

Arnold Bloch Leibler

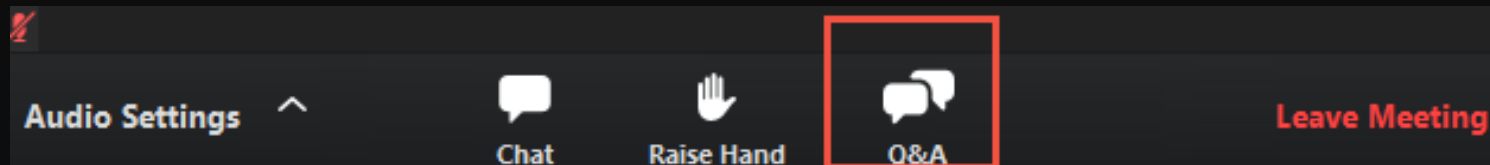
Lawyers and Advisers

Welcome to the session.
We'll be starting shortly.

Section 99B and transferor trusts issues
16 September 2020

Your video and audio will be switched off during this session.
If you experience technical issues, please contact Mariana Olivieri on +61 415 091 316.

To ask questions during the webinar, use the Q&A button below.



A blurred office scene with people in the background and a black mesh chair in the foreground.

Arnold Bloch Leibler

Lawyers and Advisers

ABL Tax Webinar Series

Session 2: Section 99B and transferor trusts issues

Presenters:

Jonathan Ortner – Partner, Arnold Bloch Leibler

Peter Scott – Senior Associate, Arnold Bloch Leibler



Introduction

This presentation considers two specific integrity measures aimed at foreign trusts, section 99B and the transferor trust rules

The provisions to be dealt with include:

- a) section 99B of the 1936 Act; and
- b) Division 6AAA of the 1936 Act.

Transferor trusts

Transferor trusts

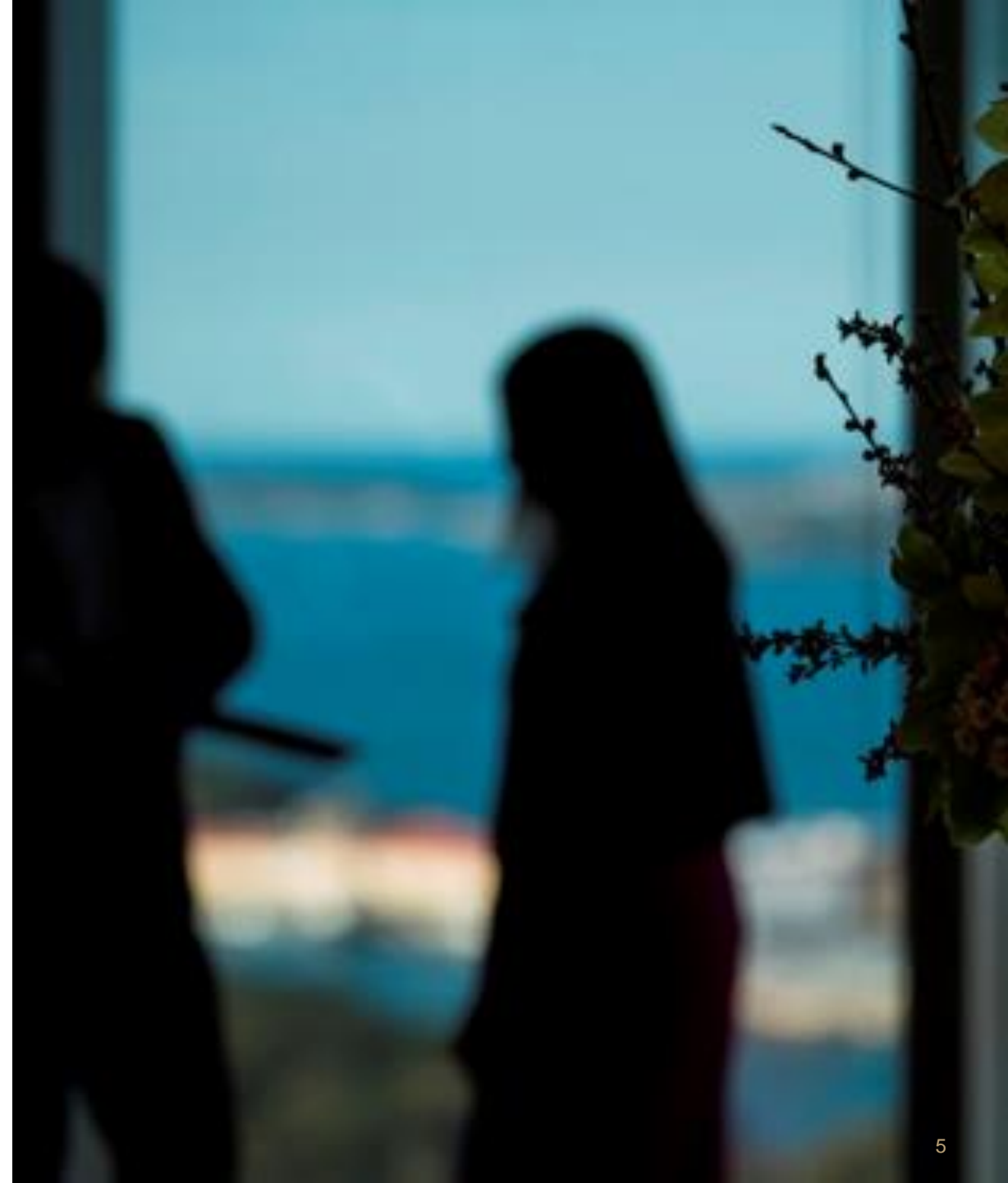
Division 6AAA of ITAA 1936 – only applies to non-resident trust estates

