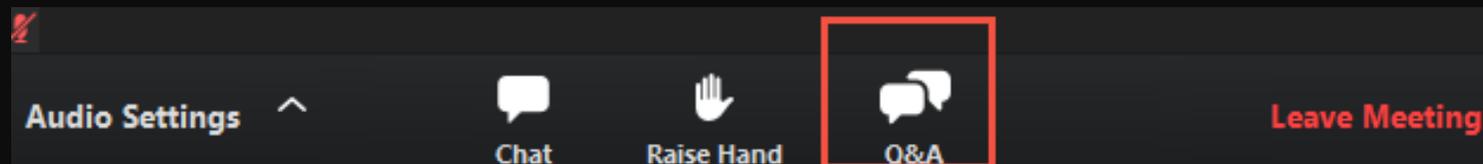


## Welcome to the session. We'll be starting shortly.

International Issues with Trusts and CGT  
9 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.



The image shows a Zoom meeting control bar with several buttons. From left to right: a muted microphone icon, 'Audio Settings' with an upward arrow, 'Chat' with a speech bubble icon, 'Raise Hand' with a hand icon, 'Q&A' with two speech bubbles icon (highlighted with a red square), and 'Leave Meeting' in red text.

Arnold Bloch Leibler

Lawyers and Advisers

# ABL Tax Webinar Series

## Session 1: International Issues with Trusts and CGT

9 September 2020

Andrew Spierings, Lawyer

Greg Judd, Senior Associate

Clint Harding, Partner



# Introduction

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This presentation provides an overview of some international issues with trusts and CGT, including:

1. *Peter Greensill Family Co Pty Ltd v FCT* [2020] FCA 559
2. Some recent ATO publications:
  - a. TD 2019/D6
  - b. TD 2019/D7
  - c. TA 2020/3
3. Section 99B and TD 2017/24
4. Structure considerations and tax treaty overlays

*Peter Greensill Family Co Pty Ltd v FCT*

[2020] FCA 559

# Greensill – Facts

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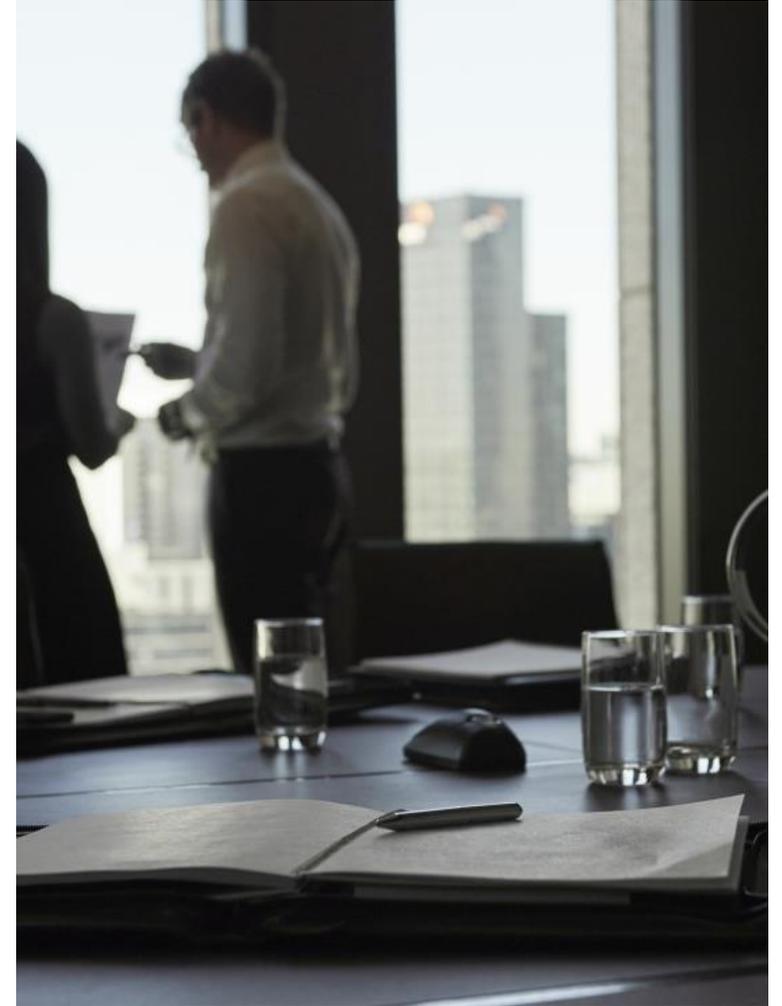
- Discretionary trust owns shares in Greensill Capital:
  - Founded in November 2011 by Lex Greensill, 43 year old UK resident
  - Substantial supply chain financing business
  - Owns various other entities in Australia and overseas
- Shares are non-TAP
- In 2015, 2016 and 2017 trustee disposed of parcels of shares – A1
- In 2017 also in-specie distribution to Lex Greensill – E5
- Gains streamed to Lex Greensill:
  - 2015 approx \$13 million
  - 2016 approx \$10 million
  - 2017 approx \$35.2 million



