and implications of section 100A – Part 2



Presenters:

Leanne Connor, CTA, WGC Advisors Pty Ltd
Fiona Dillon, CTA, Australian Taxation Office

Facilitator:

Robyn Jacobson, CTA, The Tax Institute

Content

Session outline

Background (hidden content)

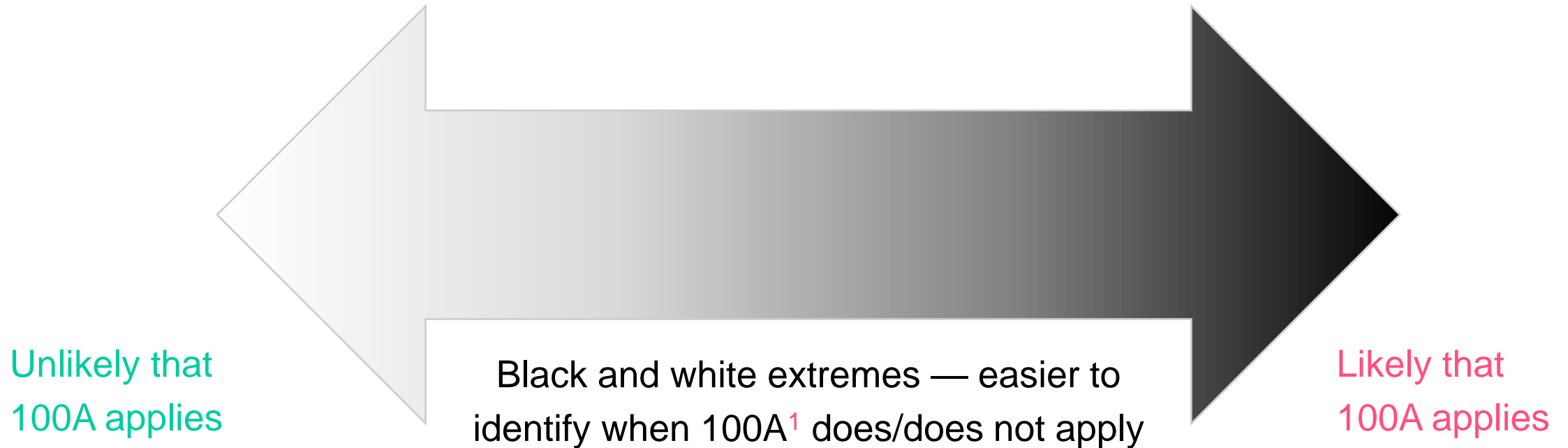
Recent developments (hidden content)

A conversation with the ATO

Case studies × 9

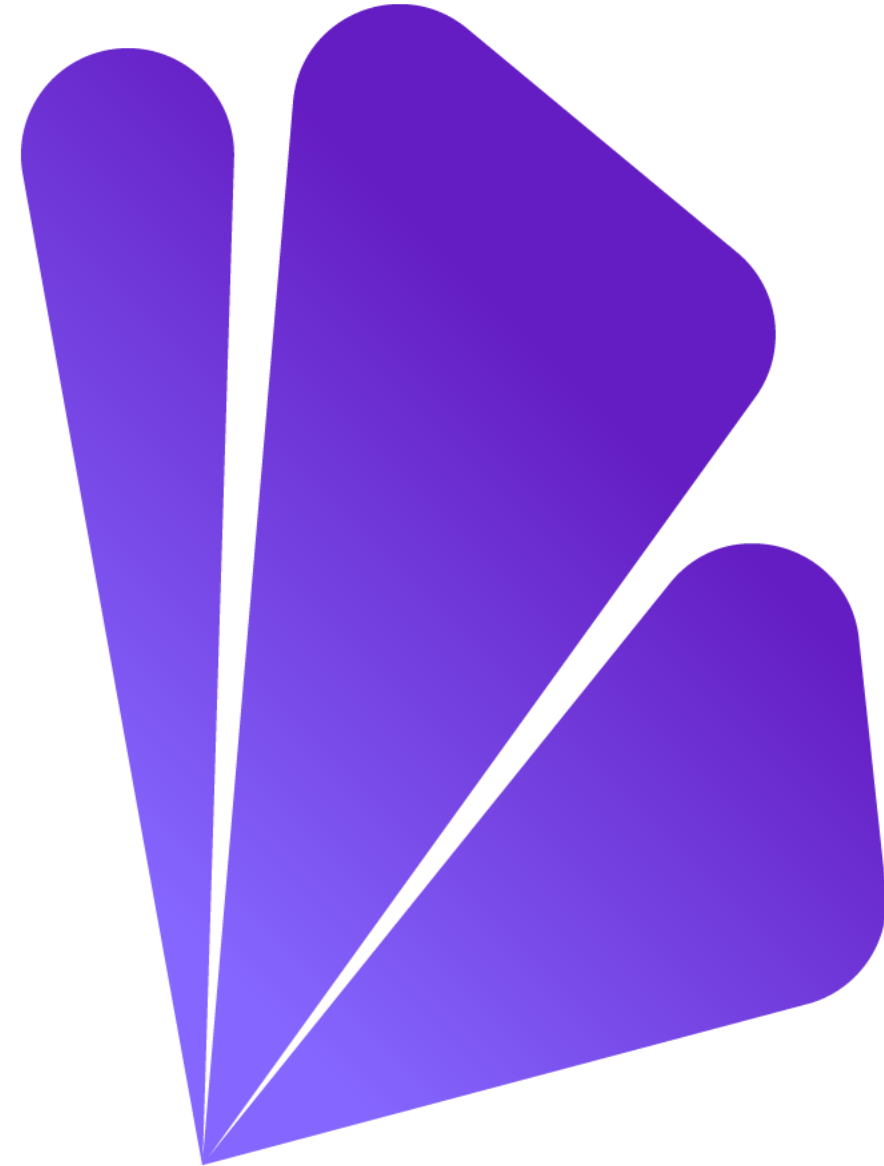
Practical takeaways

Session objective

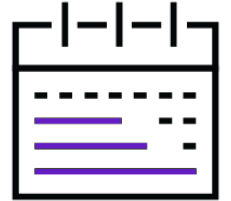


This session aims to demystify the ‘grey’ area

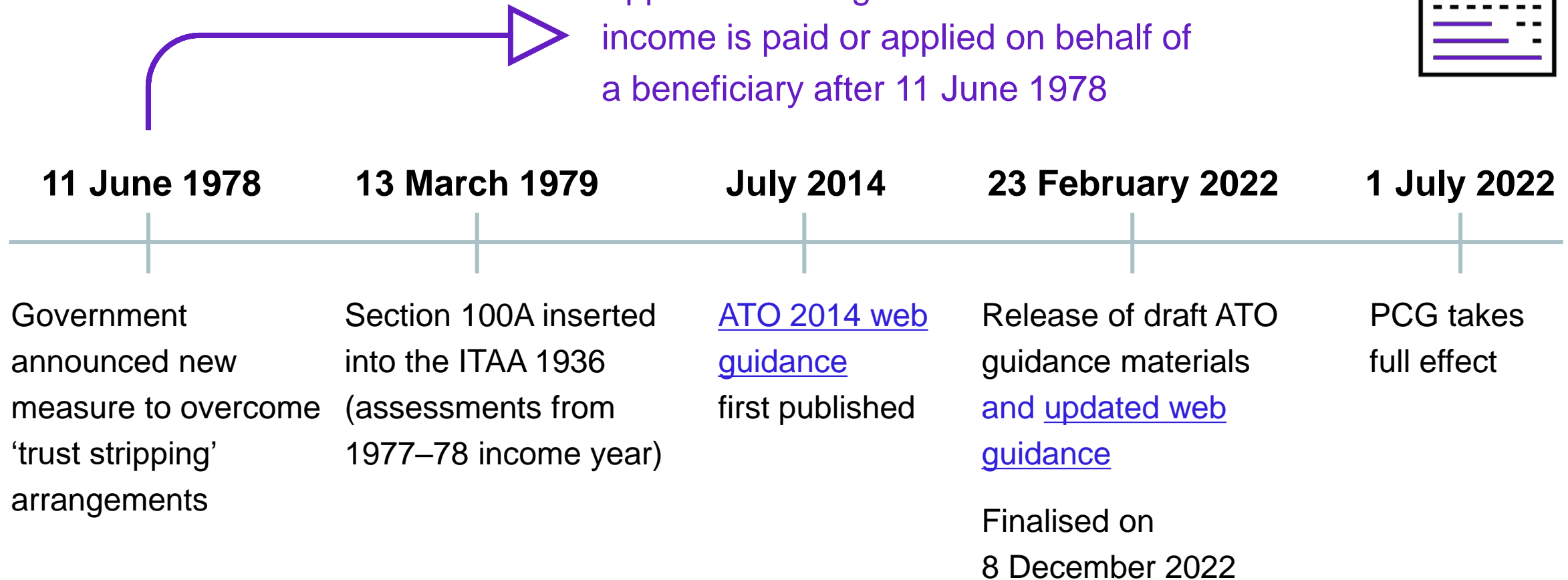
Background



Section 100A | History of developments



Applies to arrangements where trust income is paid or applied on behalf of a beneficiary after 11 June 1978




Section 100A | Final ATO guidance

[TR 2022/4](#)

