



# ATO targeting your trusts

23 May 2023

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# Introduction

## Trusts

- Widespread business and investment vehicle
- Flexibility, tax advantaged
- ATO renewed focus on certain tax outcomes through trusts
- Section 100A
- Managing risk

# Today's session

- Trust essentials
- Kinds of activity targeted
- How section 100A combats
- ATO's views, review program
- 30 June 2023 trust income decisions
- Historical

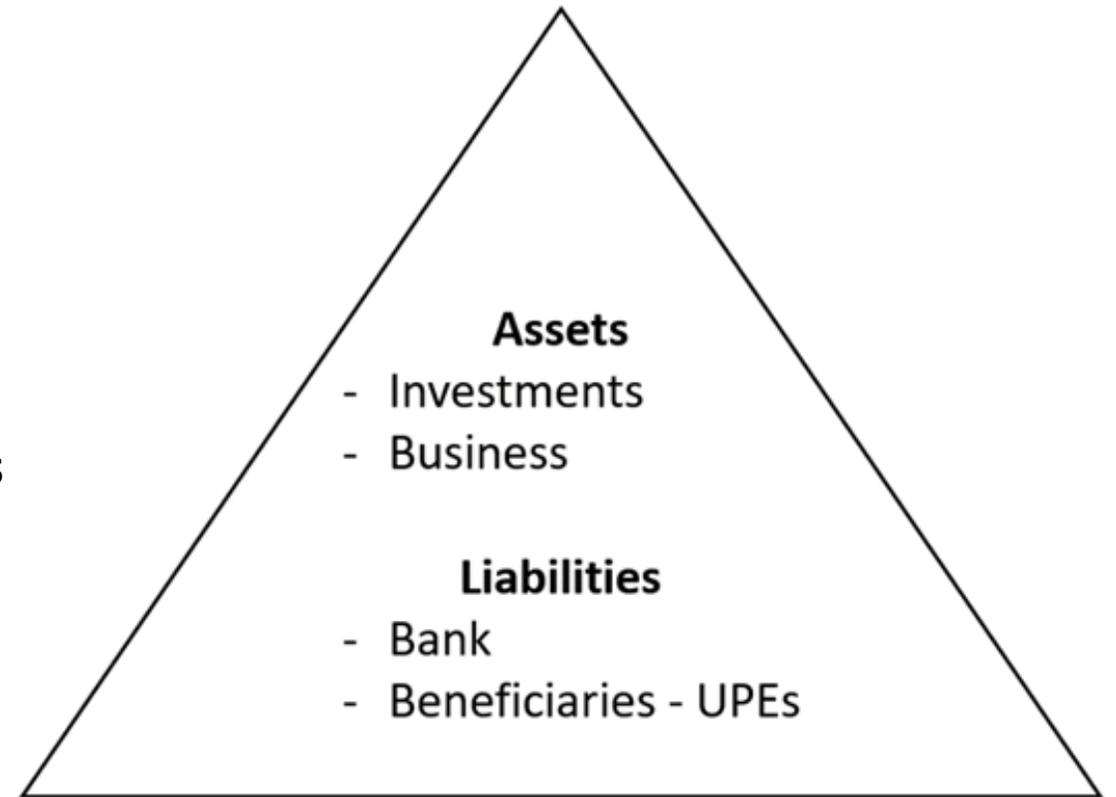
# Your options

1. Do nothing
2. Do something

# Trust essentials

# Trust essentials

- Vehicle for holding assets, operate business
- Rising popularity in 1970s, widely used from 1980s
- Trustee appoints trust income to beneficiaries
  - Presently entitled, unpaid (UPE)
  - Beneficiaries taxed on proportionate share of trust's taxable income
- Trust owes the money to the beneficiary
  - Can call anytime



# Appoint trust income

- Resolve by 30 June each year
- Any income to which no beneficiary presently entitled
  - Trustee taxed at 47%