Similar to CFC regime but broader (i.e. more than passive income is caught)

Designed to capture capital transferred offshore by Australian resident for purposes of earning tax free income (but it is broader than that)

Applies to tax the transferor as an “attributable taxpayer”

Income of trust taxed in hands of transferor, as it is earned, not distributed



Attributable taxpayer – discretionary trusts

Is the trust a discretionary trust?

Was the trust a public unit trust at any time during the entity's current income year?

Has the entity transferred directly (or indirectly) property or services to the trust?

Was the transfer in ordinary course of business on identical or similar terms as with arm's length?

Was the transfer arm's length but not in the ordinary course of business? If so, was the entity in a position to control the trust estate?

Were all transfers prior to the IP time? If so, was the entity in a position to control the trust estate?



Transferor trusts - exemptions

Transfers from
deceased estates

Transfers from non-
resident family trusts (e.g.
family relief trust or post-
marital family trust)

Transfers by individuals
who do not control the
trust and transferred
property or services
before residence
commenced

Transferor trusts – attributable income

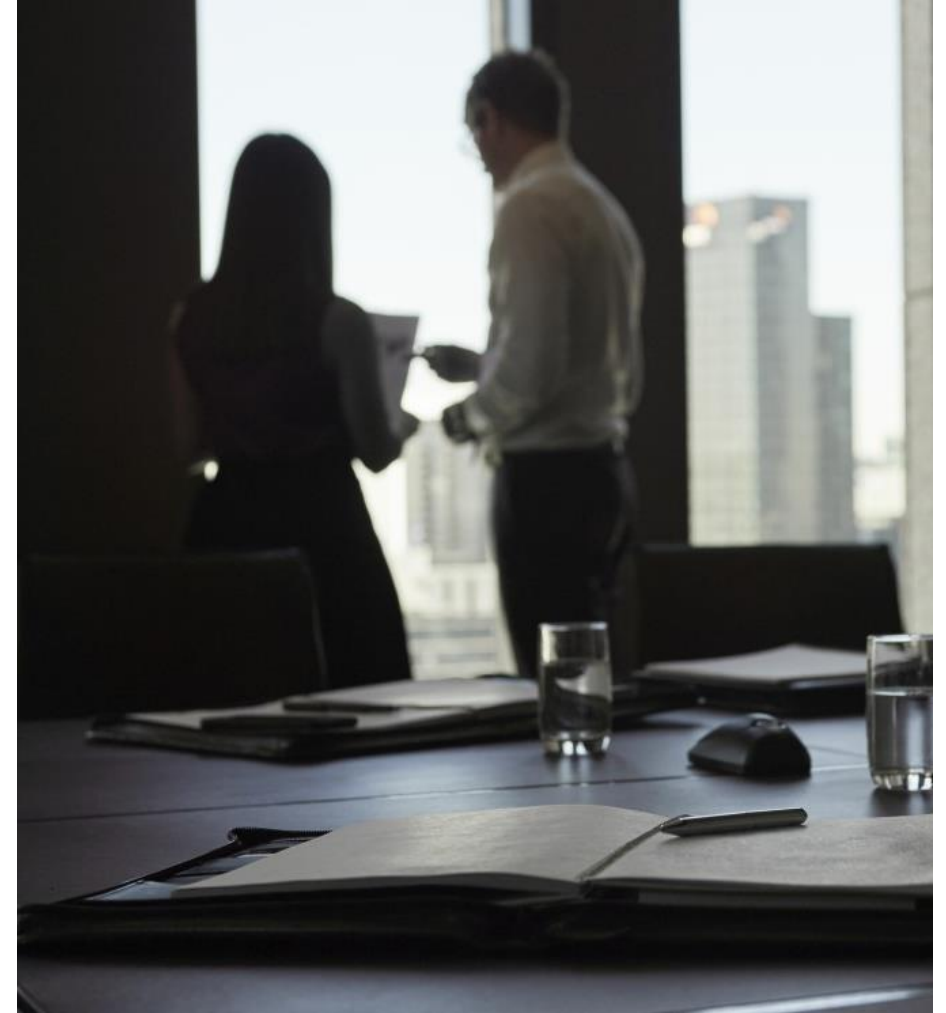
Trust in listed country – attributable taxpayer taxed only on EDCI