Income tax: section 100A reimbursement agreements


[TTI submission](#)

| | |
|--|------------------|
|  | |
| Taxation Ruling TR 2022/4 | |
| Status: legally binding | |
| Taxation Ruling Income tax: section 100A reimbursement agreements | |
| <p>Relying on this Ruling</p> <p>This publication (excluding appendices) is a public ruling for the purposes of the Taxation Administration Act 1953.</p> <p>If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not have to pay any more tax or penalties or interest in respect of the matters covered by this Ruling.</p> | |
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| Family objectives | 29 |
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| Consequences of section 100A – trustee liable for income tax and beneficiary relieved | 33 |
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| Current and prior case law | 47 |
| Elements of section 100A | 55 |
| Connection requirement (subsections 100A(1) to (6)) | 57 |
| A present entitlement | 63 |
| An identified agreement, arrangement or understanding | 66 |
| Taxation Ruling TR 2022/4 Page 1 of 43 | |

[PCG 2022/2¹](#)


Section 100A reimbursement agreements – ATO compliance approach

[TTI submission](#)

| | |
|---|------------------|
|  | |
| Practical Compliance Guideline PCG 2022/2 | |
| Practical Compliance Guideline Section 100A reimbursement agreements – ATO compliance approach | |
| <p>Relying on this Guideline</p> <p>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.</p> | |
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| Green zone: scenario 1 – distribution to individuals who are members of a family | 20 |
| Green zone: scenario 2 – beneficiary's entitlement received and used by the beneficiary | 22 |
| Green zone: scenarios 3A and 3B – retention of funds by the trustee | 25 |
| Green zone: scenario 3A – individual beneficiary and retention of funds by the trustee | 26 |
| Green zone: scenario 3B – company or trust beneficiary and retention of funds by the trustee | 28 |
| Green zone: scenario 4 – examples described in TR 2022/4 as being an ordinary family or commercial dealing | 30 |
| Exclusion from the green zone | 32 |
| Red-zone arrangements | 33 |
| Red zone: scenario 1 – arrangements where the presently entitled beneficiary lends or gifts some or all of their entitlement to another party | 34 |
| Red zone: scenario 2 – arrangements where trust income is returned to the trust by the beneficiary in the form of assessable income | 36 |
| Red zone: scenario 3 – arrangements where the presently entitled beneficiary is issued units by the trustee (or related trust) and the amount owed for the units is set off against the beneficiary's entitlement | 41 |
| Red zone: scenario 4 – arrangements where the share of net income included in a beneficiary's assessable income is significantly more than the beneficiary's entitlement | 43 |
| Red zone: scenario 5 – arrangements where the presently entitled beneficiary has losses and is outside the family group | 45 |
| Red zone: scenario 6 – arrangements subject to a Taxpayer Alert | 48 |
| Record keeping | 49 |
| Practical Compliance Guideline PCG 2022/2 Page 1 of 31 | |

[TA 2022/1²](#)

Parents benefitting from the trust entitlements of their children over 18 years of age

| | |
|---|------------------|
|  | |
| Taxpayer Alert TA 2022/1 | |
| Taxpayer Alert Parents benefitting from the trust entitlements of their children over 18 years of age | |
| <p>About Taxpayer Alerts</p> <p>Alerts provide a summary of our concerns about new or emerging higher risk tax or superannuation arrangements or issues that we have under risk assessment.</p> <p>While an Alert describes a type of arrangement, it is not possible to cover every potential variation of the arrangement. The absence of an Alert on an arrangement or a variation of an arrangement does not mean that we accept or endorse the arrangement or variation, or the underlying tax consequences.</p> <p>Refer to PS LA 2008/15 for more information about Alerts. See Alerts issued to date.</p> | |
| Table of Contents | Paragraph |
| Overview | 1 |
| Description | 4 |
| Example 1 | 7 |
| Example 2 | 13 |
| Example 3 | 17 |
| What are our concerns? | 23 |
| What are we doing? | 26 |
| What should you do? | 28 |
| Do you have information? | 30 |
| <p>Overview</p> <p>1. We are currently reviewing trust arrangements where parents enjoy the economic benefit of trust income appointed to their children who are over 18 years of age (Children). The common feature of the arrangements is that trust income is appointed between members of the family group but in substance it is the parents who exercise control over and enjoy the economic benefit of the income.</p> <p>2. In some arrangements, there is an understanding that trust income appointed to the Children will be paid to their parents or otherwise dealt with at their parents' discretion. In others, the trust income appointed to the Children is recorded as applied (with or without their knowledge) to repay amounts owed by them to their parents, being amounts owed in respect of expenses that benefit the children but are properly understood as parental expenses. Examples of these expenses are the costs of their upbringing as a minor or for the kinds of ongoing financial support parents would ordinarily provide their children.</p> <p>3. The arrangements we are concerned about are those which are more properly explained by the tax outcomes obtained, including the accessing of tax-free thresholds and</p> | |
| Taxpayer Alert TA 2022/1 Page 1 of 6 | |

¹ [Compendium](#) exists

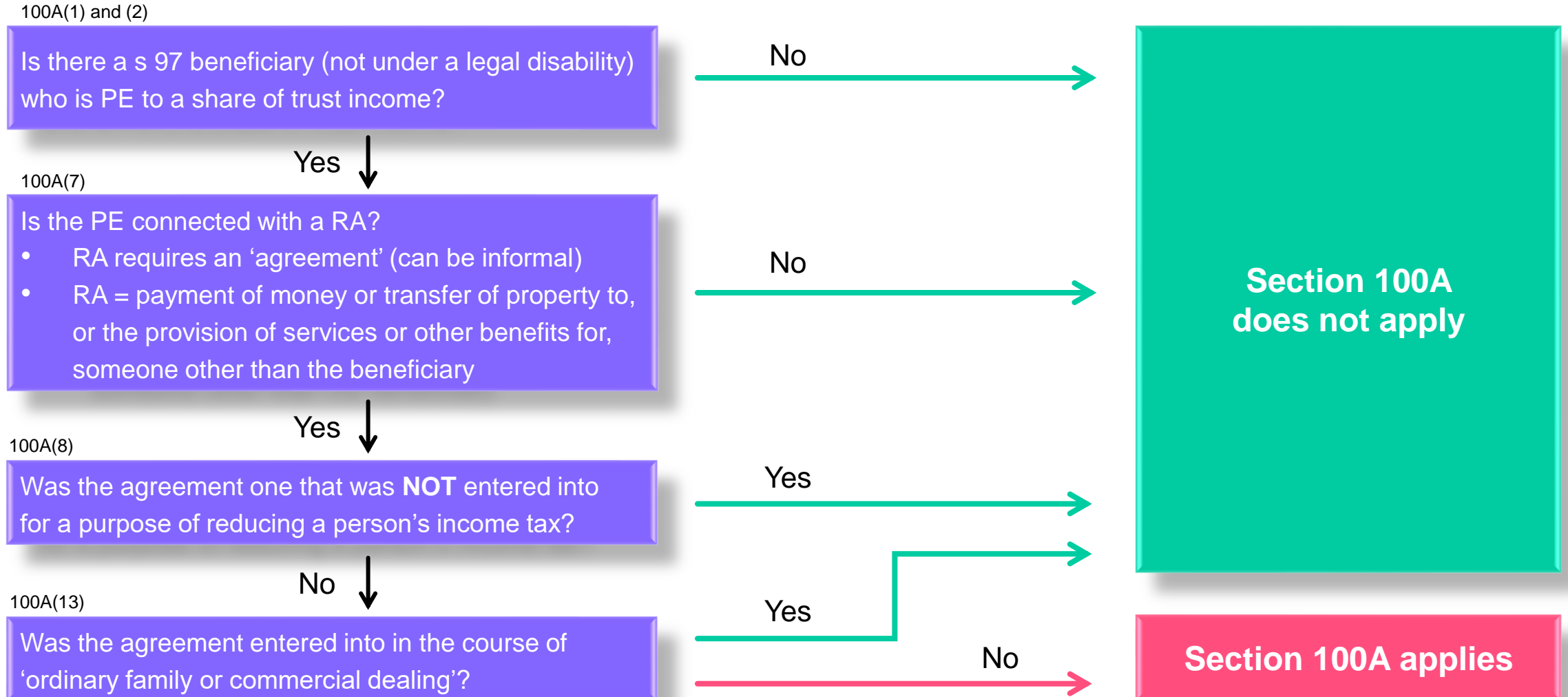
² Not released in draft

Requirements for section 100A to apply

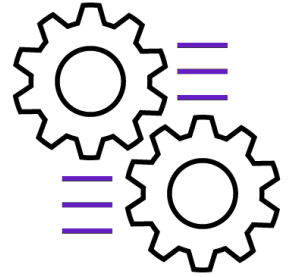


1. A beneficiary who is not under a legal disability has a present entitlement (**PE**) to a share of trust income
2. PE arose out of a reimbursement agreement (**RA**)
3. A benefit is provided to someone other than the beneficiary
4. Exclusions:
 - Agreement excludes one that was **not** entered into for a purpose of reducing (or deferring) a person's income tax
 - Agreement was not entered into in the course of ordinary family or commercial dealing (**OFCD**)

Section 100A | Flow chart



Consequences of section 100A applying



- Beneficiary is **treated as if they are not PE** to that share of the trust income and were never PE to it
 - No one is PE to that share of the trust income for tax law purposes
 - This is the case even if there is a default beneficiary clause in the deed
 - Beneficiary remains PE to the trust income under trust law concepts
- **Trustee is assessed under section 99A**
- Franking credits still available to the trustee (but no refund of excess credits)
- Commissioner can amend an assessment at any time for the purpose of giving effect to 100A — **unlimited amendment period**¹