# Greensill – Taxpayer Contentions

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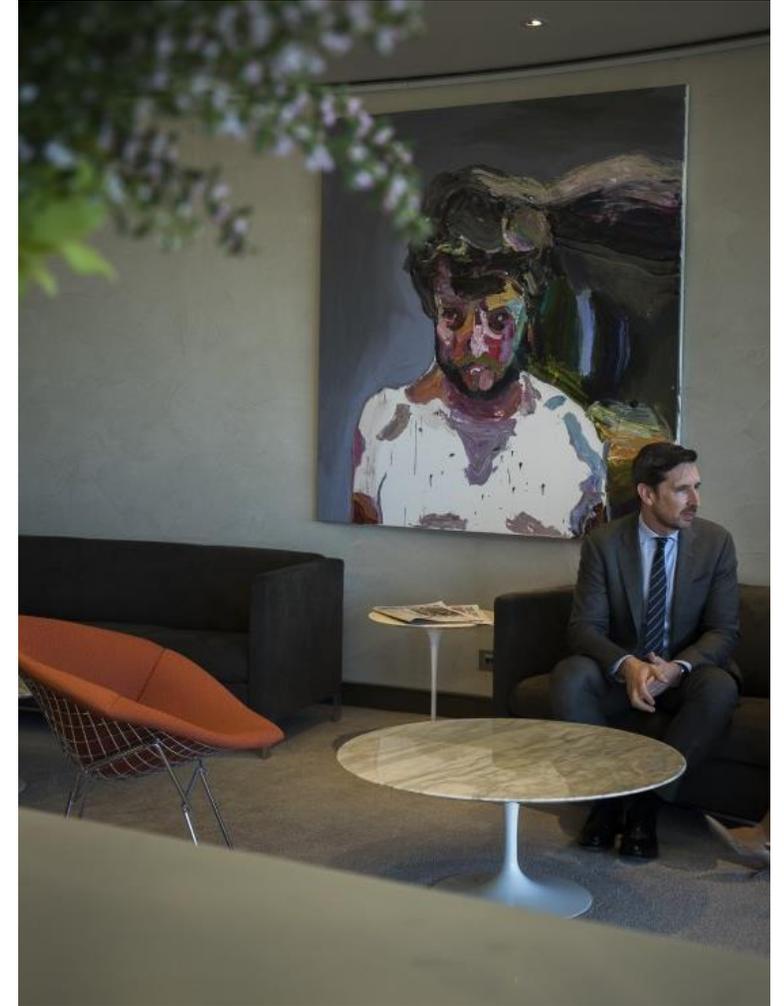
- s 855-10(1) applies to disregard the gain
- When Subdivision 115-C refers to an amount in relation to beneficiary refers to a disregarded amount
- s 855-10 would definitely apply if owned shares directly
- s 855-40 would apply if fixed trust
- Absurd if s 855-10 didn't apply in this case
- Policy not to tax foreigners on non-TAP assets