# Trusts: anti-avoidance

# Trusts

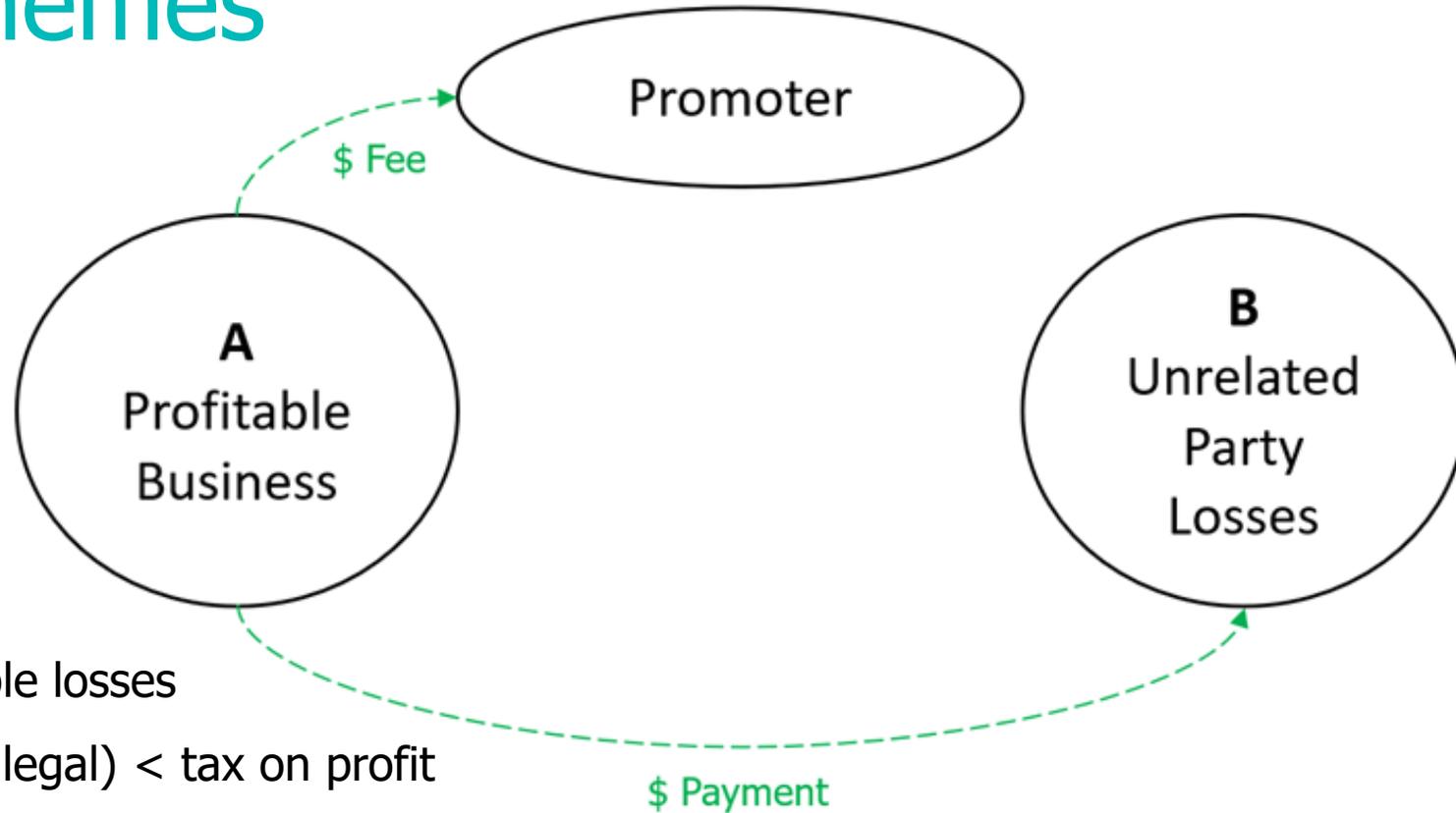
## Taxing history

- Anti-avoidance rules
  - Section 100A (1978)
  - \$416 tax-free limit for minors (1981)
  - General anti-avoidance (Part IVA, 1981)
  - Trust losses (1995)
  - Commercial debt forgiveness (1996)
  - 45-day franking credit rule (1997)
  - Promoter penalty regime (2006)
- “Interim” taxing reforms (2011)
  - Streaming capital gains, franked dividends

# 1970s promoted schemes

## Trust stripping

- Promoter:
  - Advertises; B responds
  - Promotes scheme to A
- Results:
  - B gets something for otherwise unusable losses
  - A's costs (promoter fee, payment to B, legal) < tax on profit
  - Promoter earns fee
- Everybody wins, right?
  - ...except everyone else in Australia



# 1970s promoted schemes

## Trust stripping

- Reaction to high tax impost:
  - Company rate: 46c (no imputation)
  - Top personal tax rate: 65c
- Effective tax rate of 81.1c
- Pattern:
  - 1990s scheme era
  - Today...



