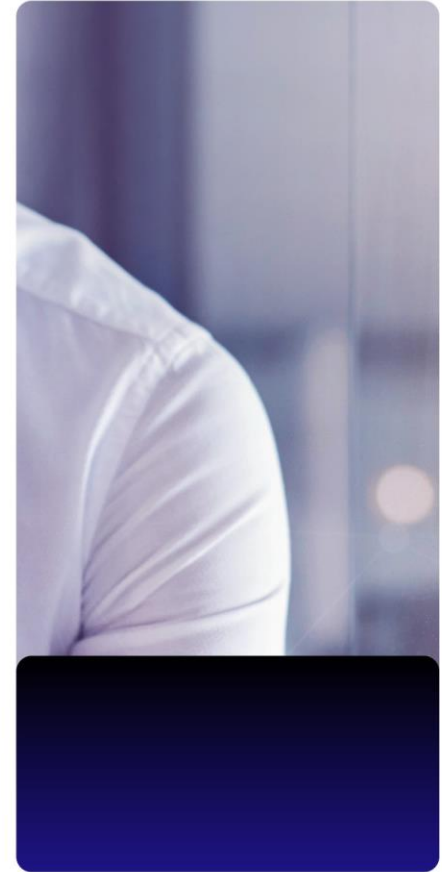
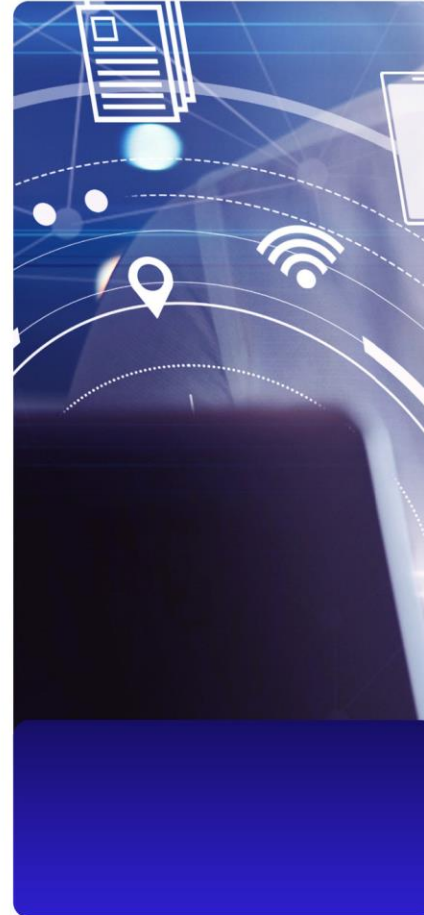


# 6-Webinar series

 Hot topics by members for members

1.5 CPD hours per webinar



# Part 1: Think it's simple? Uncover the hidden complexities of Australian tax issues

**Presenters:**

Kimberley Barnes, McInnes Wilson Lawyers

Christopher Pedler, HLB Mann Judd

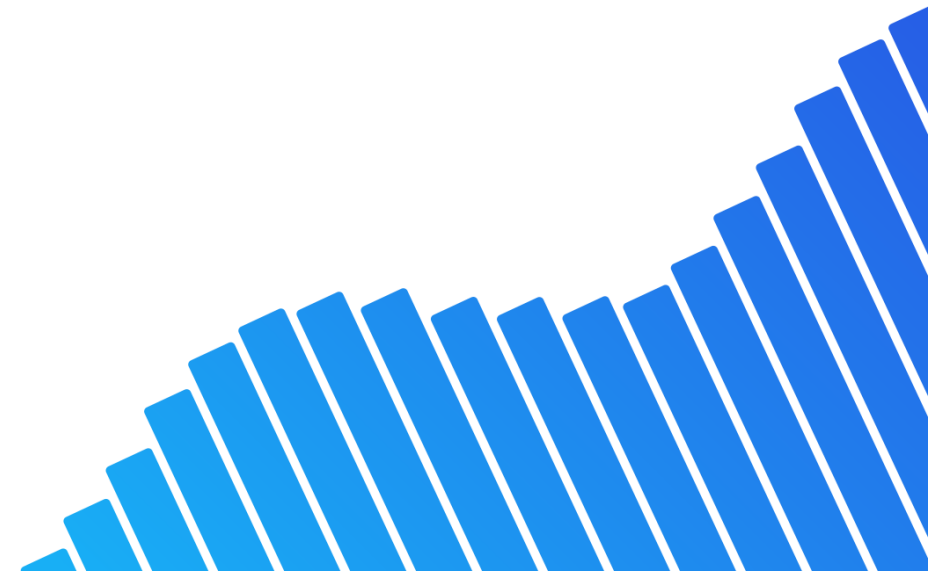
Thomas Walrut, FTI, Cooper Grace Ward Lawyers

# Welcome and opening address

**Presenter:**

Kim Reynolds, CTA, Vincents, Chair of QLD State Council

# Small Business CGT Concessions Common Tips, Trips and Traps



# Small Business CGT Concessions

- Allows the reduction, disregard or deferral of some or all of a capital gain from an **active asset** used in a small business
- 4 concessions available - 15 year exemption, 50% active asset reduction, retirement exemption and a roll-over
- Objects - provide a concessionary regime for small business owners who don't have the same access to the superannuation regime (provide retirement funds)
- Implementation - complex provisions fraught with trips and traps causing ineligibility

# TIP: MNAV & Aggregated Turnover Test

- Who's in?
  - You
  - Entities connected with you
  - Your affiliates
  - NOT connected entities of your connected entities
- Affiliate must be carrying on a business
- Spouses not automatically "in"
- Partners in partnership not automatically "in"

# TIP & TRIP: MNAV & Aggregated Turnover Test

- Special Affiliate Rule: Spouses (152-47):
  - You own a passive asset (including entity you control)
  - Spouse or child under 18
  - Used in their business
  - Considered to be your affiliate
- Used for:
  - Active Asset Test
  - MNAV
  - Aggregated Turnover Test
- TIP: Assets that would not be active, become active (business premises)
- TRIP: Extended range of entities may cause failure of the MNAV test