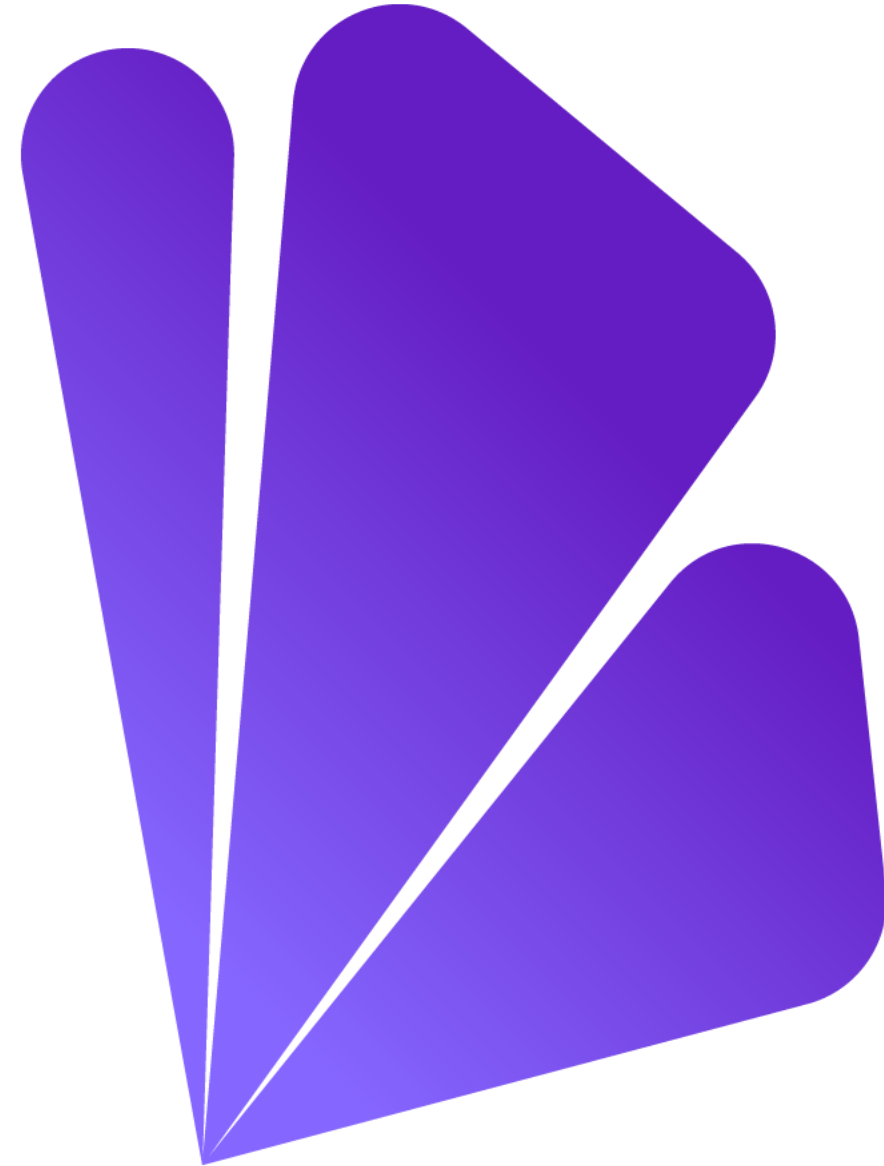
¹ Item 17 of the table in subsection 170(10) of the ITAA 1936
Includes assessments of beneficiaries

Section 100A | Historical case law



- [*Re East Finchley Pty Limited v Commissioner of Taxation*](#) [1989] FCA 481 (24 November 1989)
- [*Prestige Motors Pty Ltd as trustee of Prestige Toyota Trust v Commissioner of Taxation*](#) [1997] FCA 346 (13 May 1997)
- [*Idlecroft Pty Ltd v Commissioner of Taxation*](#) [2005] FCAFC 141 (5 August 2005)
- [*Raftland Pty Ltd as trustee of the Raftland Trust v Commissioner of Taxation*](#) [2008] HCA 21 (22 May 2008)

Recent developments



Section 100A | Recent case law

- **Guardian**

[Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust](#)¹

[2023] FCAFC 3, Perry, Derrington and Hespe JJ

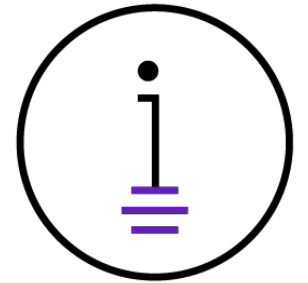
- Hearing on 25 August 2022; judgment reserved until 24 January 2023
- Appeal from [Guardian AIT Pty Ltd ATF Australian Investment Trust v Commissioner of Taxation](#) [2021] FCA 1619 (21 December 2021), Logan J
- [Draft ATO Decision impact statement](#) — issued 24 April 2023

- **BBlood**

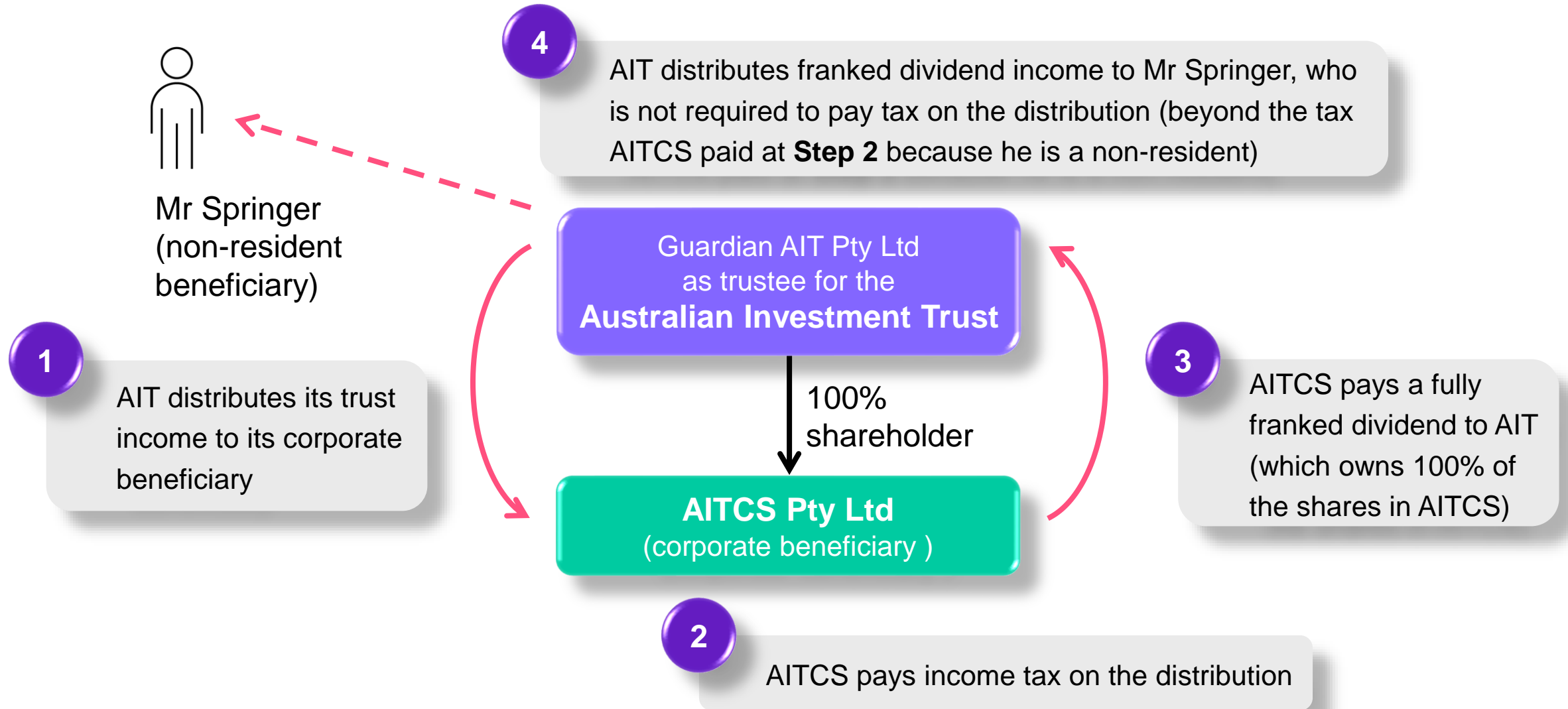
[B&F Investments Pty Ltd as trustee for the Illuka Park Trust v Commissioner of Taxation](#)

[2023] FCA 89 (9 June 2023), Moshinsky, Colvin and Hespe JJ

- Appeal from [BBlood Enterprises Pty Ltd v Commissioner of Taxation](#) [2022] FCA 1112 (19 September 2022), Thawley J
- Held share buy-back arrangement was subject to 100A