Broadly: passive income that is concessionally taxed in listed countries

Listed countries: Canada, United Kingdom, USA, France, Japan, Germany, New Zealand

Trust in unlisted country – attributable taxpayer taxed on all trust net income

Broadly attributable income is reduced by any amounts subject to Australian tax (e.g. amounts included in a beneficiaries assessable income under s 97)

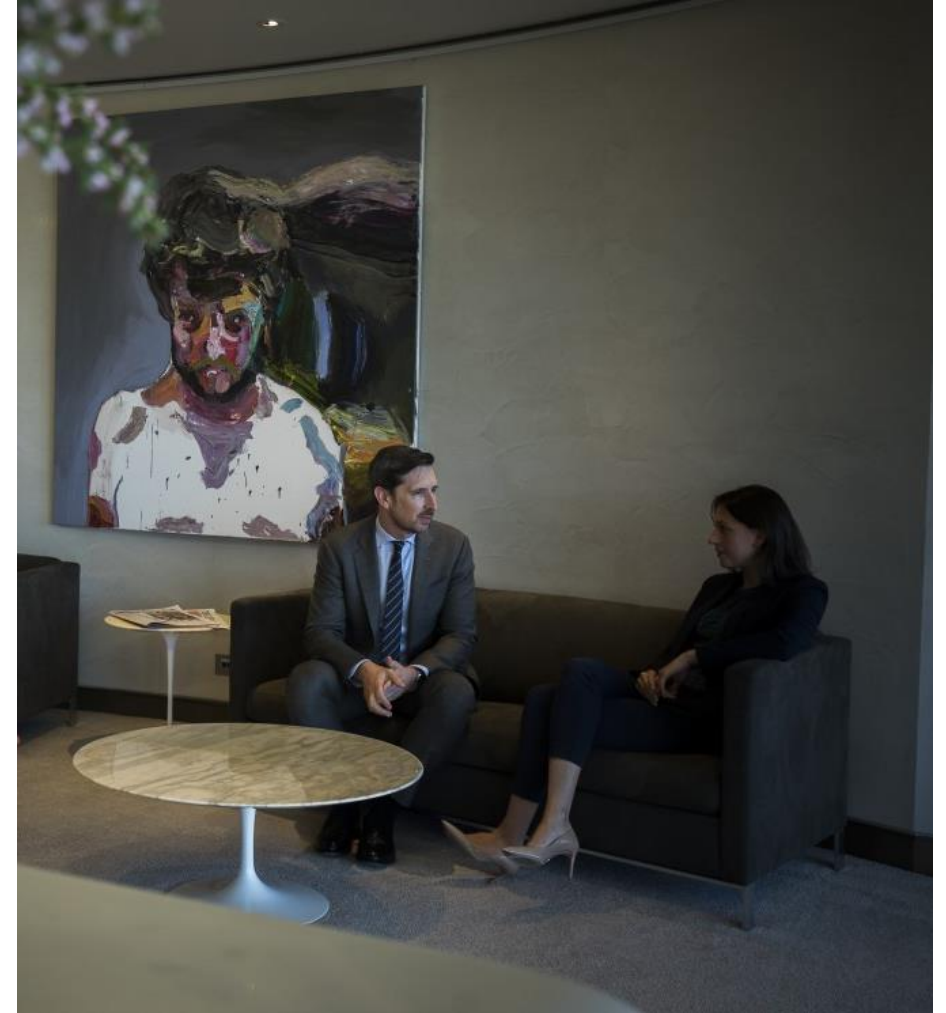


Transferor trusts – attributable income

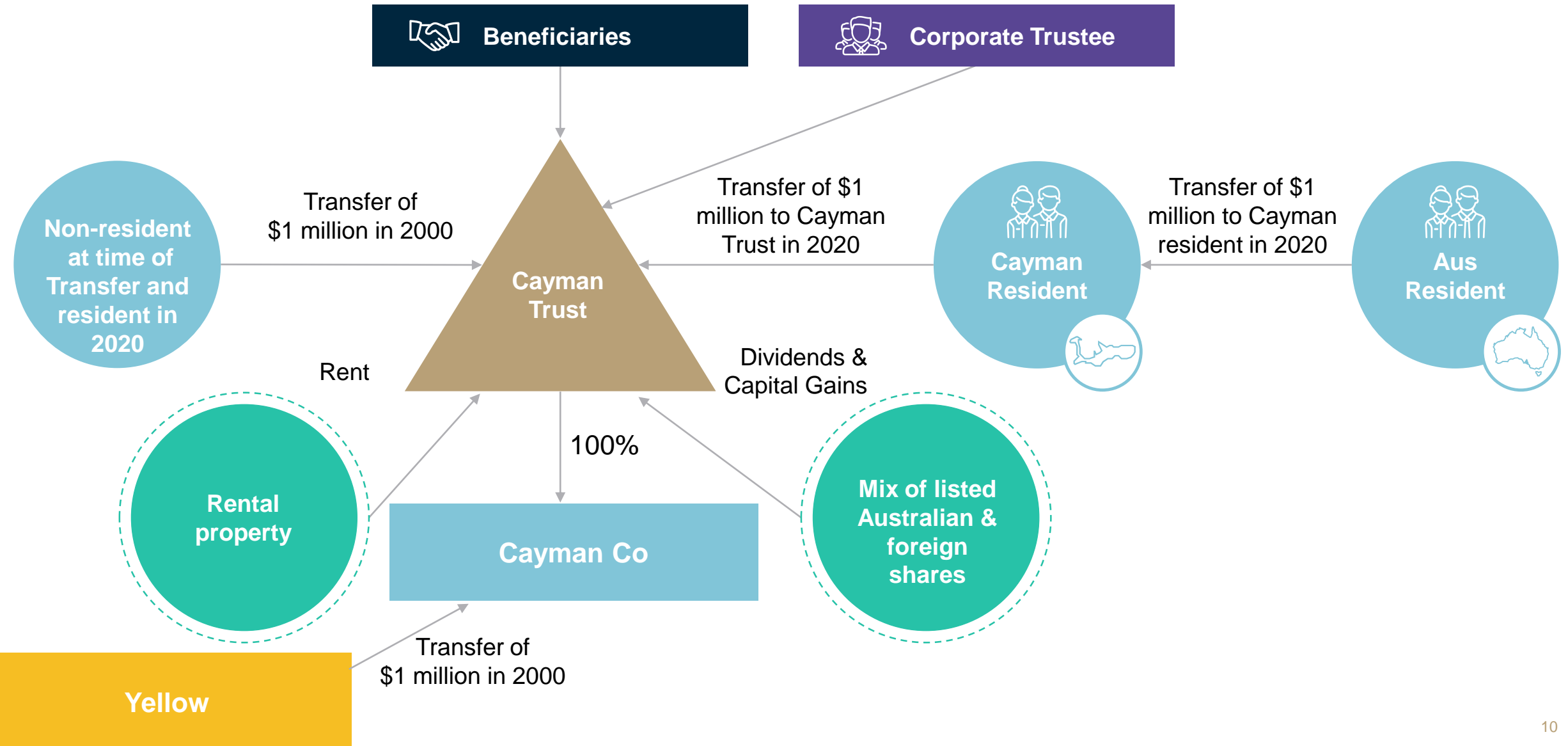
Multiple transferors will still be taxed on all trust net income
– require Commissioner's discretion to apportion