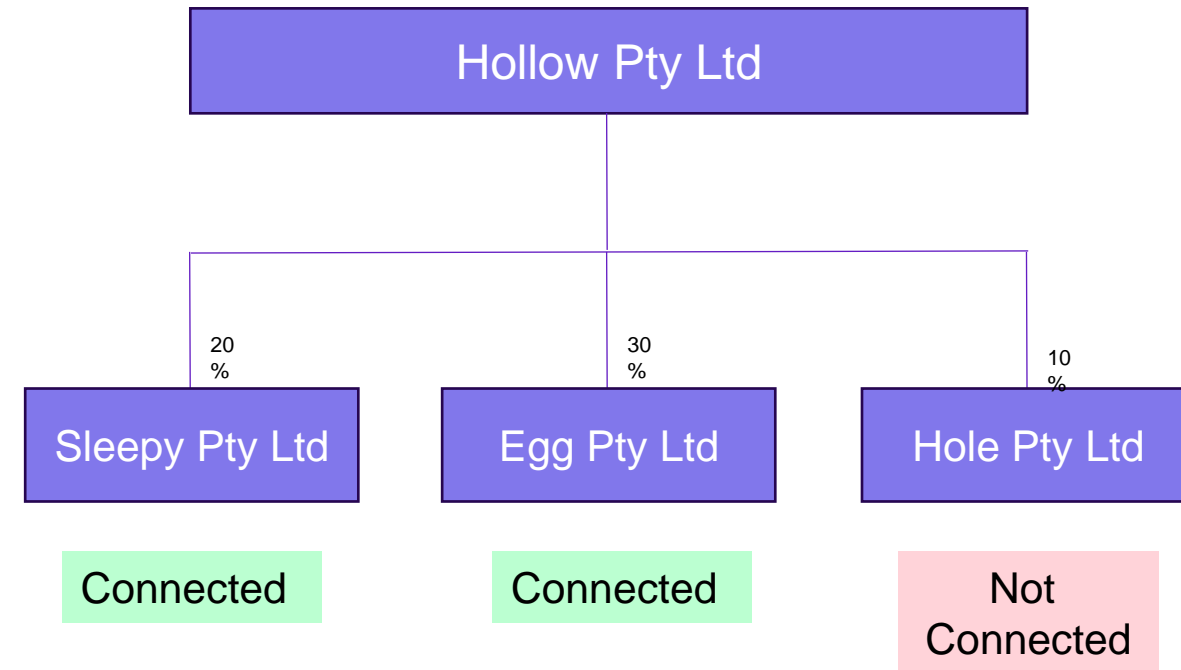
# TIP & TRAP: MNAV & Aggregated Turnover Test

- Partnerships
  - Generally, partners in a partnership each declare their respective CGT consequences separately when selling partnership assets
  - BUT the partnership can be an entity you are "connected with"
  - If your partnership interest is more than 40% more, the partnership is included in the MNAV and turnover test
- Partnership Turnover Rule (152-48)
  - Person is a partner in more than one partnerships and asset is used in more than one partnership business
  - All partnerships aggregated turnover is included to work out the aggregated turnover test
- TRAP: Partnership includes tax law and general law partnerships = needing to include 100% value in property



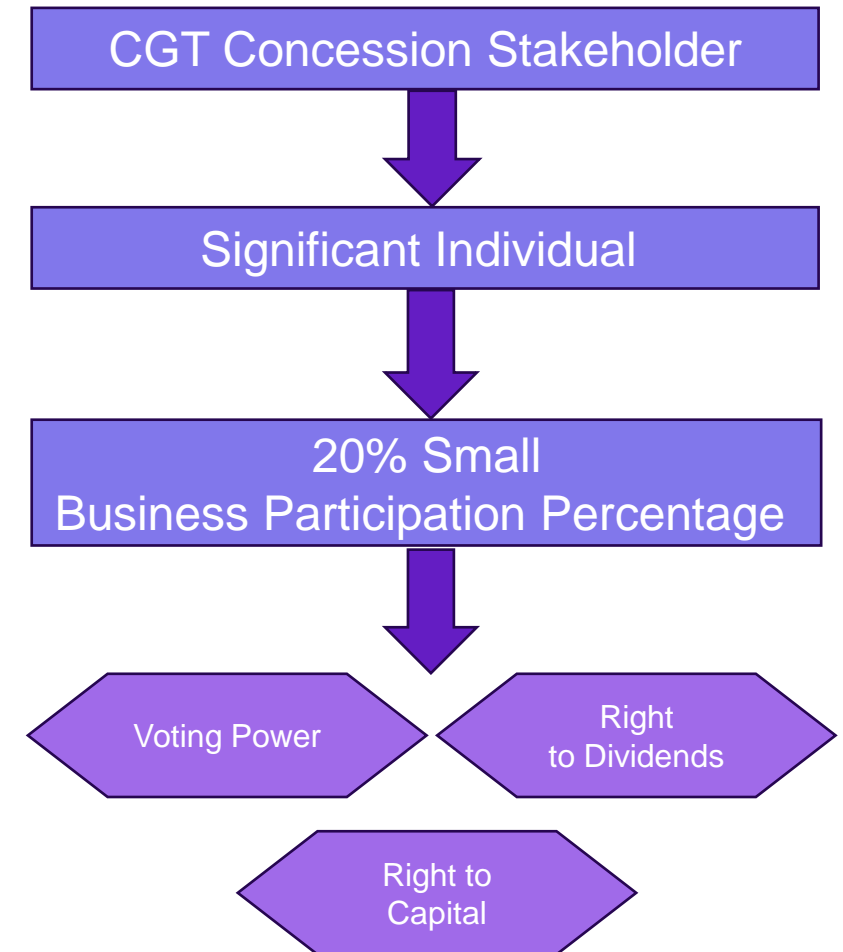
# Modified Connected Entity Rule

- Selling shares in a company
- Company (or trust) must be either a SBE or meet the MNAV using the modified connected entity rule
- Company controls another entity if it has a control percentage of at least 20% in the other entity (instead of 40%)
- Commissioner's discretion regarding control is disregarded
- Object Entity must have MNAV or Turnover below \$6M/\$2M even if the seller passes the test
- TRAP: Wider range of entities to include in the turnover or MNAV test – can cause failure of these tests