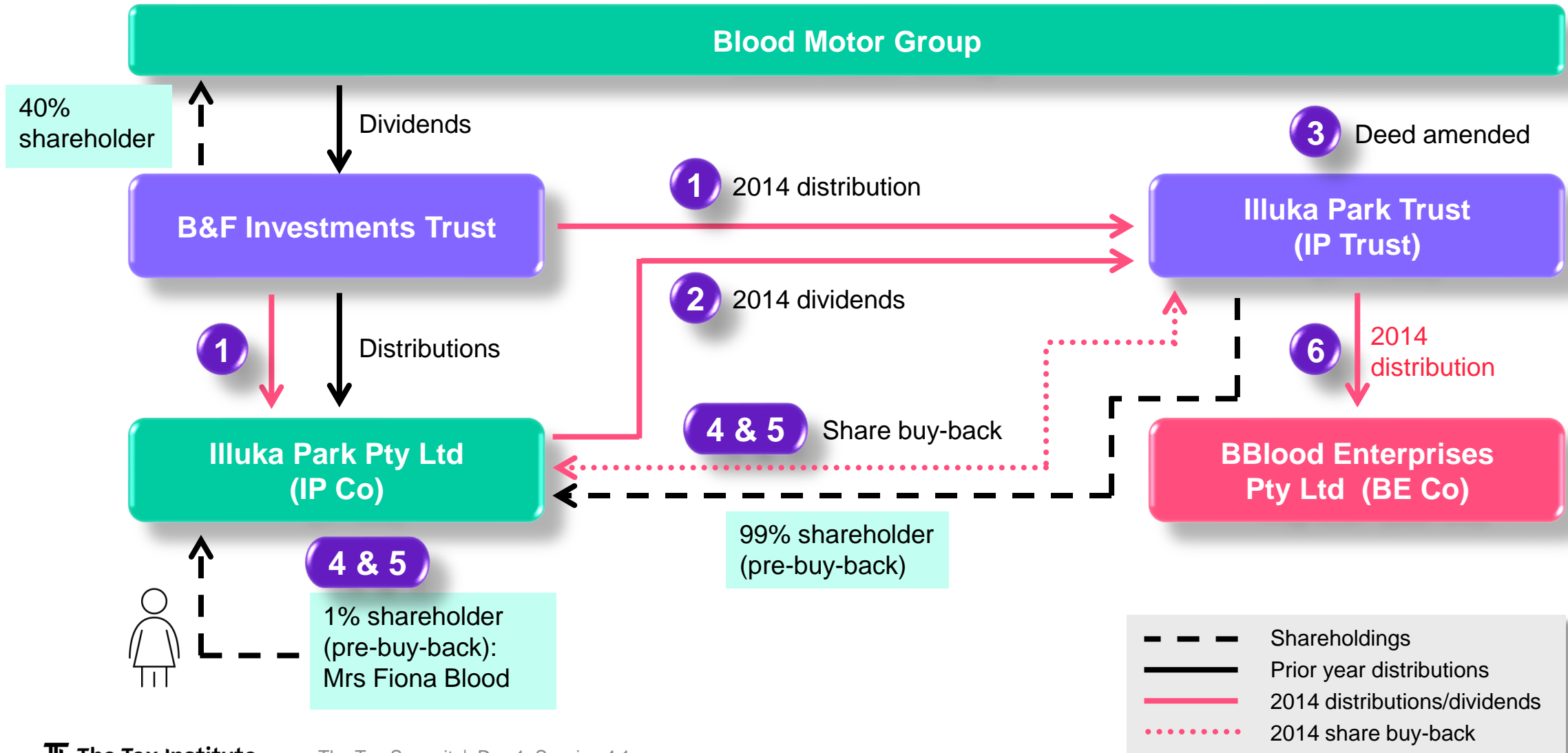
Section 100A | Guardian: structure



Section 100A | Guardian AIT decision

| Income year | First instance (FCA) | | On appeal (FCAFC) | |
|-------------|---|----------------------|--|----------------------|
| | Section 100A | Part IVA | Section 100A | Part IVA |
| 2012 | <ul style="list-style-type: none"> No reimbursement agreement so 100A did not apply In any case, was 'ordinary family or commercial dealing' | Did not apply | Commissioner did not appeal this decision | Did not apply |
| 2013 | | | No reimbursement agreement so 100A did not apply | Applied |
| 2014 | | | Commissioner did not appeal the FCA's decision (UPE managed as Division 7A loan) | |

Section 100A | BBlood: structure

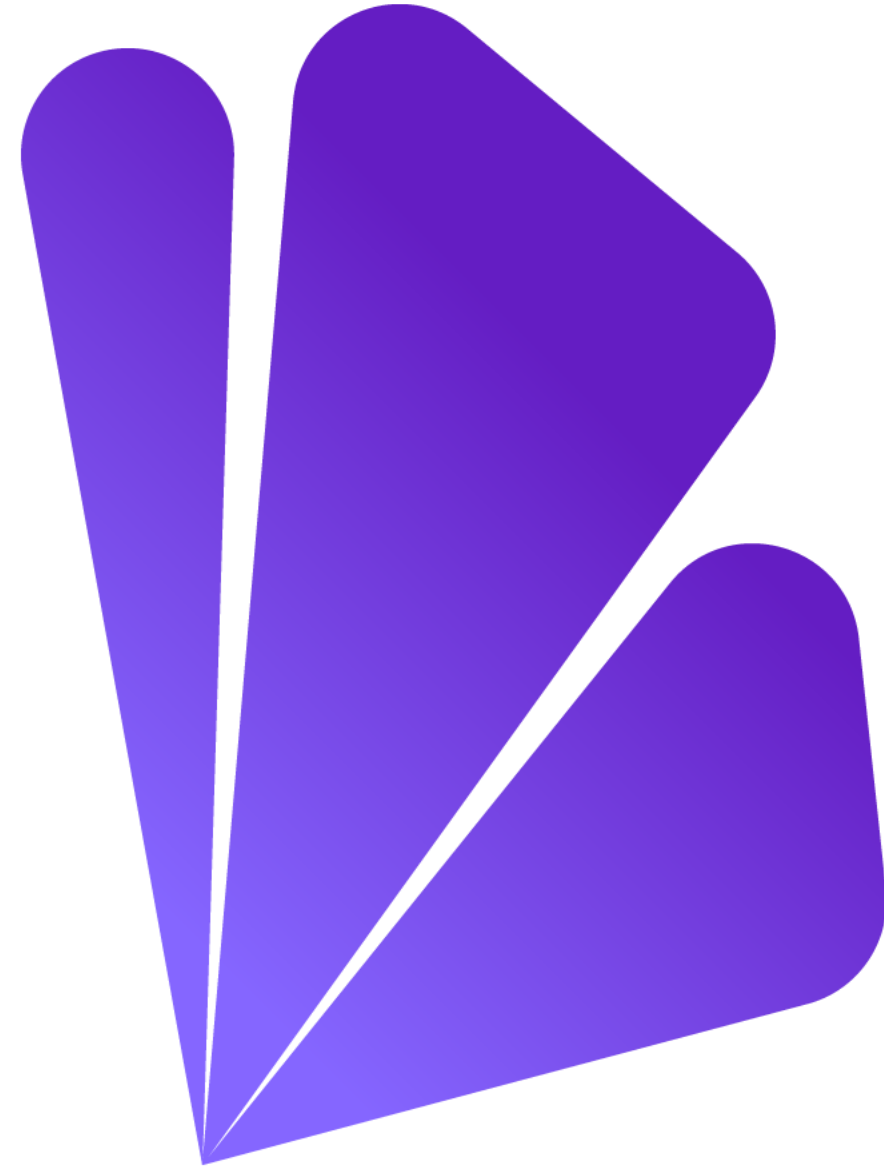


Section 100A | BBlood: Illuka Park steps

Share buy-back and related transactions

1. The trustee of the B&F Investments Trust resolved to distribute the trust income for the period ended 31 March 2014 to:
 - **IP Trust:** \$123,238
 - **IP Co:** remaining \$2,999,496 (UPE)
2. **March and April 2014** | IP Co paid franked dividends to the IP Trust in of \$181,139
3. **13 June 2014** | The IP Trust Deed was varied to amend definition of 'income' — consequence of amendment to the deed meant that the trust income for 2013–14 was **\$304,377**, comprising:
 - distribution made by the B&F Investments Trust on 31 March 2014 of \$123,238
 - dividends paid by IP Co of \$181,139
4. **25 June 2014** | Off-market share buy-back whereby IP Co bought back 99 shares held by the IP Trust for \$99 against share capital account and \$10,189,770 against retained earnings of IP Co. Section 159GZZZP of the ITAA 1936 treated \$10m as dividend
5. Franking credits of \$4,367,002 allocated to dividend arising from the share buy-back — wholly sheltered the tax liability
6. **30 June 2014** | Trustee of IP Trust resolved to distribute all the trust income for 2013–14 (\$304,377) to BE Co

A conversation with the ATO




ATO public advice and guidance update


Taxation Ruling [TR 2022/4](#)


Practical Compliance Guideline [PCG 2022/2](#)

Taxpayer Alert [TA 2022/1](#)

Draft [Decision impact statement](#) — following [Guardian](#) and [BBlood](#) decisions

| | |
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| Status: legally binding | |
| Taxation Ruling Income tax: section 100A reimbursement agreements | |
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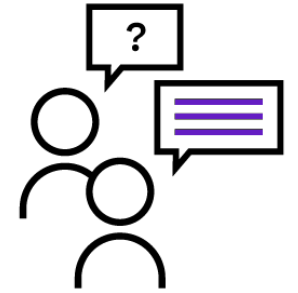
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| Taxpayer Alert TA 2022/1 Page 1 of 6 | |

| | |
|--|---------------------------------------|
| Decision impact statement | |
| Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust | |
| Court citations: | [2023] FCAFC 3 |
| Venue: | Federal Court of Australia |
| Venue reference no: | QUD 36 of 2022; QUD 37 of 2022 |
| Judge name/s: | Perry, Derrington, Hespie JJ |
| Judgment date: | 24 January 2023 |
| Appeals on foot: | No |
| Decision outcome: | Partly favourable to the Commissioner |
| Impacted advice The ATO is reviewing the impact of this decision on related advice and guidance products. | |
| <ul style="list-style-type: none"> TR 2022/4 PS LA 2005/24 | |
| Summary This Decision impact statement outlines the ATO's response to this case, which concerns the application of the anti-avoidance provisions in section 100A and Part IVA of the Income Tax Assessment Act 1936 (ITAA 1936). All legislative references in this Decision impact statement are to the ITAA 1936. | |
| Brief outline of facts Mr Springer had conducted several business ventures in Australia through various entities, collectively known as the Springer Group. The Springer Group included the Australian Investment Trust (AIT), the trustee of which in relevant years was Guardian AIT Pty Ltd (Guardian). Mr Springer was a member of the eligible class of beneficiaries of the AIT and a non-resident for tax purposes during the 2012, 2013 and 2014 income years. In June 2012, AIT Corporate Services Pty Ltd (AITCS) was incorporated (with Guardian holding 100% of the issued shares) and became a member of the eligible class of beneficiaries of the AIT. During the relevant income years, Mr Springer exercised | |
| <small>¹ In this Decision impact statement, all references to Guardian will be in its capacity as trustee for the AIT.</small> | |