# Greensill – Decision

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- Trust makes the gains and s 855-10 does not disregard them
- Nor does s 855-10 disregard a Subdiv 115-C amount
- Subdiv 115-C makes a calculation and adds it to assessable income
- It is not a gain “from a CGT event”
- Orthodox textual approach
- s 855-10 requires a direct connection, otherwise 855-40 is redundant
- Policy evident from the text, not the other way around
- Appeal pending



*...a very well-reasoned judgment that traverses all of the relevant statutory and extrinsic materials that bear upon the correct construction of s. 855-10. It reaches a logical conclusion after detailed analysis of the language of that provision, statutory context, and legislative history.*

*- N & M Martin Holdings Pty Ltd v FCT [2020] FCA 1186 (Steward J)*

# ATO Publications

- Commissioner's view that subdiv 855-A does not disregard gains of a foreign resident beneficiary from a non-fixed trust
- Explanation sets out the reasoning in *Greensill* as the Commissioner's view
- 'Alternative views':
  - Requires reading in the words “from a CGT event **that happens to you**” in s 855-10
  - Places undue reliance on preserving a role for s 855-40
- Those issues were urged on Steward J in *Martin Holdings* and rejected

## Example

- Resident discretionary trust derives income from a business
- Also non-discounted capital gains from sale of non-TAP shares it held for less than 12 months
- Resolve to make foreign beneficiary entitled to all trust income
- No beneficiary specifically entitled to gains; follow trust income
- Trustee assessed under s 98
- Beneficiary assessed with an offset for tax paid by trustee

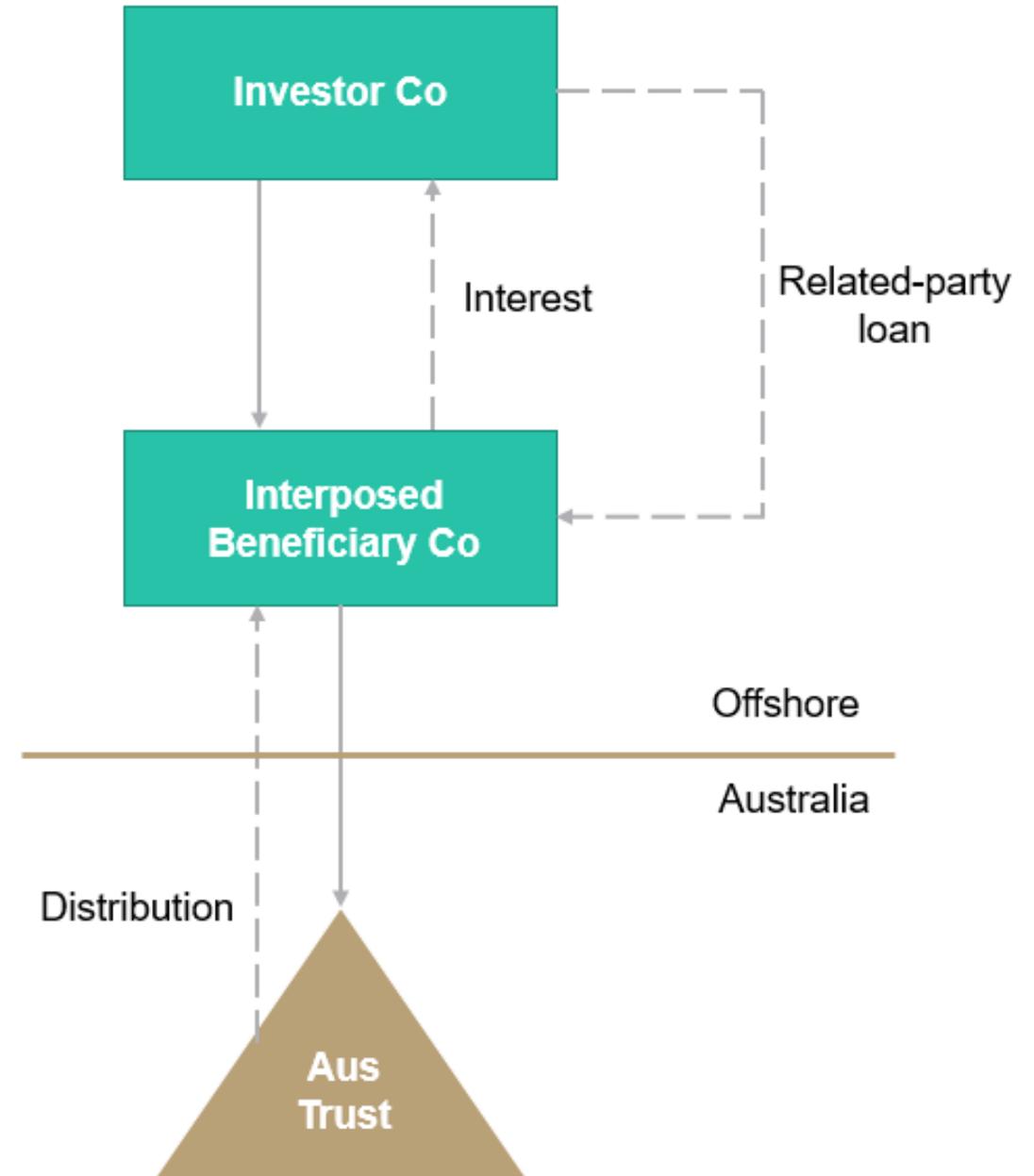
- Ordinarily, income without an Australian source flowing through an Australian trust to a non-resident beneficiary is not assessable
- Commissioner's view that the source concept in Div 6 is not relevant to assessments of non-resident beneficiaries on capital gains from resident trusts
- The amount of gain is included in assessable income because of Subdiv 115-C, which is not concerned with source, rather than by Div 6, which is concerned with source
- If the trust was fixed, s 855-40 would disregard the gain from non-TAP assets, not because they are not sourced in Australia