# CGT Concessions Stakeholder Test

- Relevant for sale of shares (or units in a unit trust) or company/trust is seller
- Basic Condition you are a CGT Concession Stakeholder = you must be a significant individual in the company
- Significant Individual (or a spouse of a significant individual with a small business participation percentage > 0)
- Significant Individual = a person with a small business percentage greater than 20%
- Small business participation percentage in a company = 20% or more of:
  - Voting power
  - Right to dividends
  - Right to capital



# TRAP: Concession Stakeholder Test/Significant Individual

- Requires at least 20% of the voting power and rights to dividend AND capital
- Considers ALL classes of shares (except redeemable preference shares)
- Issue:
  - Multiple share classes that don't rank pari passu for dividends, capital and voting (i.e., can declare dividends on one class of share and not another)
  - Consider impact of the use of discretionary dividend class shares
- Failure of the CGT Concessions Stakeholder Test limits the ability to use the 15 year exemption and Retirement Exemption

# TIPS: Concession Stakeholder Test/Significant Individual

- Future proof your small business:
  - Review share classes
  - Redeem/Buy-Back any discretionary dividend shares (DDS)
  - If using DDS, consider Devuba Shares, i.e. turn off the rights to be considered
  - Consider multiple share classes (are they necessary, are they being used, do they hold value, can you vary class rights?)
- Retirement Exemption - CGT Concession Stakeholder must be met *just before the CGT Event*
- 15-year Exemption - must have a Significant Individual for at least 15 years
  - Consider distributing capital from a trust each year, where no net income exists to distribute, to ensure there is a significant individual each year

# MODIFIED ACTIVE ASSET TEST

- Selling shares in a company
- Company must meet the 80% test
- Market value of the company's active assets, financial instruments and cash (those that are inherently connected with the business) equal at least 80% of the market value of all of the assets of the company
- Remember the shares must be active at least:
  - 50% of the time if owned under 7.5 years
  - 7.5 years if owned for greater than 15 years

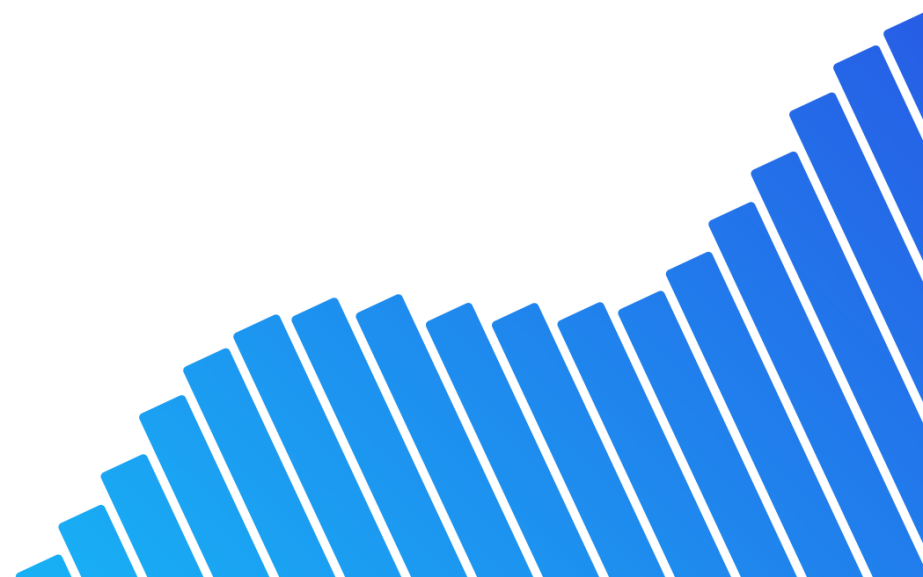
# TRIP: MODIFIED ACTIVE ASSET TEST

- Division 7A Loans = not an Active Asset
- Shares held in other companies or trusts = not an Active Asset (unless they meet the 80% test)
- Related party company to company loans = not an Active Asset
- Surplus retained profits in an interest bearing accounts = not an Active Asset
- Large Division 7A loan balances, related party loan balances and share ownership can cause failure of the Modified Active Asset test

# TIP: MODIFIED ACTIVE ASSET TEST

- Consider the utility of division 7A loans
- Long term planning if you believe the concessions may be used in the future
- Interposed entity to make third party company loans and division 7A loans – useful?
- Record keeping in the early years of business (less likely to accrue large loan balances early on)
- Track goodwill value each year (as this is an Active Asset)

# Division 7A



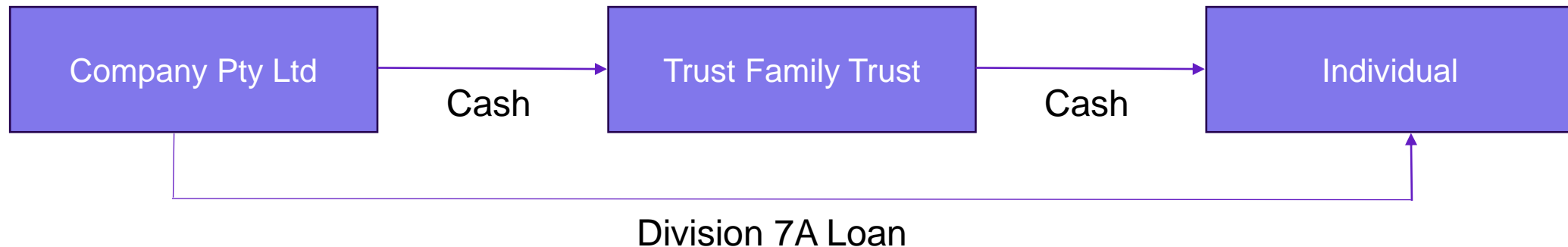


# Division 7A - Overview

- Can apply to treat private company loans to shareholders (or their associates) as unfranked dividends.
- Loans can include:
  - Transfers of money,
  - Financial accommodation,
  - Debt forgiveness.
- Can be repaid over 7 or 25 years if the loan is formalised in a complying loan agreement.
- Subject to the benchmark interest rate for the relevant year.
- Inter-company loans are not subject to Division 7A.