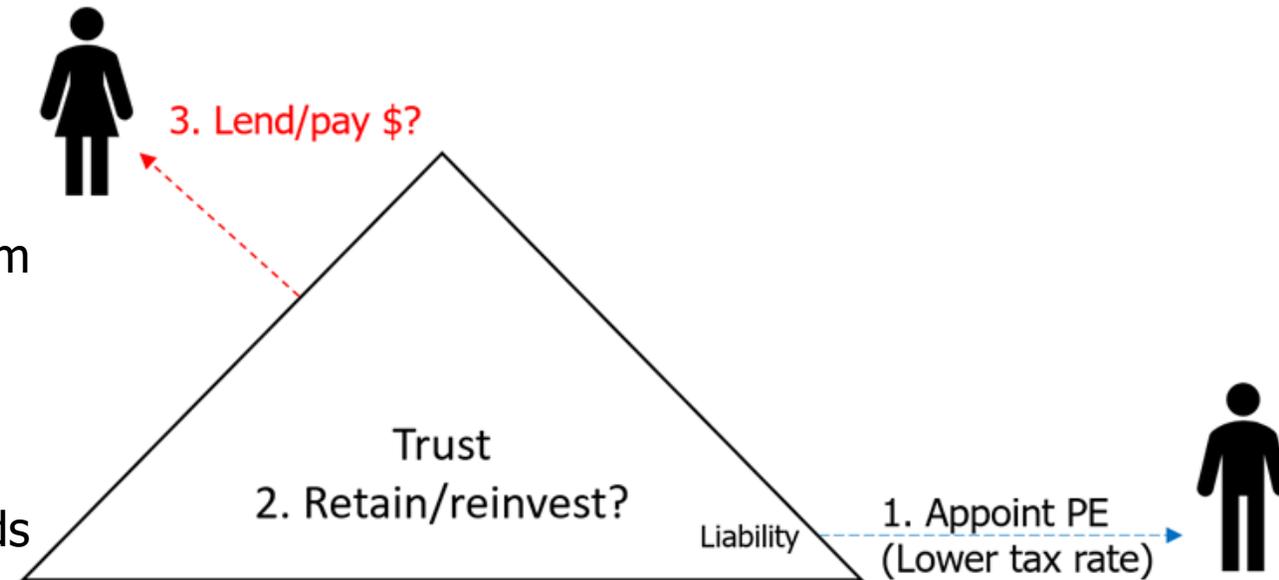
# Section 100A

## Trust stripping

- Introduced to stamp out
- Wouldn't work today, because of subsequent anti-avoidance rules. Eg:
  - Trust losses
  - Debt forgiveness
  - General anti-avoidance (Pt IVA)

# Trusts today

- Section 100A just as applicable to trusts today
  - Not limited to promoted schemes
- We all inadvertently could find ourselves in the realm of targeted activity:
  - Appoint trust income to a beneficiary
    - Typically on lower tax rate
  - Someone else gets the benefit of underlying funds
- Self-executing



# Section 100A

## Consequences of breach

- *Deemed* no beneficiary PE to trust income:
  - Fiction created by law
  - Trustee assessed at 47%
  - Possible penalties, interest
  - Beneficiary gets their tax back
- *Reality* unchanged:
  - Trust still owes the PE to beneficiary

# Section 100A

## Example of breach

- \$100 trust income:
  - Appointed to beneficiary
  - Pay down PE \$21 for beneficiary's tax
  - Remaining UPE: \$79
- If breach of s100A, overall cost to trust funds:
  - $\$21 + \$47 + \$79 = \$147$
  - Before penalties

# Section 100A

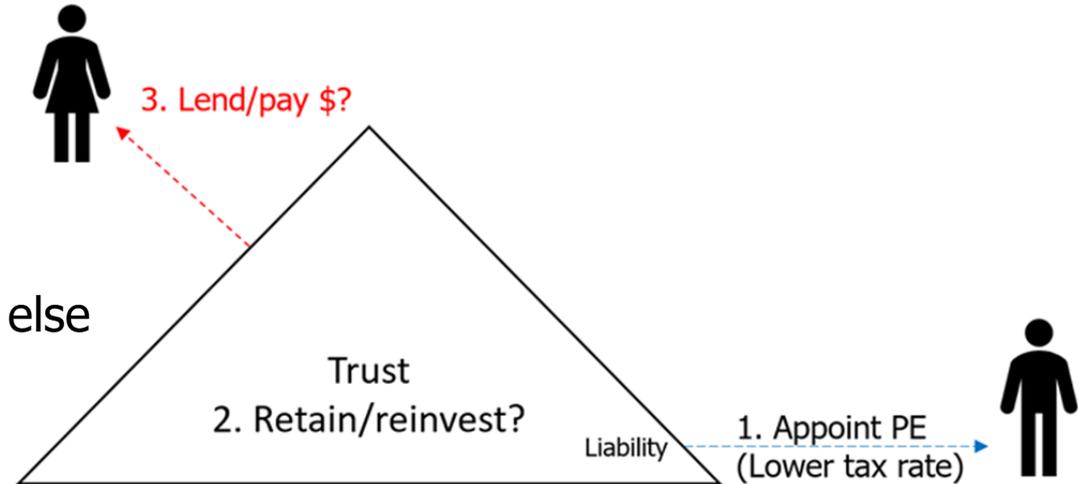
## When applies

- Three requirements:
  1. Appoint trust income to a beneficiary (present entitlement)
    - Exception: minors
  2. PE arose from a “reimbursement agreement”
  3. Purpose of tax saving
  