De minimis exception for trust estates in listed countries

Statutory formula to determine attributable income if no information available



Transferor Trusts – case study



Transferor trusts – Key takeaways

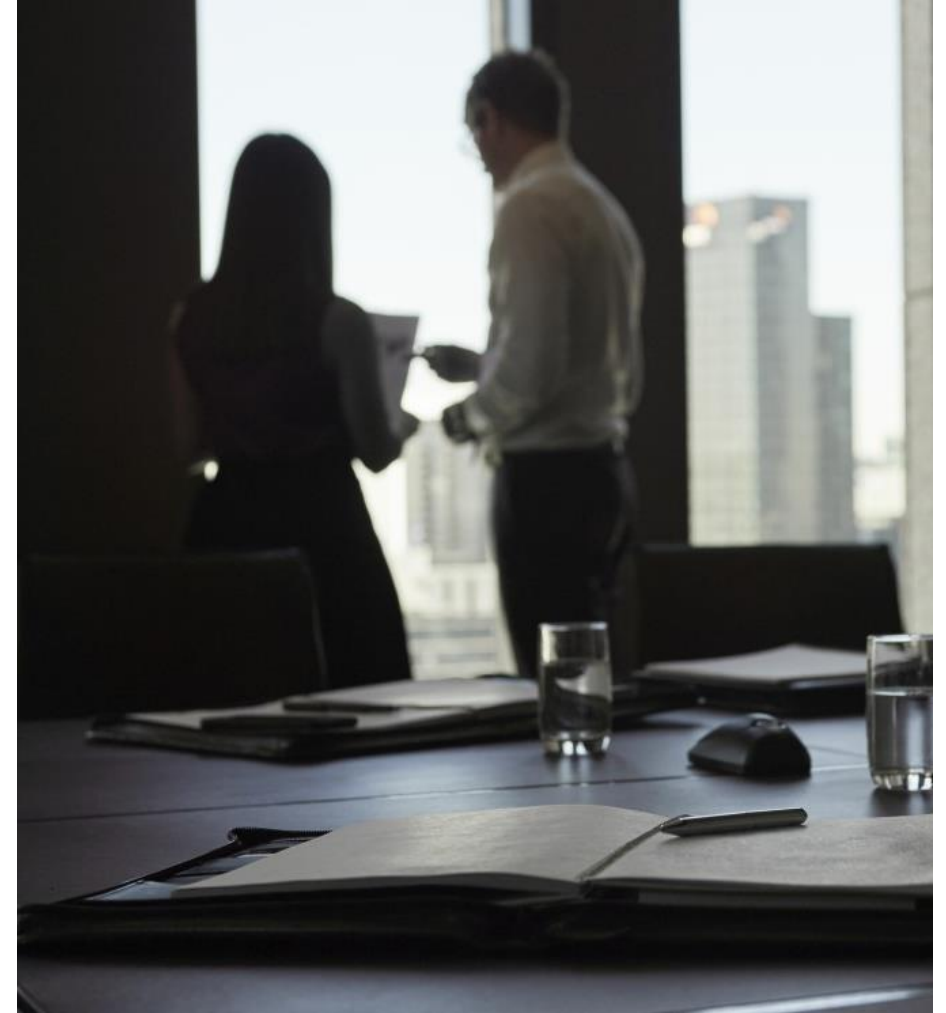
A transferor will, generally speaking, be taxed on all accumulated income of the trust regardless of whether it relates to passive or active income

Consider winding-up a foreign trust prior to an individual, who would be a transferor of that trust, commencing residency

Exclusions are very limited