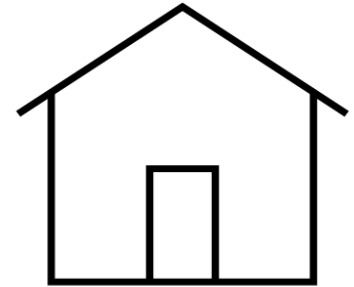
# Interposed Entity Loans - Subdivision E

- Loan from a company to a non-corporate entity through one or more interposed entities
- Treats the loan as being between the company and the final non-corporate entity
- Important to consider especially when a company has no distributable surplus



# 25-Year Loan - Requirements

- Full loan value must be secured by mortgage over real property
- Mortgage must be registered in accordance with State or Territory law
  - The relevant State or Territory law is that in which the real property is located
- Market value of real property must be at least equal to 110% of the loan amount when the loan is first made
  - The market value is reduced by any other liabilities secured over the property



# Division 7A Loan - 7 Year Term

## ■ Facts

- \$100,000 loan
- 7 Year term
- 8.27% interest rate
- Payment with fully franked dividend
- Shareholder is an individual at highest marginal rate
- Company Tax Rate 30%

Year	Minimum Yearly Repayment	Interest	Tax on Interest	Tax on Dividend	Total Tax
1	17,564.88	5,450.00	1,635.00	4,265.75	5,900.75
2	17,564.88	4,789.74	1,436.92	4,265.75	5,702.67
3	17,564.88	4,093.49	1,228.05	4,265.75	5,493.80
4	17,564.88	3,359.30	1,007.79	4,265.75	5,273.54
5	17,564.88	2,585.10	775.53	4,265.75	5,041.28
6	17,564.88	1,768.70	530.61	4,265.75	4,796.36
7	17,564.88	907.81	272.34	4,265.75	4,538.09
<b>Total</b>	<b>122,954.16</b>	<b>22,954.15</b>	<b>6,886.24</b>	<b>29,860.25</b>	<b>36,746.49</b>

# Division 7A Loan - Repaid Prior to Lodgement

- Facts

- \$100,000 loan
- Fully franked dividend declared before lodgement due date
- Shareholder is an individual at highest marginal rate
- Company Tax Rate 30%

Year	Repayment	Interest	Tax on Interest	Tax on Dividend	Total Tax
1	100,000.00	0.00	0.00	24,285.72	24,285.72

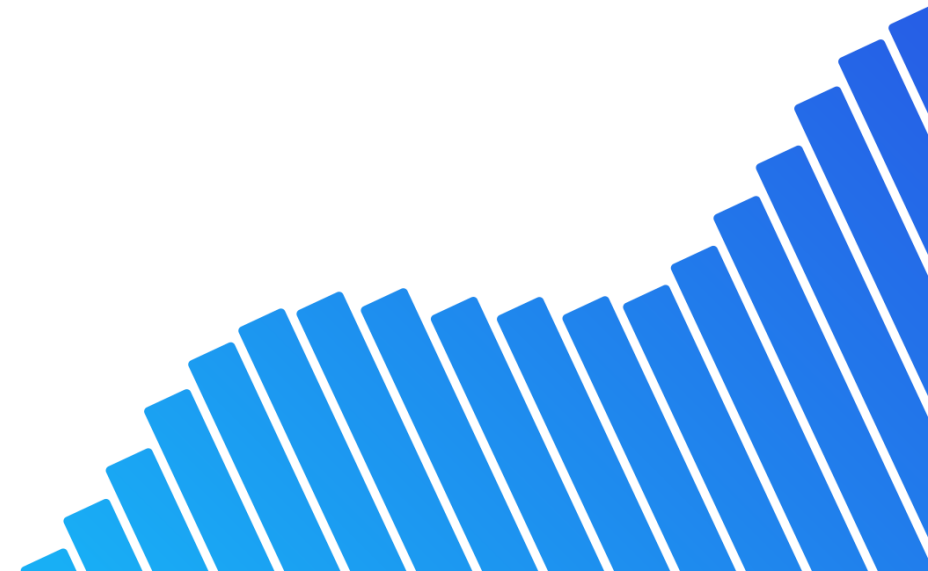
# Division 7A Loan - Tax Comparison

Year	Division 7A Loan			Loan Repaid	Cumulative Total Difference
	Tax on Interest	Tax on Dividend	Total Tax	Total Tax	Total Tax
1	1,635.00	4,265.75	5,900.75	24,285.72	18,384.97
2	1,436.92	4,265.75	5,702.67	0.00	12,682.30
3	1,228.05	4,265.75	5,493.80	0.00	7,188.50
4	1,007.79	4,265.75	5,273.54	0.00	1,914.96
5	775.53	4,265.75	5,041.28	0.00	(3,126.32)
6	530.61	4,265.75	4,796.36	0.00	(7,922.68)
7	272.34	4,265.75	4,538.09	0.00	(12,460.77)
<b>Total</b>	<b>6,886.24</b>	<b>29,860.25</b>	<b>36,746.49</b>	<b>24,285.72</b>	

# Division 7A - Other Topical Matters

- Potential for double dividends
- Bendel Case
- s109RB Applications
- Non-genuine loan repayments
- s109M

# Family Trust and Interposed Entity Elections





# Purpose of the Elections

- Family Trust Election
  - Utilisation of trust tax losses in the future
  - Utilisation of tax losses of a company under the COT
  - Distribution of franking credits
  - Simplification of SBE Restructure Roll-over
  - Avoidance of the trustee beneficiary reporting rules
- Interposed Entity Election
  - To make the entity a member of the family group
  - Avoidance of the trustee beneficiary reporting rules