- Unlimited amendment period
- Recent cases

# Section 100A

## Reimbursement agreement

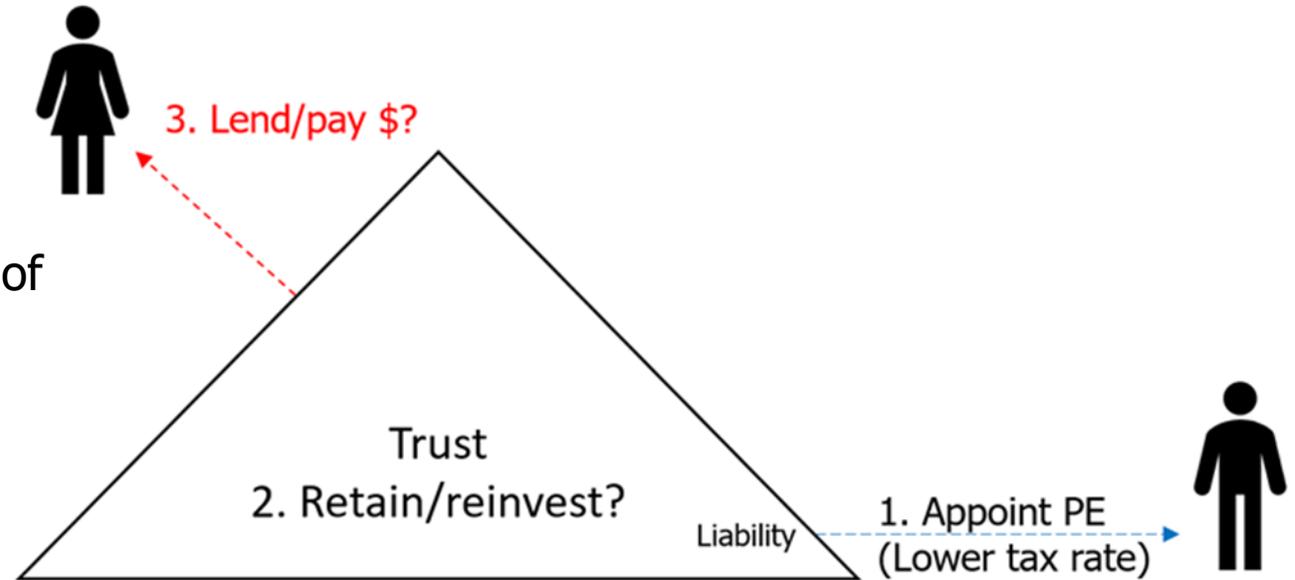
- Agreement
  - Broadly defined
  - Provides for payment, benefit etc to someone else
  - No actual “reimbursement” required
- Must be in place *before* trust income appointed



# Section 100A

## “Ordinary...” exclusion

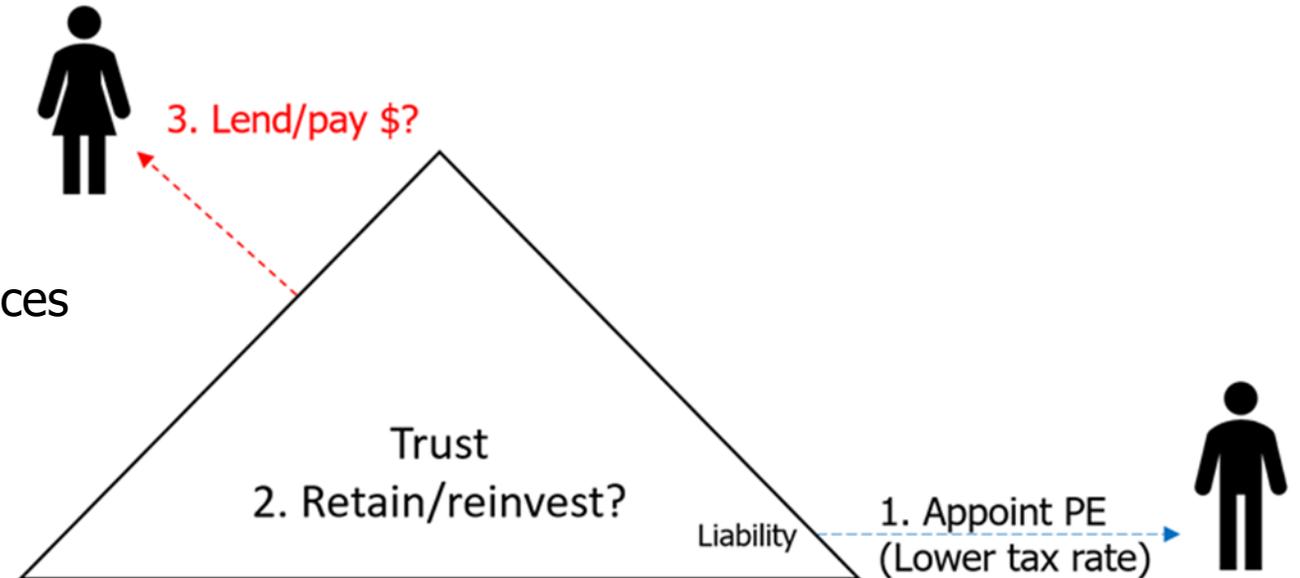
- Three requirements met, but...
  - ...agreement “entered into in the course of ordinary family or commercial dealing”
- “...entered into in the course of...”
  - Process, not outcomes



# Section 100A

## “Ordinary...” exclusion

- Not defined
- Little considered by courts
- Nobody can say with certainty what circumstances fall within exclusion
  - Can offer only a considered opinion
- ATO has their views