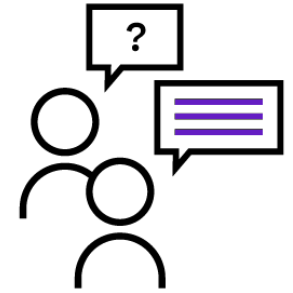
A conversation with the ATO

- Tax return usually doesn't provide the visibility of a '100A risk' — further enquiries are needed to understand the risk level
- Can a risk review of a group lead to an enquiry regarding 100A ?
- How does it get on the radar?
- What raises a red flag before the ATO even commences a review?
- Understanding and agreeing on the facts pre-dispute is paramount
- Compliance cases tending to be readily sorted into 3 categories:
 - Ascertained and agreed that 100A does not apply to the arrangement
 - Taxpayer concedes that 100A does apply
 - Those that challenge the finding

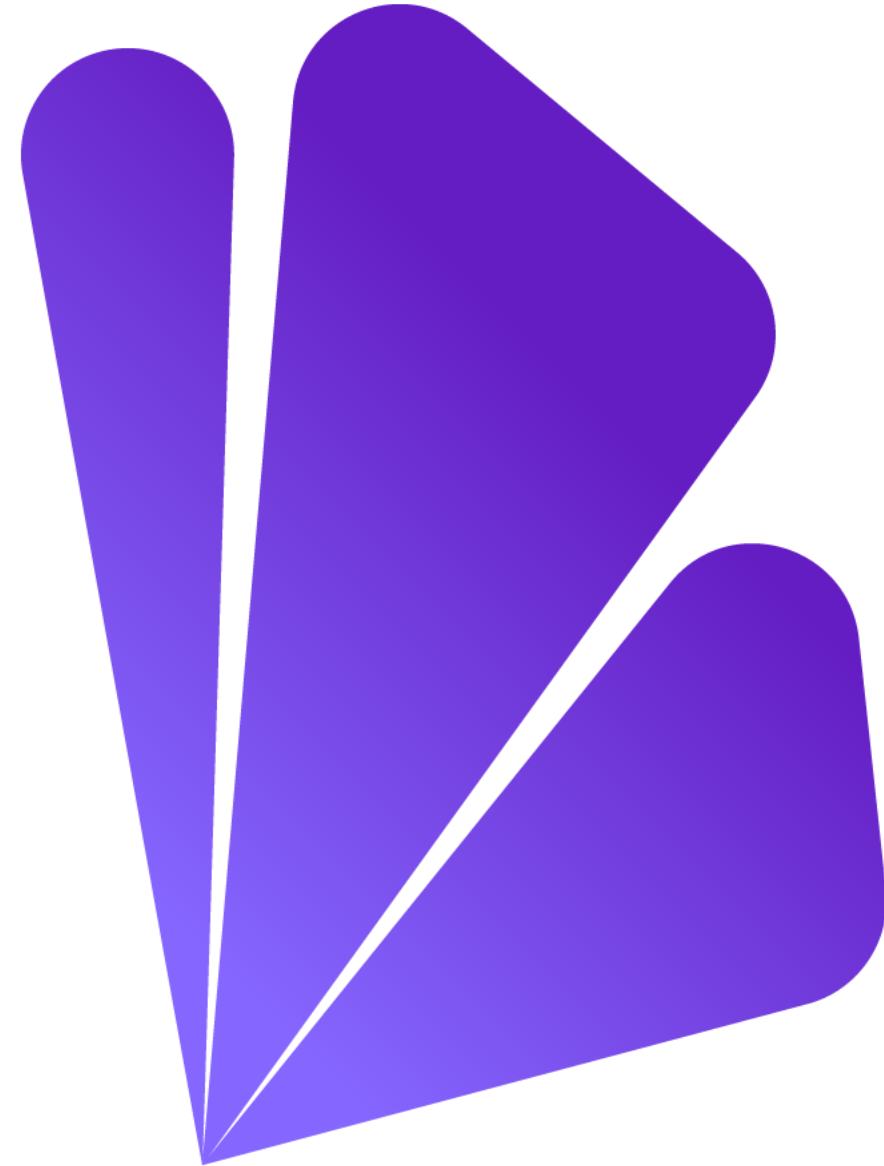


A conversation with the ATO

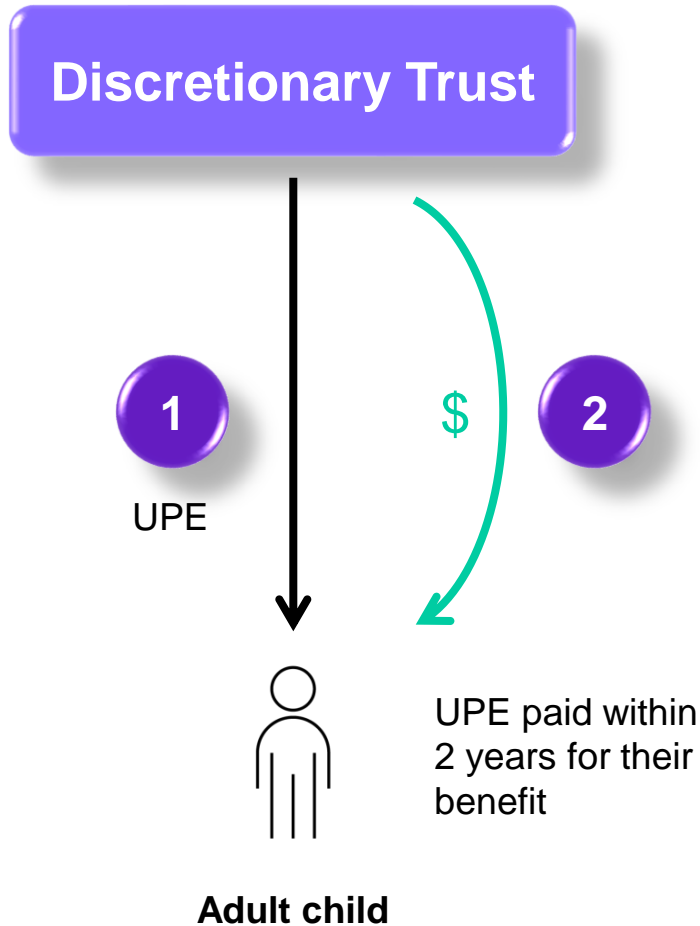
- **Permanent** disconnect between profit and cash versus **temporary** use of the funds
- What is the role of 100A if the beneficiary doesn't receive the benefit within a perceived time? If beyond 2 years, can the OFCD exception explain the behaviour?
- What factors indicate a low risk of ATO compliance resources being allocated?
 - Beneficiary ultimately receives the benefit
 - Company's PE remains unpaid but the UPE is managed as a complying loan under Div 7A
- Paying a UPE:
 - Within 2 years doesn't mean 100A cannot apply to the arrangement
 - More than 2 years later doesn't mean 100A will apply



Case studies



1 | UPE paid within 2 years



Facts

- Discretionary trust distributes income to adult beneficiary
- UPE paid to beneficiary in cash within 2 years
- Beneficiary retains the benefit of the distribution

Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA?
- Is there a tax purpose?
- Can the arrangement be excluded as an OFCD?