The definition of transfer is very broad and can be by natural persons or entities and direct or indirect

No cost base uplift for assets held by a transferor trust that becomes a resident trust estate



Section 99B

Section 99B



Response to
Union Fidelity



Purpose of the
provision – an integrity
provision designed to
tax accumulated
foreign income in
foreign trusts



Does it apply to
resident trust estates
as well as foreign trust
estates?



Deemed interest
charge – 102AAM



S 99B

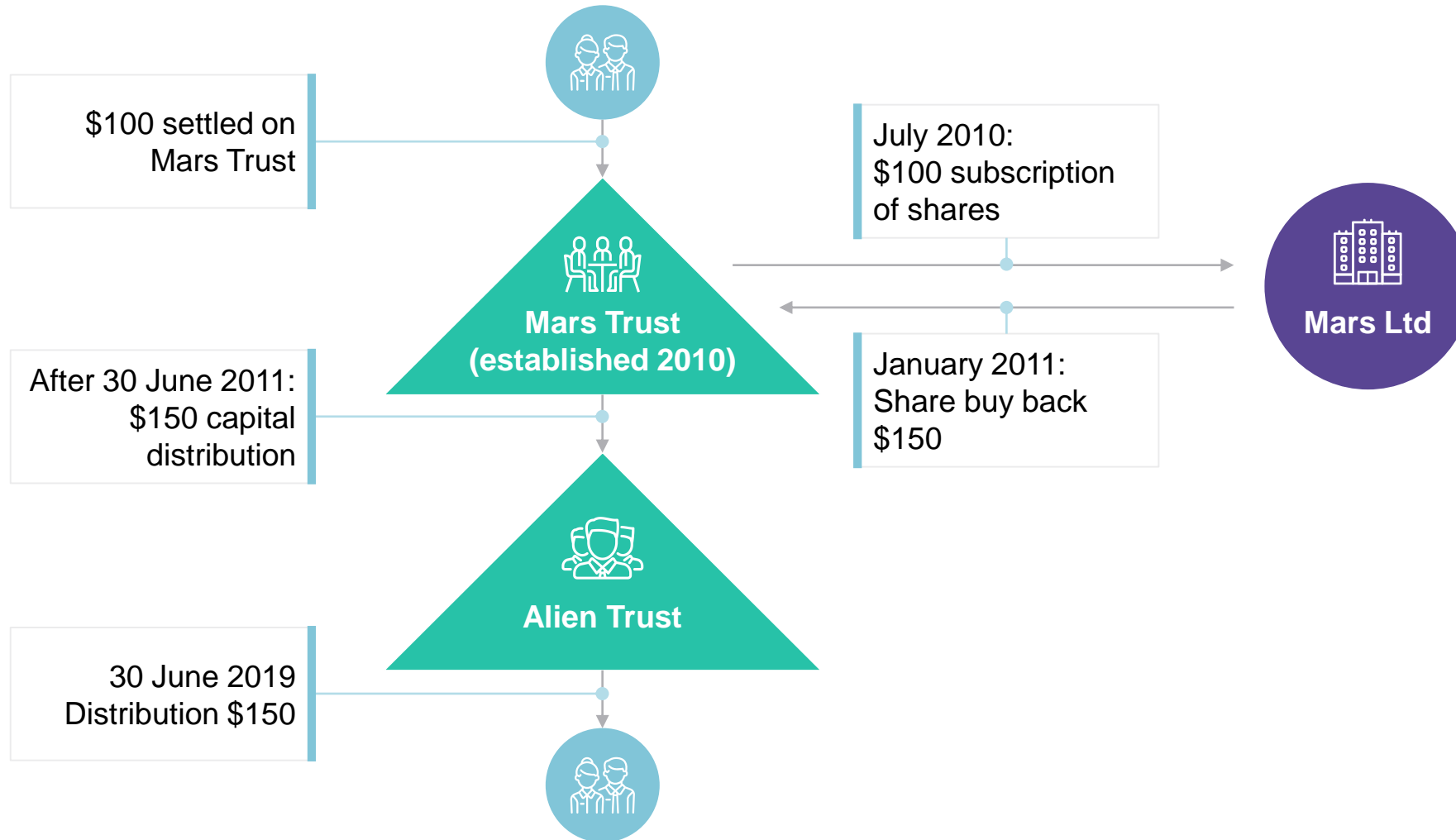
Receipt of trust income not previously subject to tax