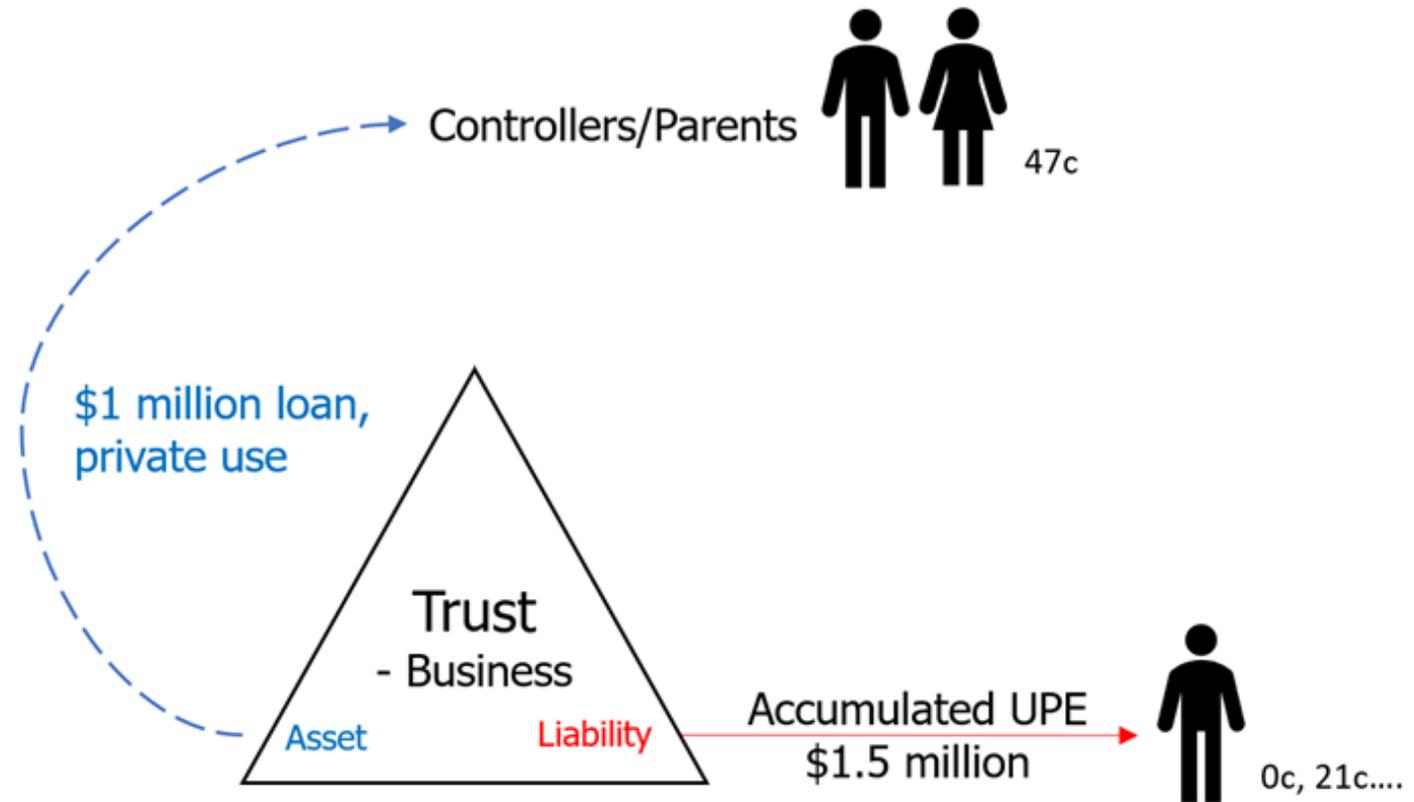


# Example – High-risk scenario

# Example

## High s100A risk

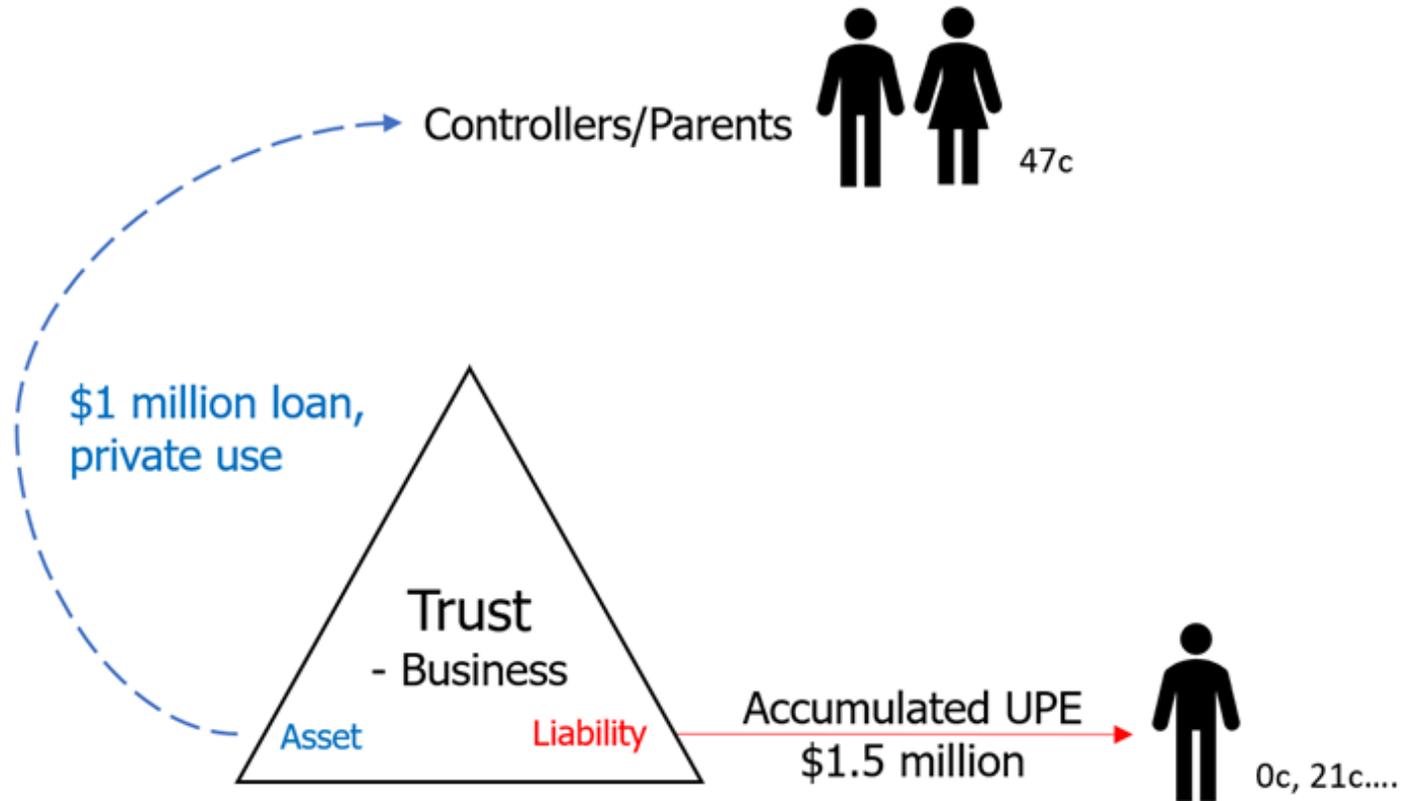
- Child largely unaware
- Parents used funds for:
  - Family home
  - Holiday
  - Private car
  - Normal private consumption



# Example

## Contrast – lower risk

- Parents used funds for:
  - Emergency cancer treatment



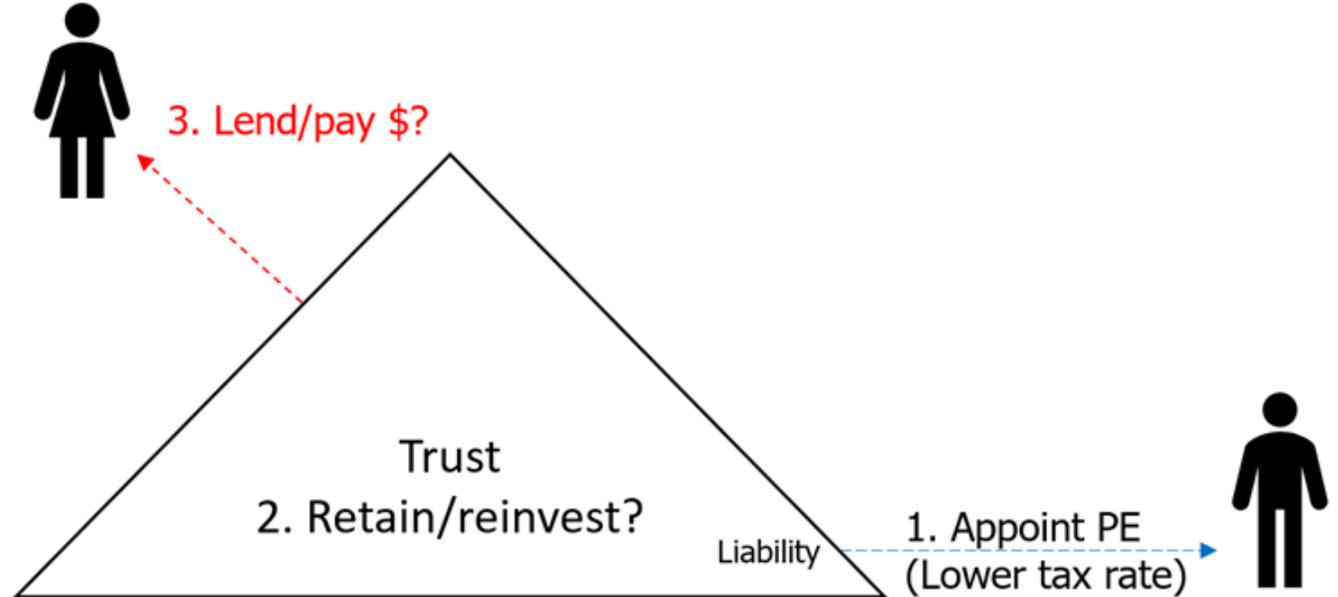
# ATO's views

- Taxation Ruling TR 2022/4

# TR 2022/4

## Three requirements

- Exact understanding between all parties not required
- Benefit includes retaining funds in the trust
- Tax reduction purpose of any extent
  - Includes deferral
  - Can infer from objective facts