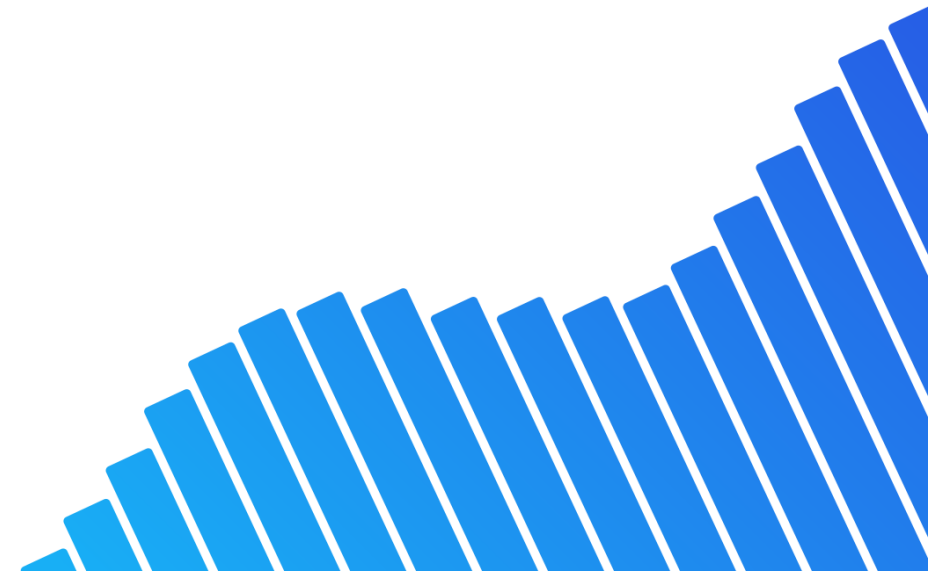
# Family Trust Distribution Tax

- Trustee liable for tax where a distribution is made outside a family group
- Tax payable at highest individual marginal rate + Medicare levy
- Amounts that are subject to FTDT are not taxable to the beneficiary
  - They are however used to calculate the MLS if applicable

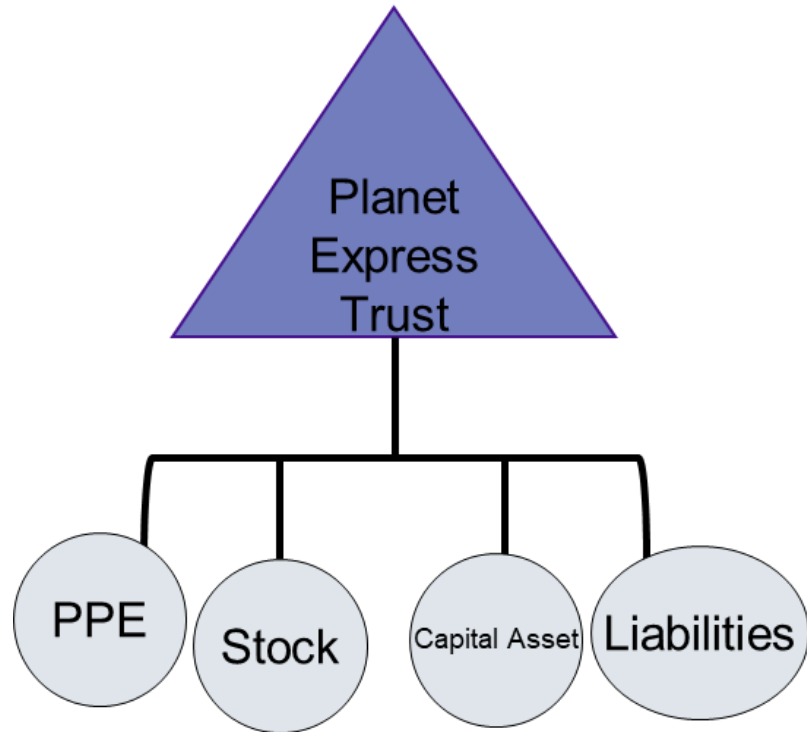
# Elections - Common Issues

- No election lodged
- Errors with lodging the notification
- Not displaying on the ATO Portal
- Family Breakdowns
- Death of Specified Individuals