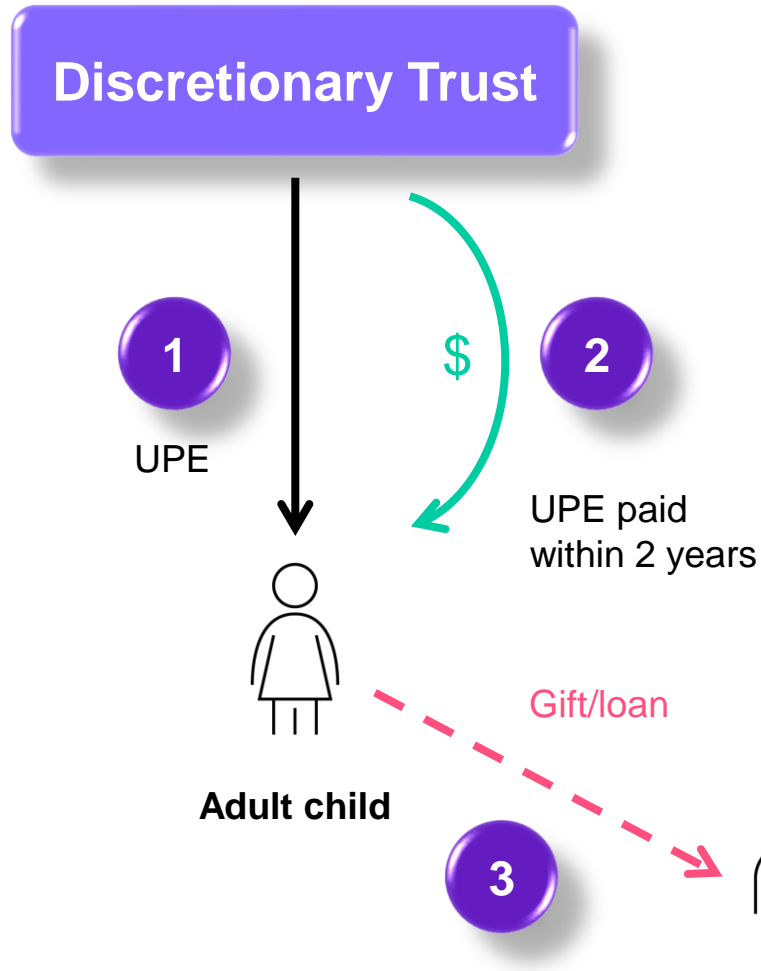


Potentially



- Within green zone
- Low risk of 100A applying

2 | UPE paid within 2 years, with gift/loan



Facts

- Discretionary trust distributes income to adult beneficiary
- UPE paid to beneficiary in cash within 2 years
- Beneficiary gifts/loans the amount to parent on higher MTR

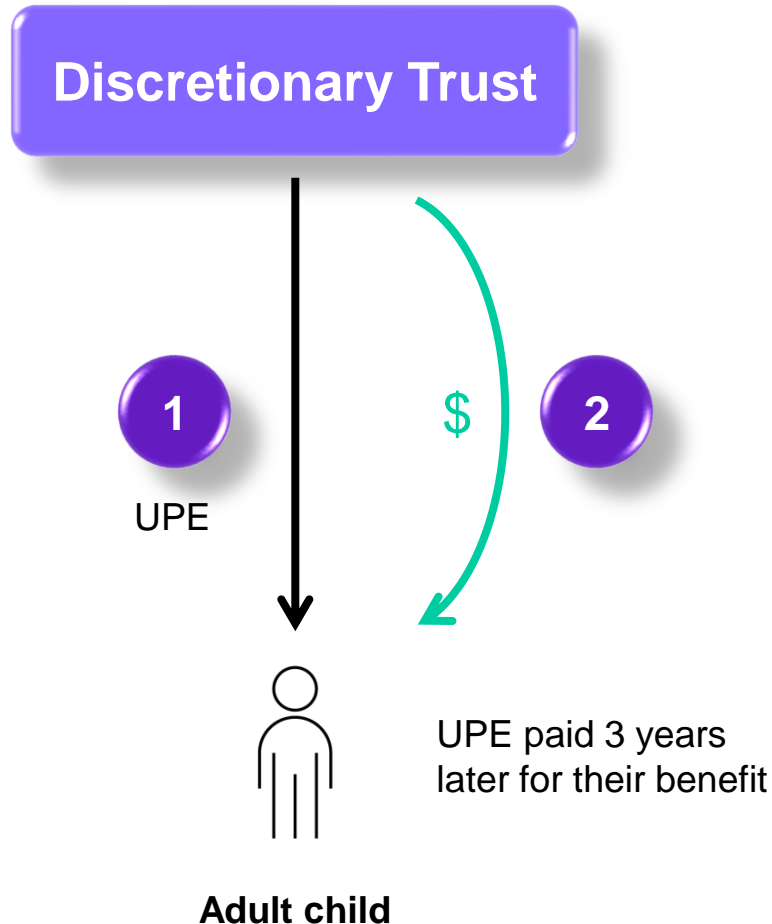
Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA? ✓
- Is there a tax purpose? ✓
- Can the arrangement be excluded as an OFCD? Unlikely



- Within red zone
- High risk of 100A applying

3 | UPE paid outside 2 years



Facts

- Discretionary trust distributes income to adult beneficiary
- UPE paid to beneficiary 3 years later in cash
- Trustee has use of funds until UPE paid to beneficiary who retains the benefit of the distribution

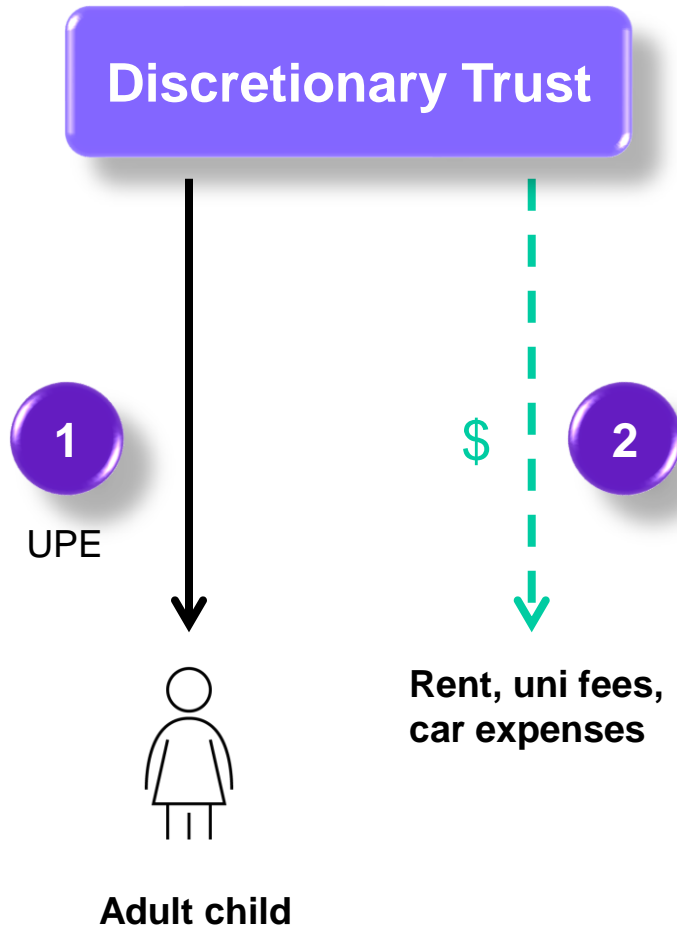
Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA? ✓
- Is there a tax purpose? ✓
- Can the arrangement be excluded as an OFCD? Potentially



- Outside green zone
- But low risk of 100A applying

4 | UPE applied to beneficiary's expenses



Facts

- Discretionary trust distributes income to adult beneficiary
- Beneficiary directs UPE be applied against their expenses
- Trustee promptly pays expenses on behalf of beneficiary

Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA?
- Is there a tax purpose?
- Can the arrangement be excluded as an OFCD?

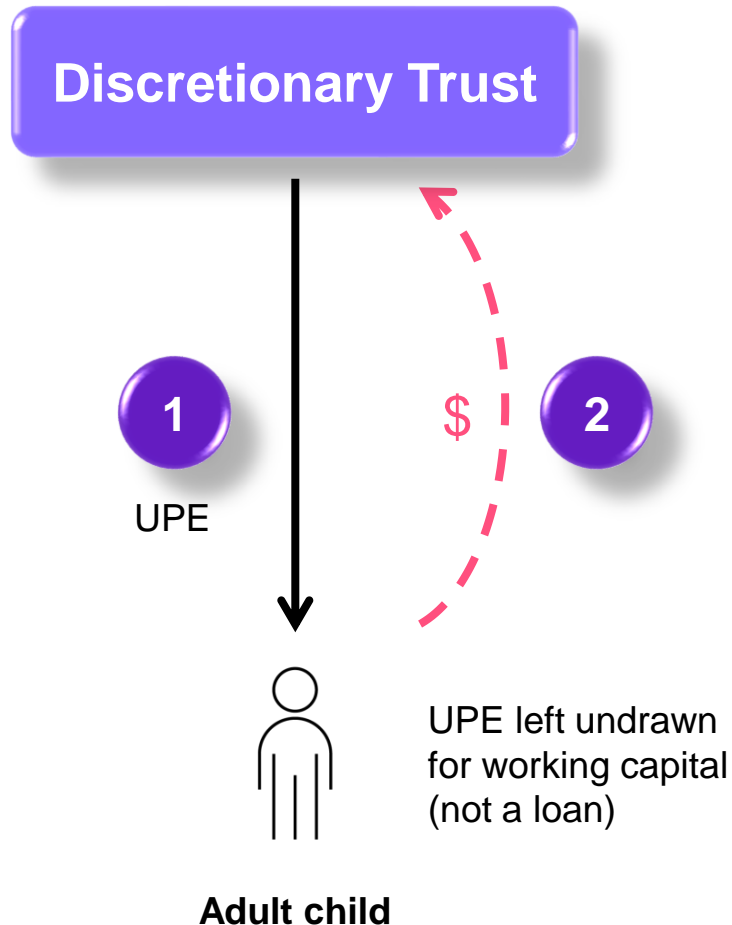


Not necessary



- Within green zone
- Low risk of 100A applying

5 | UPE left undrawn for working capital



Facts

- Discretionary trust distributes income to adult beneficiary
- UPE left undrawn, beneficiary does not call for payment
- Trustee retains the use of funds for **working capital or investment** until beneficiary calls for payment of the UPE