# TR 2022/4

## Ordinary family or commercial dealing

- Process, not outcomes
- Core test:
  - Explained by family or commercial objectives
- Objective inquiry
  - Principally from perspective of those with tax-reduction purpose
- Not regarded as ordinary...
  - Paying less tax to maximise group wealth

# ATO's compliance approach

- Practical Compliance Guideline PCG 2022/2

# PCG 2022/2

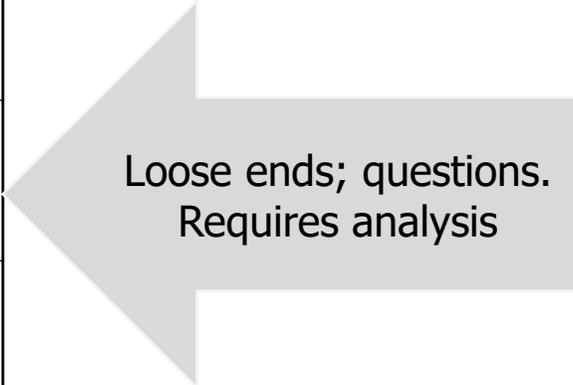
## Who gets reviewed, who's left alone

- Applies to past and future
- Test case

# PCG 2022/2

## Risk zones

Risk zone	Risk level	Description	ATO approach
White	Low	Pre 1/7/14	Bar exceptions, won't investigate
Green	Low	Unlikely to offend s100A	Won't investigate
"No zone" void	Indeterminant	No guidance	Will have a look, might investigate further, might not
Red	High	Likely to offend s100A	Will investigate further



Loose ends; questions.  
Requires analysis

# PCG 2022/2

## Green zone examples

- PE to beneficiary; spouse benefits
- PE paid out within 2 years

# PCG 2022/2

## Green zone: trust retains funds

- Beneficiary does not call for pay-out of PE
- Trust retains funds (beyond 2 yrs)
  - Qualifying conditions
- &
- Beneficiary is:
  - Controller of trust, or spouse; or
  - Employed in management of a business trust conducts; or
  - Company/trust in family group

# PCG 2022/2

## Red zone

- Does not automatically mean s100A applies
- ATO will review
  
- But, if you are doing any of these things...

# PCG 2022/2

## Red zone examples

- Beneficiary gives money to someone else
- Washing machine
- Exploit difference between accounting profit and taxable income
- Others

# PCG 2022/2

## No-zone void

- Not Green, not Red
- Requires analysis

# Parental obligations vs PE pay-down

# Pay down PE liability owing to child

## Acceptable examples

- Car, running expenses
- HECS/HELP debt
- Towards cost of home
- Cash, no strings attached
- Board set-off