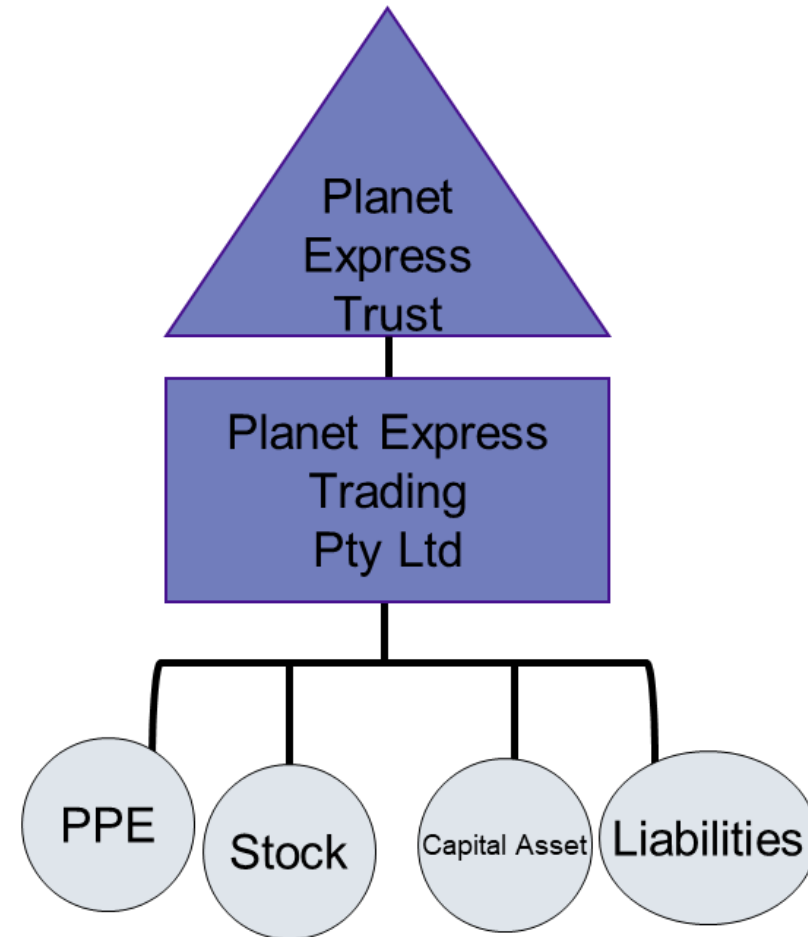
# Common CGT rollovers



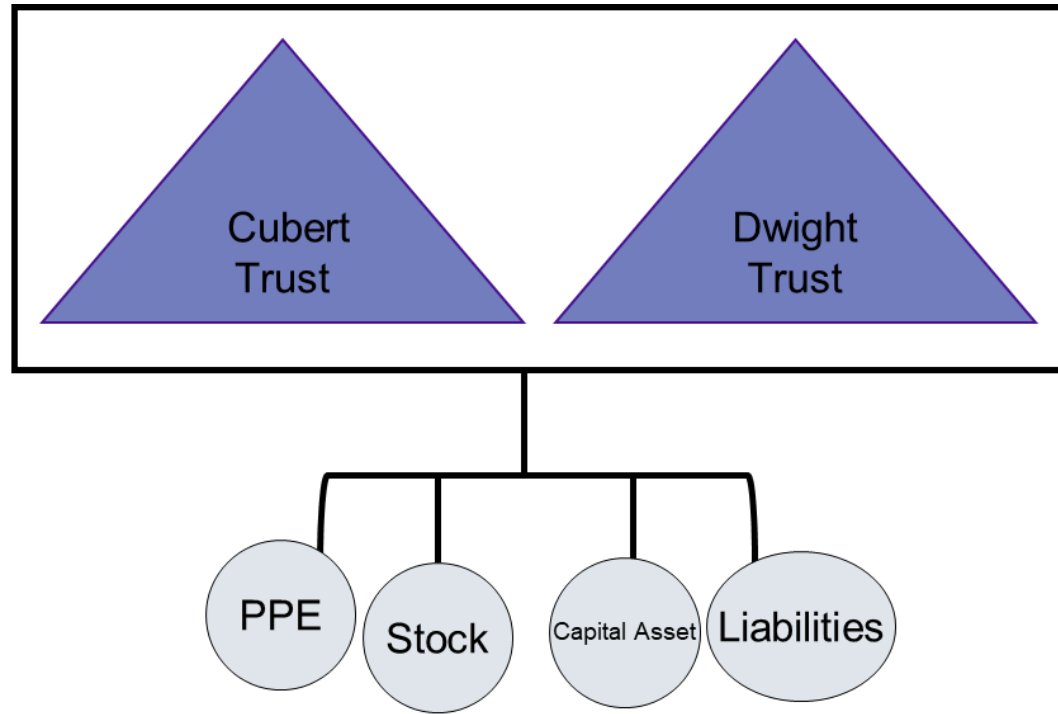
# 122 – A and 122 – B Rollovers



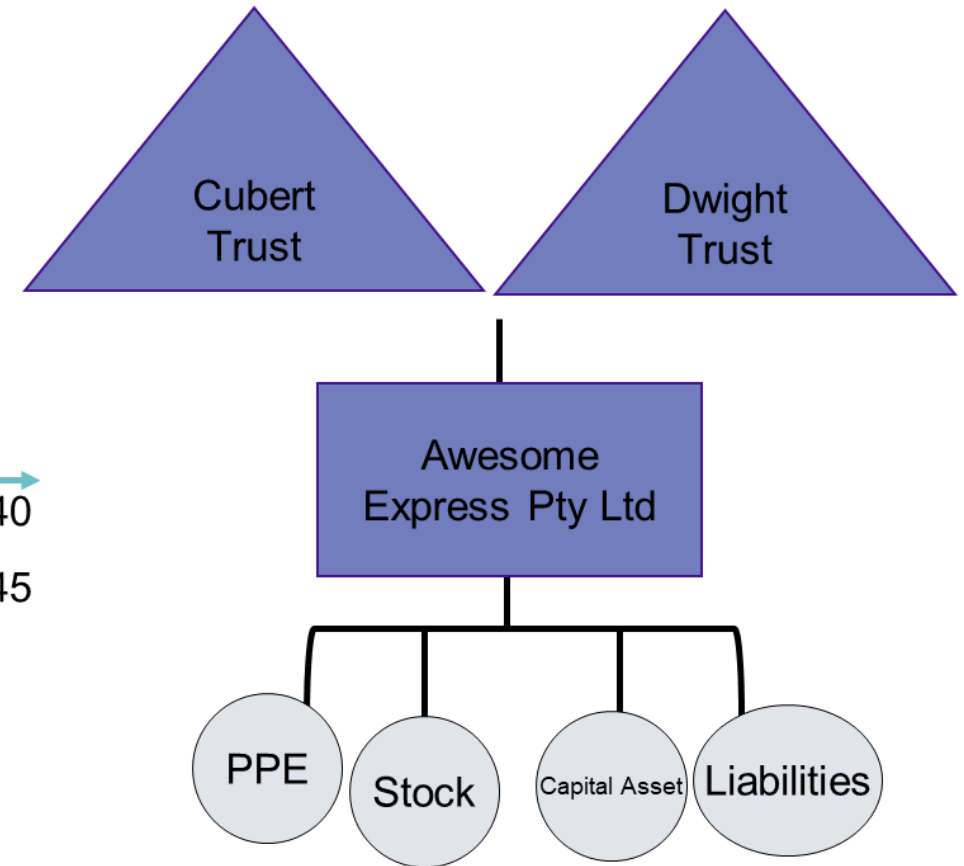
122A  
→  
Div 40 -340  
Div 40 -345  
Trading Stock