## Example:

- Resident non-fixed trust makes \$100,000 of gains from sale of shares by a contract executed in the UK
- \$70,000 of gains are from TAP assets, \$30,000 are non-TAP
- Trustee treats gains as income and makes non-resident beneficiary entitled to all income
- Trustee assessed under s 98
- Beneficiary assessed with an offset for tax paid by trustee

# TA 2020/3

- ATO looking for features including:
  - No rationale for interposing non-resident beneficiary
  - No rationale for interposed beneficiary to bear the debt
  - Effective tax rate on Australian-sourced income is minimal
  - Related-party debt at a premium to third party debt or cost of funds and outside the 'green zone' in PCG 2017/4
  - The structure maximises deductions under the thin cap rules
  - Use of low tax or non-treaty jurisdictions
- May raise issues of:
  - Anti-avoidance provisions, especially for avoidance of interest withholding
  - Transfer pricing rules to reduce deductions
  - Thin cap rules to reduce deductions
  - Assessable dividends paid by the interposed beneficiary

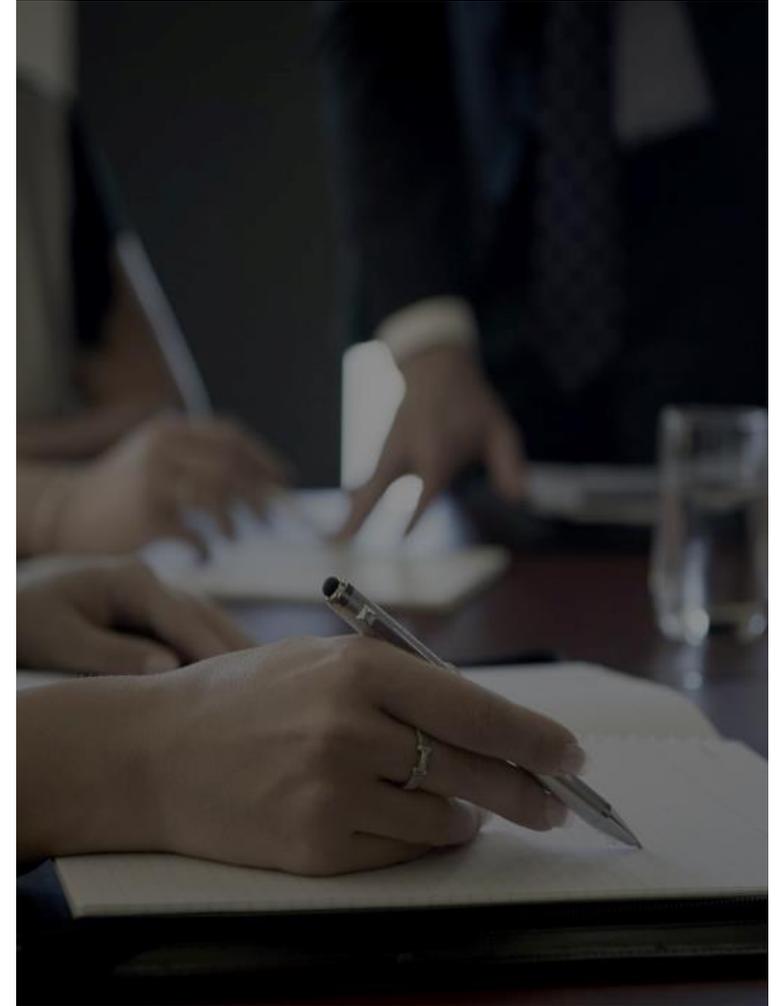


Section 99B and TD  
2017/24

# Sect 99B and Gains of Foreign Trusts

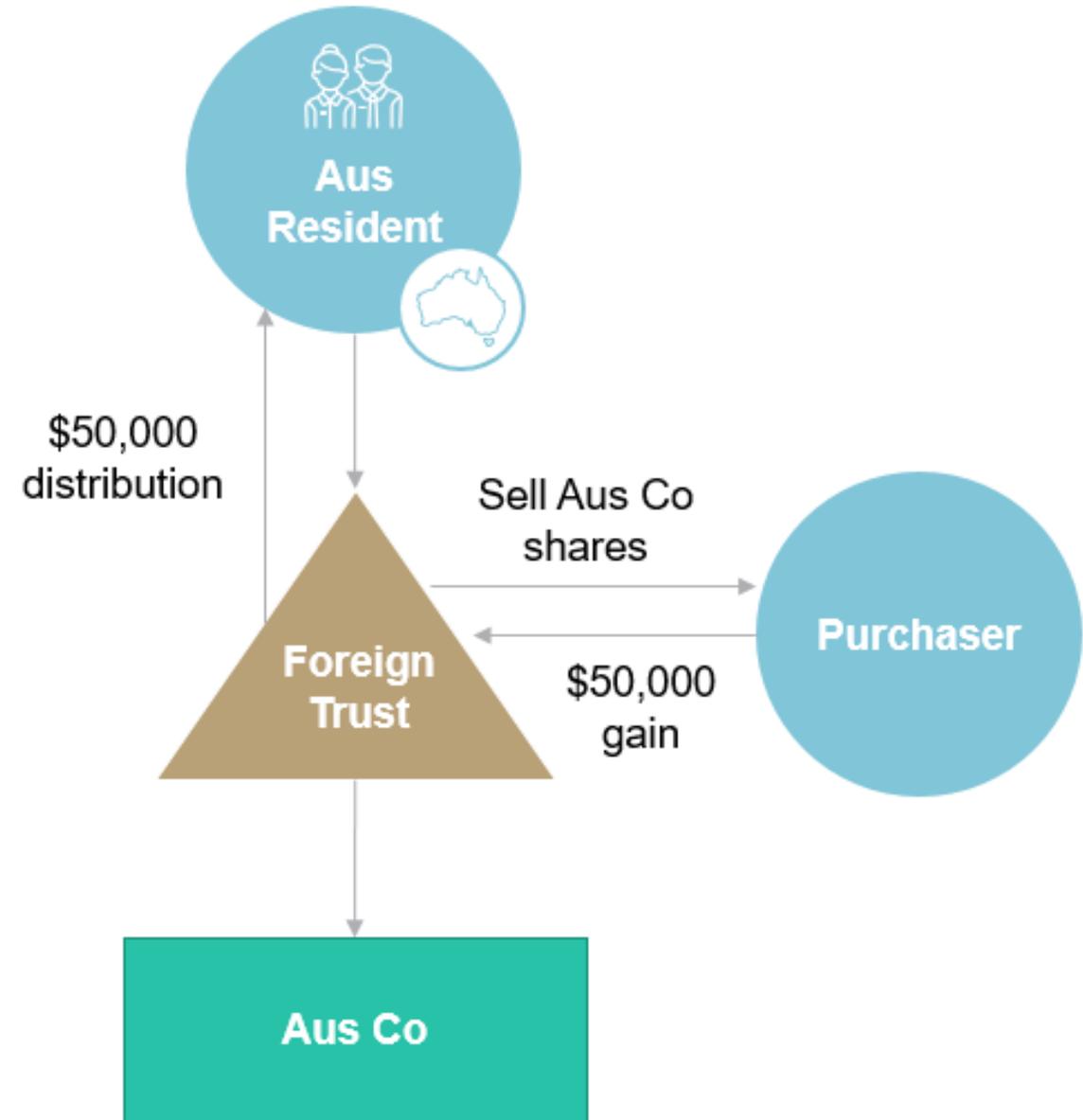
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- “Resident trust for CGT purposes” has its own definition
- A capital gain made by a foreign trust for CGT purposes from non-TAP assets is disregarded: s 855-10
- s 855-10 operates notwithstanding the residency assumption in s 95: TD 2017/23
- But, if the trust then distributes an amount to an Australian beneficiary it can still be assessable under s 99B
- A beneficiary of a foreign trust that distributes an amount from capital gains on non-TAP assets cannot apply capital losses or the CGT discount to the amount because it doesn't have the character of a capital gain in their hands: TD 2017/24