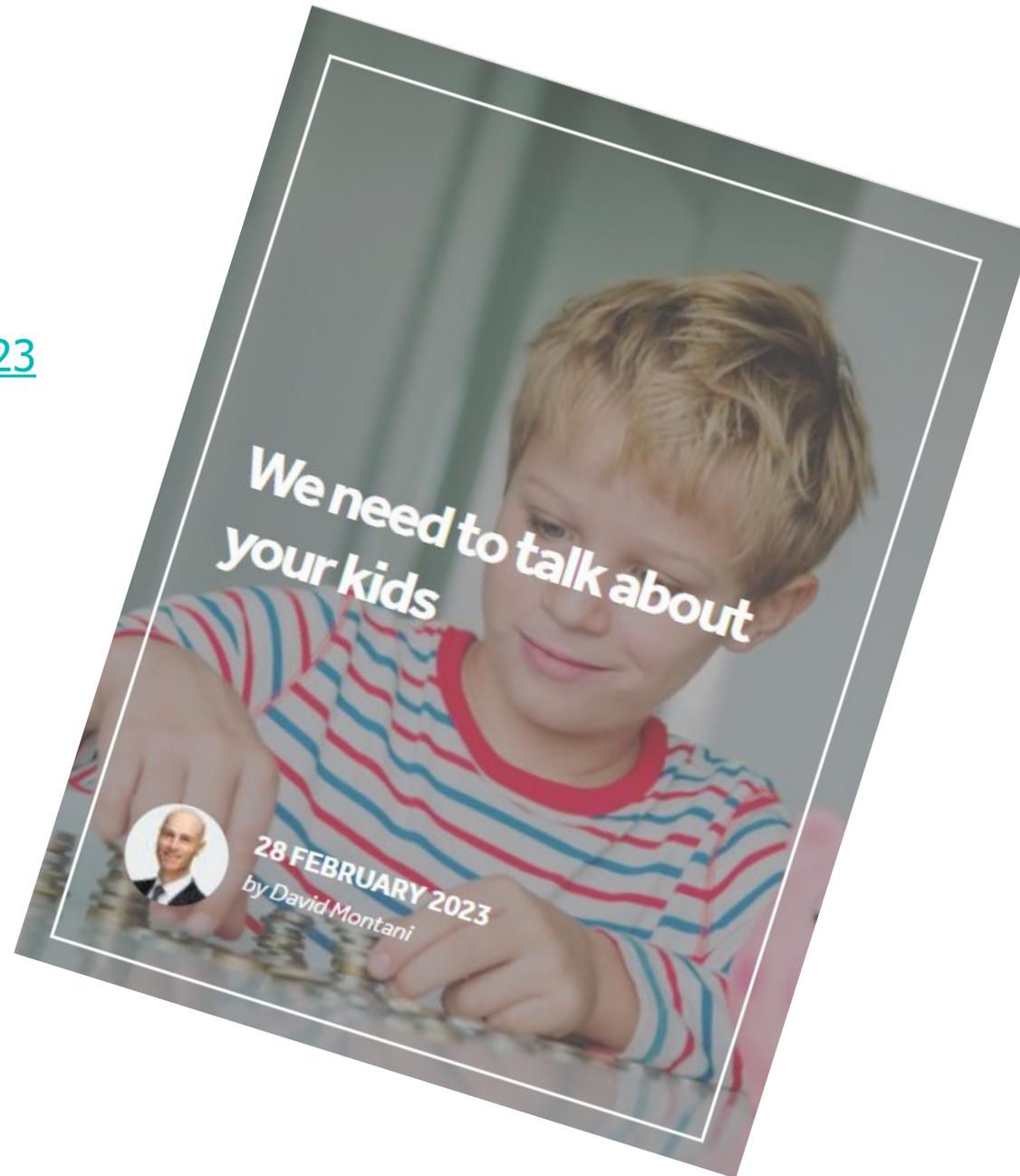
# Pay down PE liability owing to child

## Not acceptable

- Food/clothing for <18
- Other parental-obligation expenses
  
- Private school fees
  - ATO says private expense of parents
  - Debatable

# Adult children

- [NEXT Newsletter, Summer 2023](#)



# Adult children

- Awareness is a key factor
- Timeframe to pay out PE

# Pre-submitted questions

# Now what?

- 30 June 2023
- Historical

# Pragmatic approach

## Trusty-by-trust basis

- Then, beneficiary-by-beneficiary
  - UPE
- Determine PCG zone for each beneficiary's UPE
  - Green? NFA
  - Red? Discussion
  - No-zone void?
    - Then, s100A analysis

# Pragmatic approach

## Example

- A trust has UPEs with 6 beneficiaries:
  - Mum & Dad
  - 2 adult children
  - Another trust
  - 1 Corporate beneficiary (bucket company)
- Zone outcomes:
  - 2 in **Green** zone (M&D) ← NFA
  - 4 in no-zone void (children, trust, CB) ← s100A analysis

# Now what?

## 2023 trust income

- Trust-income appointment decisions
  - 38 days to go
  - Reanimated s100A new factor

June 2023						
M	T	W	T	F	S	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	<b>30</b>		



## Additional service

- Proposed trust-income appointment decision:
  - PCG zone?
  - **Green?** NFA
  - **Red?** Discussion
- If no-zone void:
  - s100A analysis
    - And hi-level Part IVA

# 2023 trust income

## No-zone void analysis

- Review most recent financial statements
  - What expect look like for 30 June 2023?
  - Where did cash go?
- Questions
- Considered position:
  - Your s100A risk
  - Possible general anti-avoidance risk
- Options, recommendations
- Discussion

# 2023 trust income

## Possible actions – decision

- Do nothing:
  - Unchanged trust-income appointment decision, NFA
  - Acknowledge any risks
- Do something:
  - Unchanged trust-income appointment decision, but with additional actions
  - Different trust-income appointment decision, with/without further actions
  - Other

# Historical

## Up to 30 June 2022

- Stand-alone body of work
- Can review anytime
  - Preferably before, say, 30 June 2024
- Historical accumulated UPEs
- Per-trust basis
- Different UPEs to different beneficiaries can be in different PCG risk zones

# Historical

## Up to 30 June 2022

- Review, questions, future intentions, analysis
- Categorise beneficiaries' UPEs
  - **White** zone
  - **Green** zone
  - **Red** zone
  - No-zone void

# Historical

## No-zone void analysis

- Considered position:
  - Your s100A risk
  - Possible general anti-avoidance risk
- Options, recommendations
- Discussion
  
- Your decisions

# Conclusion

- Trust world is changing
- ATO questioning past practices thought to be ordinary
- Heightened risk of ATO view that fallen foul of section 100A
- Risk management
  - 30 June 2023 trust-income appointment decisions coming up
  - Historical UPEs

# Talk to your trusted Nexia advisor

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