# 122 – A and 122 – B Rollovers



122B  
Div 40 -340  
Div 40 -345



# 122-A and 122-B - The non-simple parts

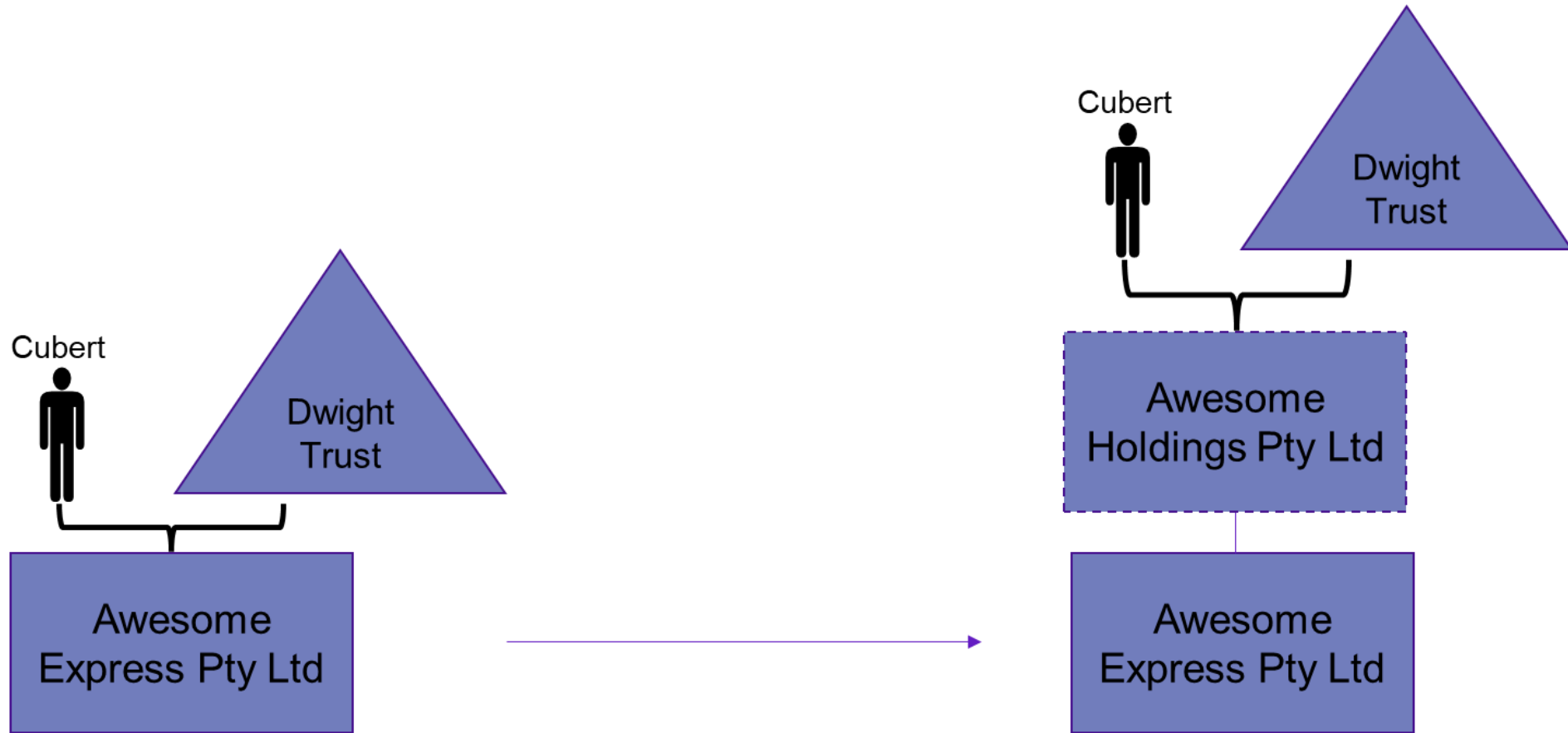
- Consideration
- Timing of incorporation and issue of shares
- Jointly held assets
- All assets of a business + liabilities
- Franking Credits
- Implementing the rollover

# 122-A and 122-B - The non-simple parts

- State taxes (duty on land and goods + WA and Qld business assets)
- Don't forget GST
  - Going Concern exemption
  - Other exemptions where available