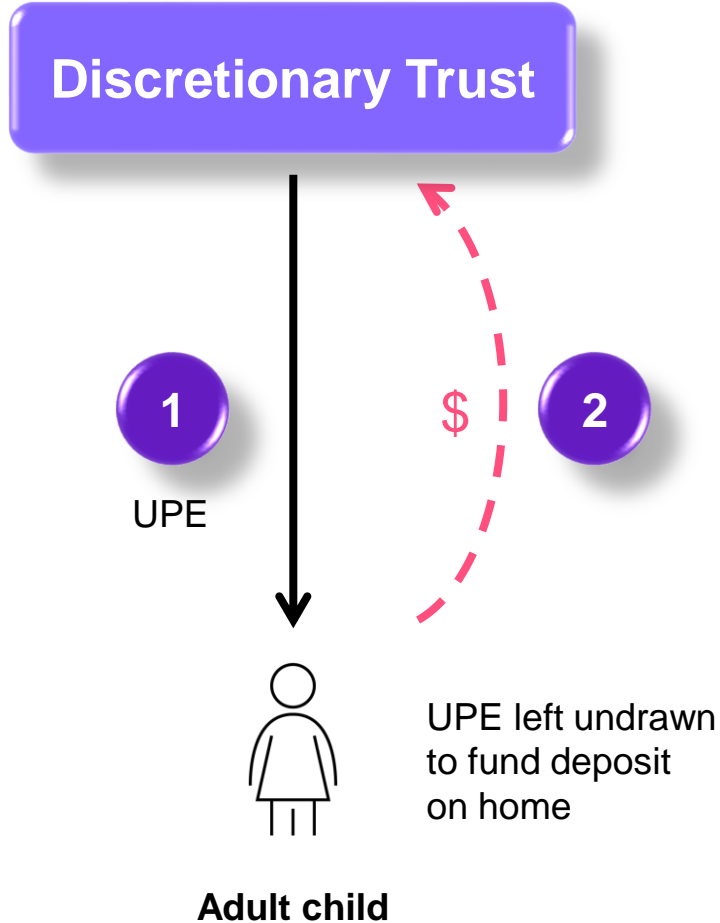
Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA? ✓
- Is there a tax purpose? ✓
- Can the arrangement be excluded as an OFCD? Potentially
- Does it make a difference whether they are involved in the business? Potentially



- Outside green zone
- But low risk of 100A applying

6 | UPE left undrawn for home deposit



Facts

- Discretionary trust distributes income to adult beneficiary
- UPE left undrawn, beneficiary does not call for payment
- Trustee retains the use of funds until beneficiary calls for payment of UPE to apply to deposit on first home

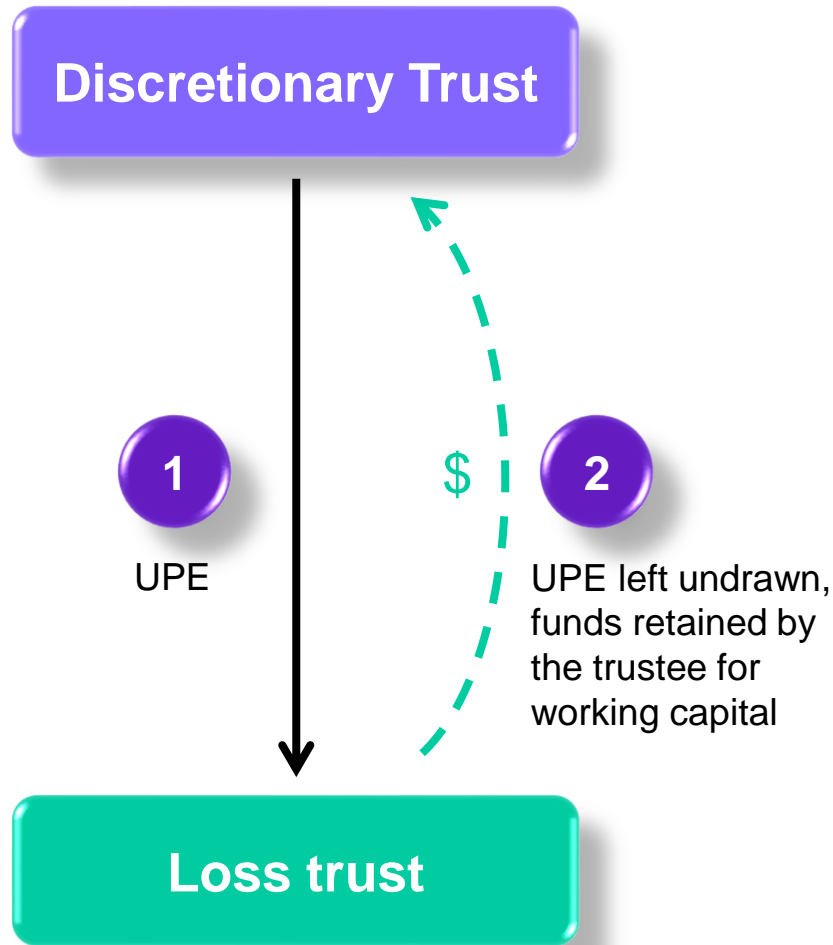
Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA? ✓
- Is there a tax purpose? ✓
- Can the arrangement be excluded as an OFCD? Potentially



- Outside green zone
- But low risk of 100A applying

7 | UPE to loss trust in same 'family group'



Facts

- Discretionary trust distributes income to loss trust (same 'family group' within the meaning of Sch 2F to the ITAA 1936)
- Trustee retains the use of funds for working capital until beneficiary calls for payment of UPE

Is there a 100A issue with this arrangement?

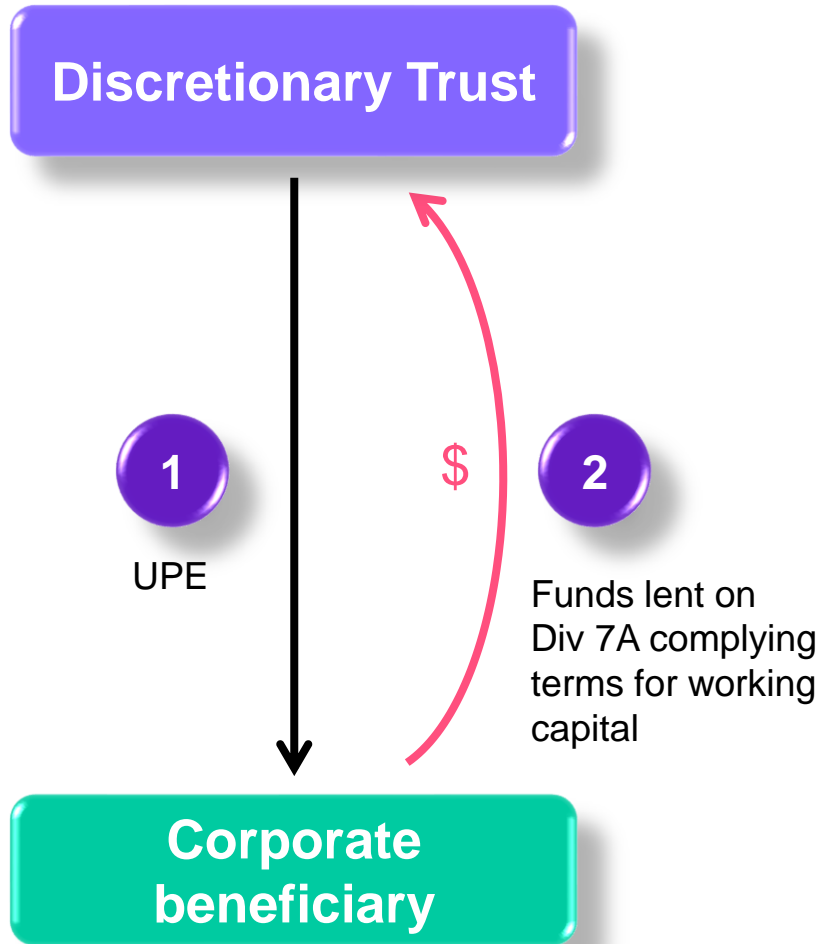
- Has a benefit been provided to someone other than the beneficiary under an RA? ✓
- Is there a tax purpose? ✓
- Can the arrangement be excluded as an OFCD?

Potentially (paid < 2 yrs)
Unlikely where > 2 yrs or not paid



- Within green zone (if paid < 2 years)
- Low risk of 100A applying

8 | UPE loaned by corporate beneficiary



Facts

- Discretionary trust distributes income to corporate beneficiary
- UPE left undrawn, beneficiary does not call for payment
- Trustee retains the use of funds for working capital (lent on Div 7A complying terms) until beneficiary calls for payment of UPE

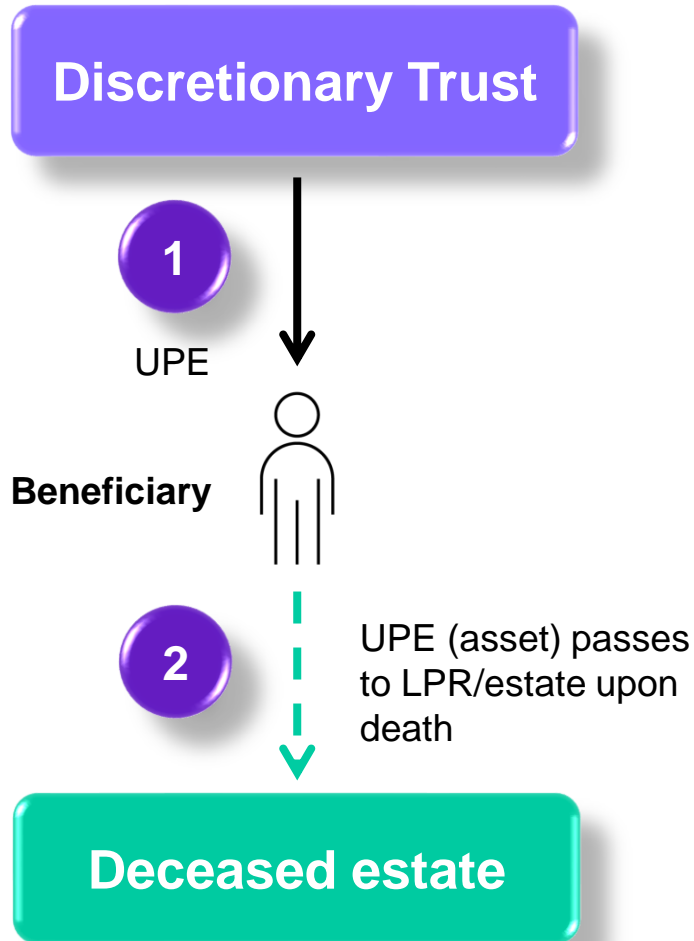
Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA? ✓
- Is there a tax purpose? ✓
- Can the arrangement be excluded as an OFCD? Potentially
- Does it matter what the trustee does with the funds? Potentially



- Outside green zone
- But low risk of 100A applying

9 | UPE of deceased beneficiary



Facts

- Beneficiary has a UPE, then passes away
- Beneficiary's UPE is an asset that passes to their LPR/deceased estate

Is there a 100A issue with this arrangement?