Section 99B applies where an amount, being property of a trust estate, is **paid to, or applied for the benefit of**, a beneficiary of the trust estate who was a resident at any time during the year of income

Exclusions - 99B(2)

- Corpus of the trust (but watch out for the “exclusion to the exclusion”).
 - An amount that, if it had been derived by a taxpayer being a resident, would not have been included in the assessable income of that taxpayer in a year of income
 - Evidence: *Campbell and Commissioner of Taxation* [2019] AATA 2043
- Amounts previously or otherwise assessed (eg s 97)
- Amount subject to the transferor trust rules

Case study – s 99B



- Does s 99B(1) apply?
- Does s 99B(2) apply to reduce what would otherwise be included in Joe's income under sub-s 99B(1)?

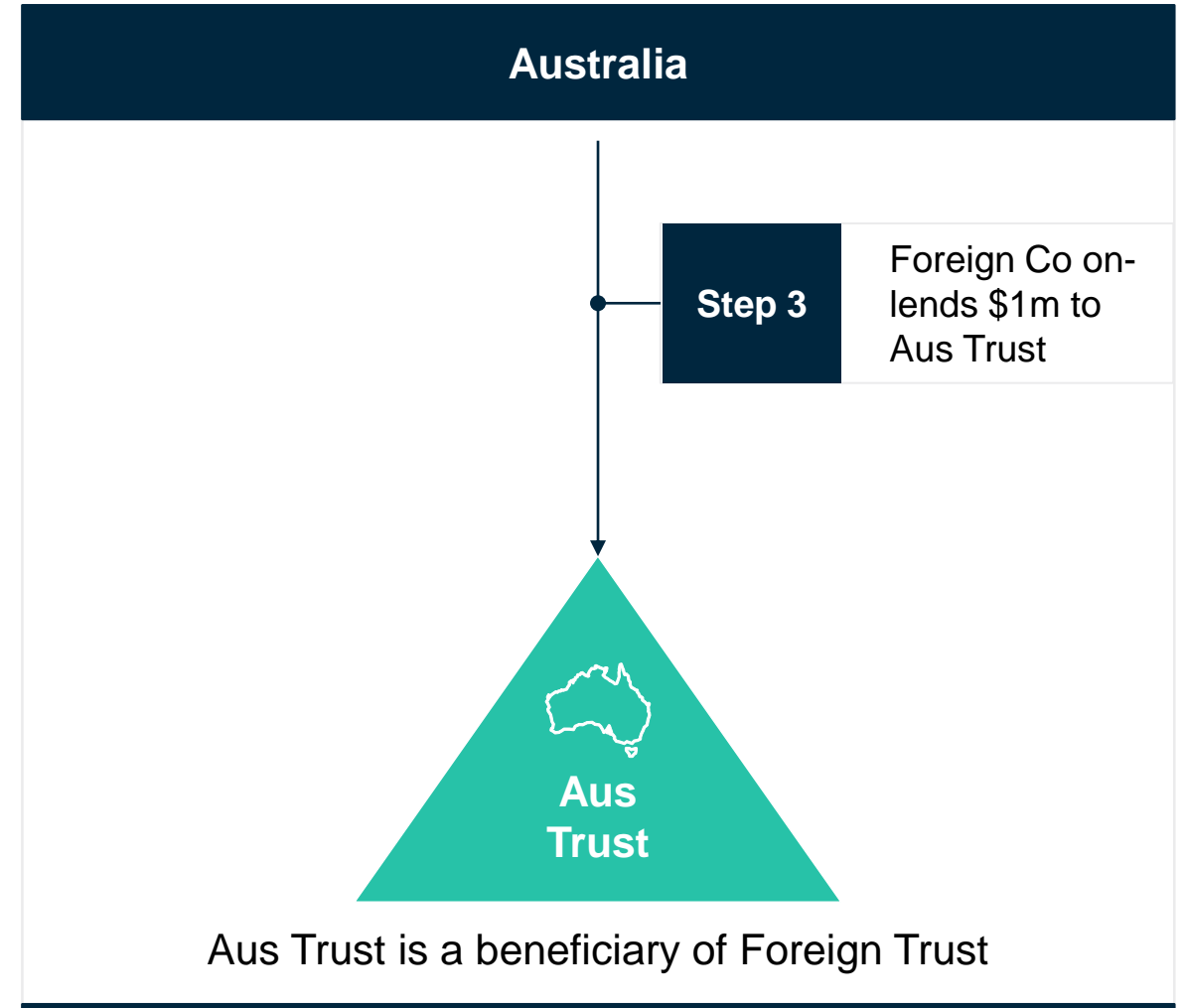
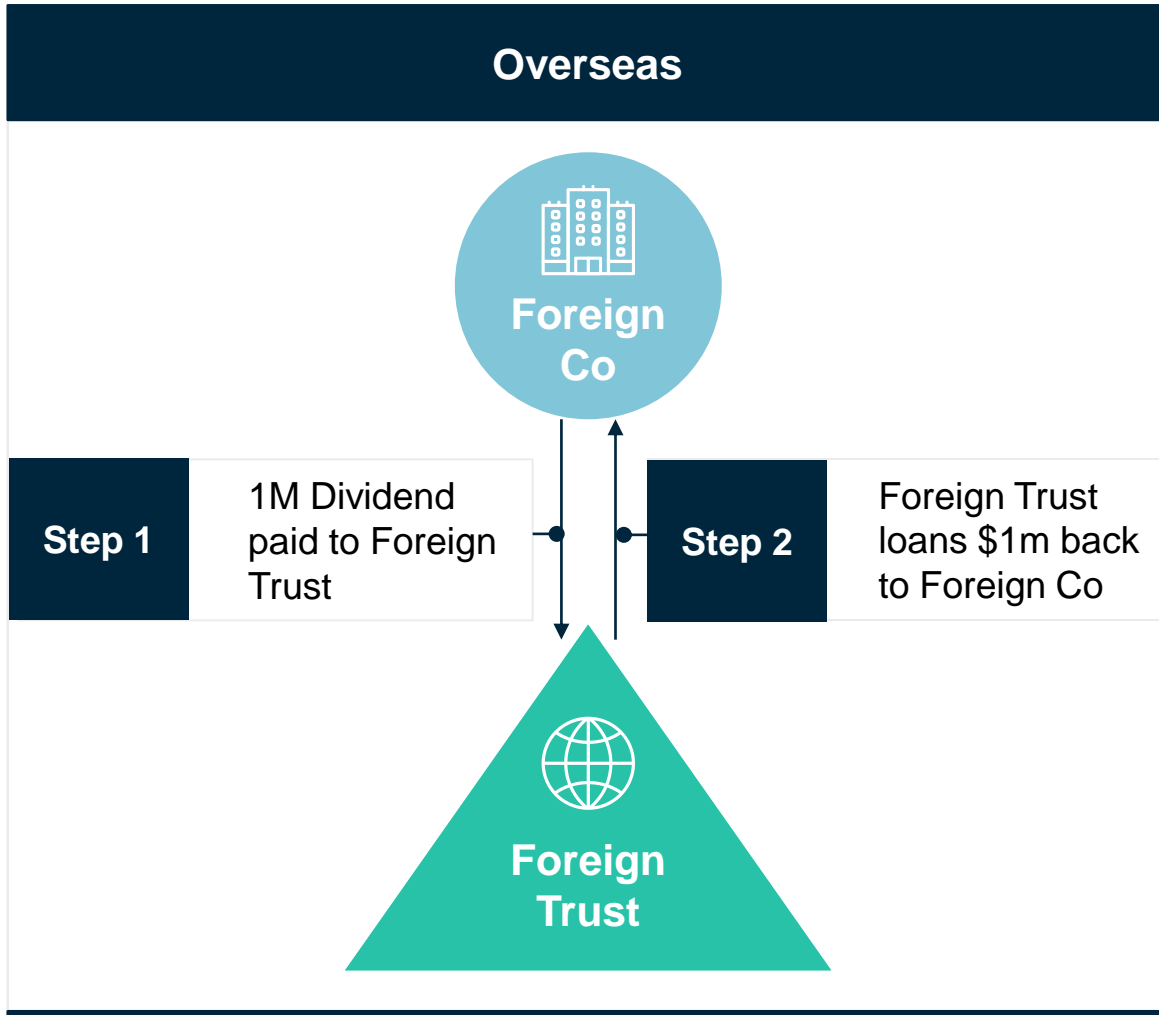