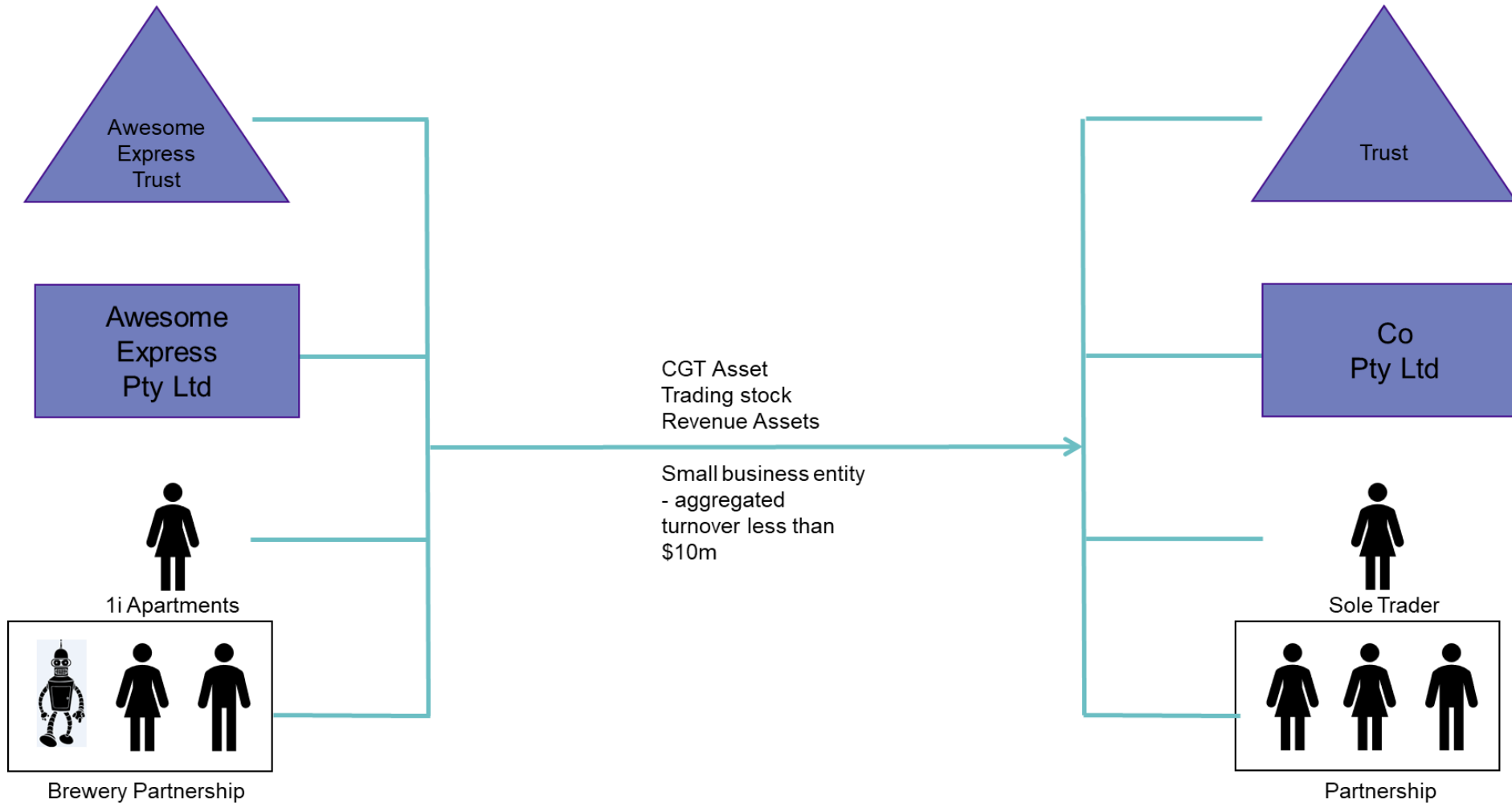
# 615 Rollovers



# 615 - The non-simple parts

- Multiple shareholders
- "And noting else"
- Under a scheme for reorganising its affair
- Cost base considerations and consolidations
- Applies to shares and units - exchanged for shares in rollover co (not like for like)
- Applies to redemptions and cancellation in exchange for shares in rollover company
- Market values and ratios
- TR97/18 and TD 2020/6 (demerger context)

# 328-G - The overview



# 328-G - The non-simple parts

- General operation of the roll-over
- Genuine restructure of an on-going business
- Safe harbour rules and Part IVA
- Trust problems
- Active assets requirements - generally doesn't work for shares/membership interest
- Significant amount of uncertainty

# 328-G - The non-simple parts

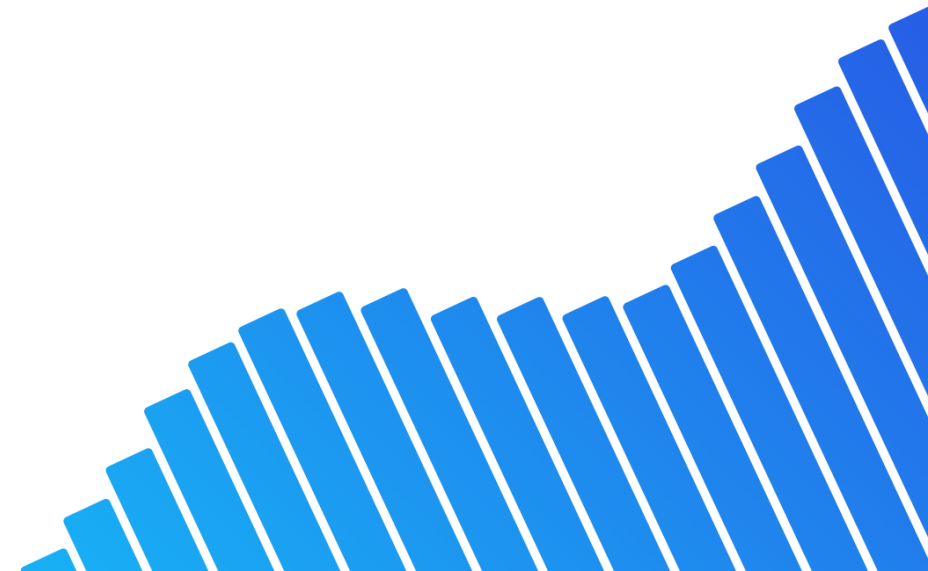
- Do rulings assist with applying the 328-G?
  - Certainty
  - Will you get one?
  - Timeframes
- Still have duty and GST considerations
- Still have commercial considerations

# Rollover take aways

- Genuine intersection between legal and accounting
- Speak to each other from the outset
- Always be thinking about the next transaction - solving one problem today may create more tomorrow
- It's not that simple (actually it's pretty complicated)
- Don't forget there are other rollovers too!

# Thank you

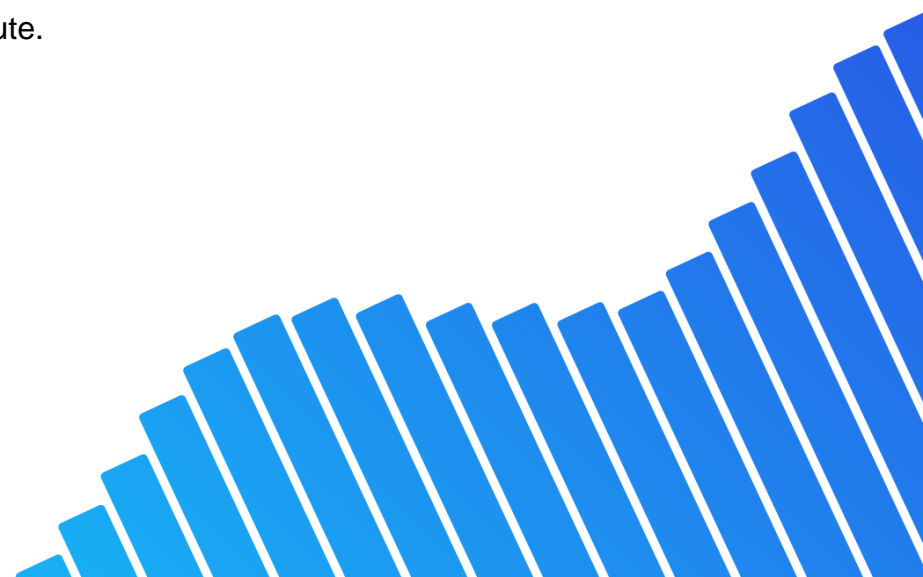
Please complete your evaluation form



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