- Has a benefit been provided to someone other than the beneficiary under an RA?
- Is there a tax purpose?
- Can the arrangement be excluded as an OFCD?

Unlikely

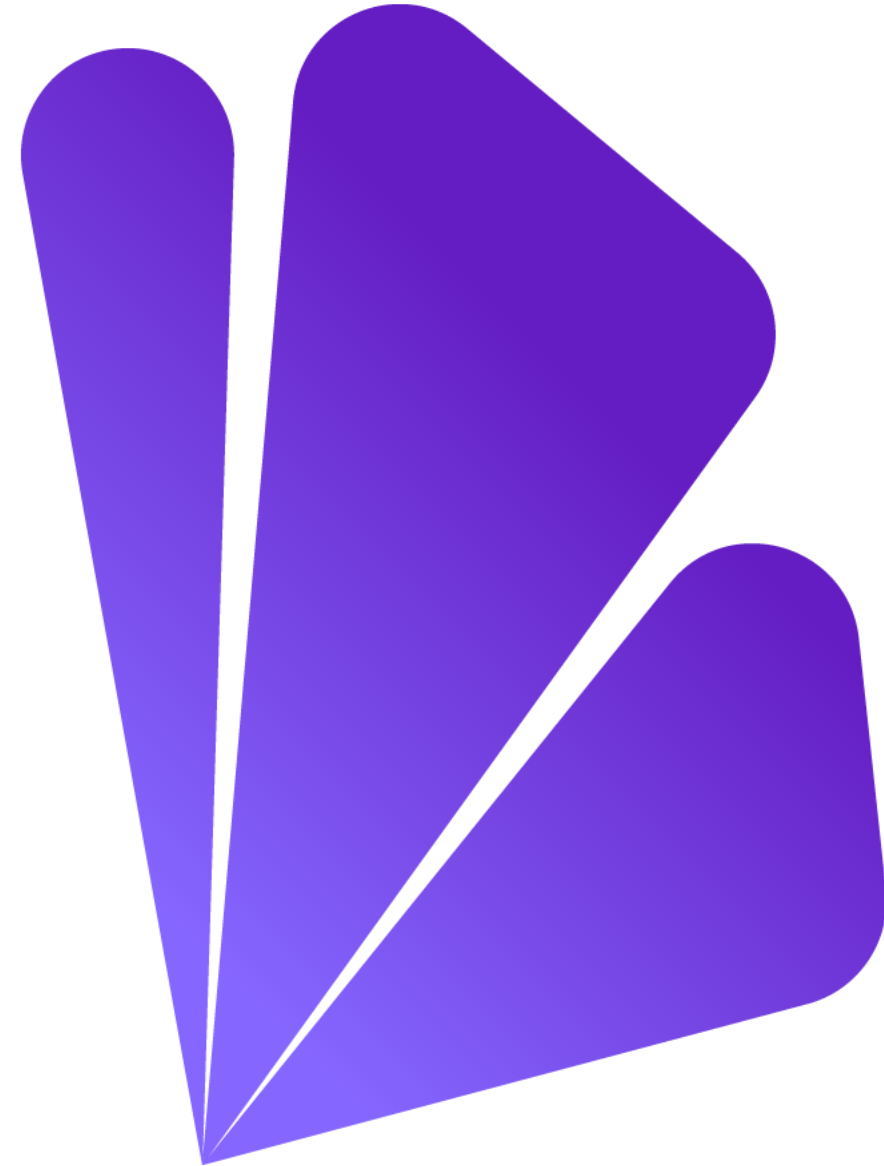
Unlikely

Likely



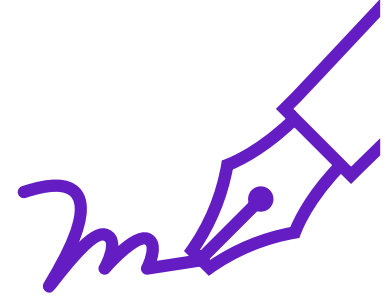
- Low risk of 100A applying

Practical takeaways



What records should you keep?

- Trust deed (including amendments), trustee resolutions, trustee's contact details and details of former trustee(s)
- Notes, records of discussions or meetings explaining the transactions that have happened or calculations made
- Details of how:
 - the beneficiary was notified of their PE to trust income
 - the trust income was received or used by the beneficiary
 - the trustee utilised the beneficiary's PE if they were not paid
- Loan agreements and records showing how loan repayments were satisfied
- File notes of a meeting between trustee and their registered tax agent
- No requirement to document the reasons for the manner of the distribution — risk of the trustee/adviser preparing too much documentation ([Owies v JJE Nominees Pty Ltd¹](#))




Practical takeaways





- Trusts 101 — need to understand trust law and fiduciary obligation of trustees
- Be prepared to explain your position
- Evidentiary requirements to support the trustee's position — how is the benefit extinguished or satisfied? Does this change over time? ... the longer the time that passes from the creation of the PE and the satisfaction of that PE, the greater the likelihood of concerns arising
- Understand the ATO's compliance approach in the PCG and review process — having contemporaneous set-off documentation is much better than preparing retrospective documentation once an ATO review has commenced
- Trustees generally know whether they intend to pay the benefit (e.g. to adult beneficiaries on lower MTRs and elderly parents)
 - As a **trustee** — wouldn't you normally just give someone the cash if you want to support them?
 - As a **beneficiary** — if you have a PE, wouldn't you want the cash?
- As a **practitioner** — seek advice/assistance where you feel out of your depth




Checklist

| Issue | Consideration |
|----------------|---|
| PE under an RA | <ul style="list-style-type: none"> Is the beneficiary PE to a share of income of the trust? Is the beneficiary under a legal disability? Did the PE arise in connection with an RA? Is a benefit received by someone other than the beneficiary under the RA?  |

Checklist

| Issue | Consideration |
|----------------|---|
| PE under an RA | <ul style="list-style-type: none"> Is the beneficiary PE to a share of income of the trust? Is the beneficiary under a legal disability? Did the PE arise in connection with an RA? Is a benefit received by someone other than the beneficiary under the RA?  |
| Exceptions | <ul style="list-style-type: none"> Was the agreement one that was NOT entered into for a purpose of reducing (or deferring) a person's income tax liability? Was the agreement entered into in the course of OFCD?  |

Checklist

| Issue | Consideration |
|--------------------|---|
| PE under an RA | <ul style="list-style-type: none"> Is the beneficiary PE to a share of income of the trust? Is the beneficiary under a legal disability? Did the PE arise in connection with an RA? Is a benefit received by someone other than the beneficiary under the RA?  |
| Exceptions | <ul style="list-style-type: none"> Was the agreement one that was NOT entered into for a purpose of reducing (or deferring) a person's income tax liability? Was the agreement entered into in the course of OFCD?  |
| Managing the issue | <ul style="list-style-type: none"> Can the transactions be explained on the basis of familial or commercial dealing? Does the trustee have notes or records of discussions or meetings that explain the transactions that have happened or calculations made? Is the behaviour of the parties consistent with the stated objectives?  |

Abbreviations

| Abbreviation | Description |
|--------------|---|
| ATO | Australian Taxation Office |
| Div 7A | Division 7A of Part III of the <i>Income Tax Assessment Act 1936</i> |
| FCA FCAFC | Federal Court of Australia Full Court of the Federal Court of Australia |
| HCA | High Court of Australia |
| ITAA 1936 | <i>Income Tax Assessment Act 1936</i> |
| LPR | Legal personal representative |
| MTR | Marginal tax rate |

Abbreviations

| Abbreviation | Description |
|--------------|---------------------------------------|
| OFCD | Ordinary family or commercial dealing |
| PCG | Practical Compliance Guideline |
| PE | Present entitlement |
| RA | Reimbursement agreement |
| TR | Taxation Ruling |
| TTI | The Tax Institute |
| UPE | Unpaid present entitlement |



Thank you

Please complete your evaluation form

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A large, stylized purple graphic resembling a spark or a burst of energy. It has a central point from which several lines radiate outwards, some solid and some dashed. Two small starburst icons are positioned near the top of the graphic. The text "Spark change" is written in a large, white, sans-serif font across the center of the graphic.

Spark change