S 99C

Determining whether property is applied for the benefit of beneficiary

- Section 99C makes clear that it is a section concerned with the application of the phrase “applied for the benefit of” as used in s 99B
 - Wide-ranging enquiry into all benefits that have accrued to the beneficiary, irrespective of their nature or form
 - Subsection 99C(1) is supplemented by subs 99C(2) which sets out five specific situations in which trust property would be considered to have been applied for the benefit of a beneficiary.
 - Indirect amounts

Section 99C - example

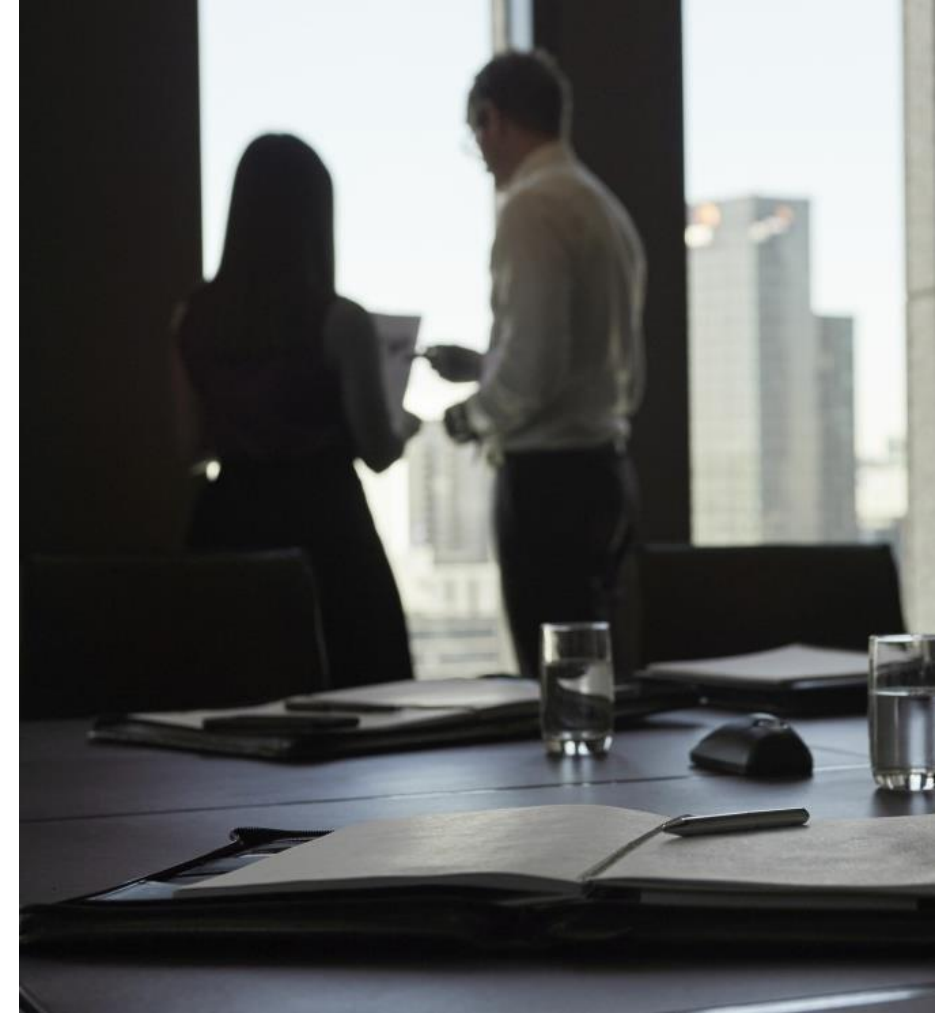


Section 99B – Key takeaways

Section 99B does not require complex overseas structures to be activated. Any number of simple and common circumstances could enliven the provision

Contemporaneous evidence is key

If you are dealing with amounts that are coming from overseas you need to understand the source of those amounts.





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Lawyers and Advisers

Q&A



Thank you

Upcoming sessions:

Wednesday 23 September
Session 3: Section 100A

Wednesday 30 September
Session 4: NSW and Vic state tax and FIRB topical issues