# TD 2017/24 Example

- Foreign trust sells shares in Australian company it owned for 5 years
- Shares are non-TAP
- Makes a \$50,000 gain
- Distributes to Australian resident beneficiary
- Beneficiary has \$40,000 of carry-forward net capital losses
- Beneficiary must include \$50,000 in assessable income under s 99B and cannot reduce it by capital losses or apply the discount



# Structuring Considerations and Tax Treaty Overlays

# Structuring Considerations

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- Resident trust status?
- Fixed or non-fixed?
- Character of gains or income?
- Residence of beneficiaries?
- Tax treatment in foreign jurisdiction and availability of FITOs



# Tax Treaty Overlay

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- Double Tax Agreements:
  - Article 6: Business Profits
  - Article 13: Gains from the Alienation of Property
  - Article 21: Other Income
- Treatment of beneficiaries in country of residence
- Article 3.1 of the MLI (Transparent Entities):

*For the purposes of a Covered Tax Agreement, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting Jurisdiction shall be considered to be income of a resident of a Contracting Jurisdiction but only to the extent that the income is treated, for purposes of taxation by that Contracting Jurisdiction, as the income of a resident of that Contracting Jurisdiction.*

- Australia has adopted Article 3 but is preserving existing corresponding bilateral detailed rules where appropriate.



Arnold Bloch Leibler

Lawyers and Advisers

Q&A

# Thank you

## Upcoming sessions:

Wednesday 16 September  
Session 2: Section 99B and transferor trust issues

Wednesday 23 September  
Session 3: Section 100A

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