

Duty exemptions when transferring real estate from a trust

LPLC

19 February 2025



Acknowledgement of traditional owners and country

This session is being held on the lands of the Wurundjeri people of the Kulin Nation and on behalf of LPLC I wish to acknowledge them as the traditional owners of the land.

I also acknowledge the traditional owners of the lands which all of those joining us online today are living, learning and working on.

I would also like to pay my respects to their Elders past and present, and any Elders of other communities who may be present today.

Agenda

Why transfer property from a trust?

Types of trusts

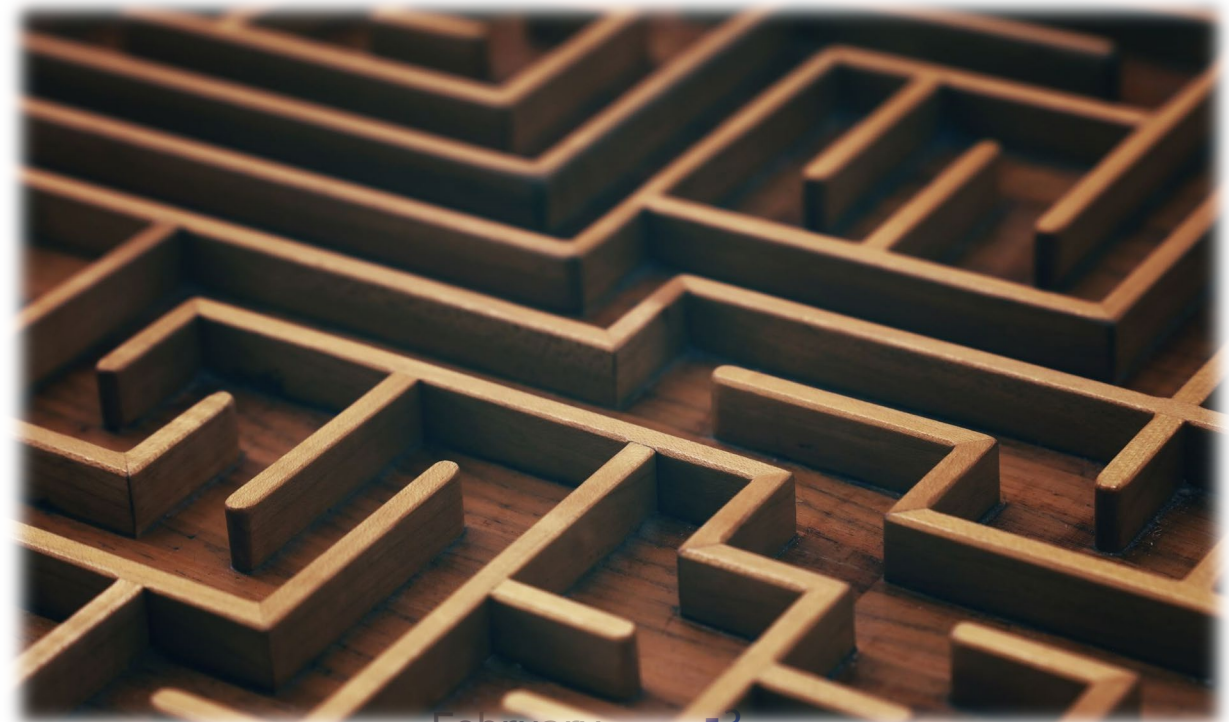
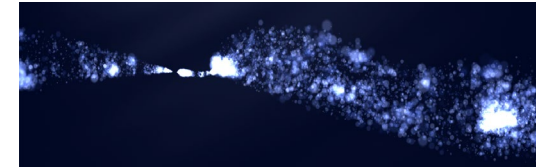
Distributions from discretionary trusts

Distributions from unit trusts, fixed trusts, super funds

Transfers of family farms

Other relevant exemptions / concessions

- Unless otherwise noted, references are to the *Duties Act 2000* (Vic)
- Emphasis added with underlining



Why transfer a property from a trust?

- Main residence / Principal place of residence and other tax reasons
- Imminent vesting date
- Succession planning, separation of assets / control and other changes to family arrangements



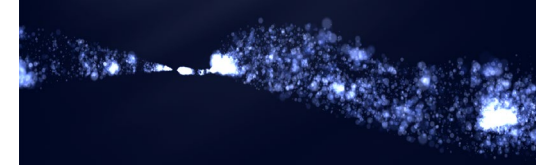
Types of trusts – Fixed trusts

- s. 36
- ‘***fixed trust*** means a trust other than—
 - (a) a discretionary trust (within the meaning of section 36A); or
 - (b) a trust to which a unit trust scheme relates; or
 - (c) a superannuation fund (within the meaning of section 41A)’



Types of trusts – Discretionary trust

- s. 36A(3) defines 'discretionary trust'
- Discretion to vest / distribute whole / part of the capital of the trust
- Identity of beneficiaries to benefit, quantum of benefit, or both
- Three possibilities:
 - Determination / exercise of discretion
 - Default – ie. if discretion not exercised
 - Distribution made may be divested if a discretion is exercised
- Does not include a unit trust scheme – i.e. tiebreaker
- Contrast with s. 3 definition – capital / income



Types of trusts – Discretionary trust

'Beneficiary'

- s. 36A(3)
- Essentially, the objects of the discretionary trust
- Person, or member of a class of person, in whom whole / part of the trust capital may be vested or remain vested:
 - If trustee exercises of a power or discretion in their favour (whether or not that power is presently exercisable); or
 - Upon default



Types of trusts – Unit trusts

‘Unit trust scheme’

- s. 3
- Arrangements for the purpose / effect of providing investment facilities by investors as beneficiaries under a trust
- For the acquisition, holding, management or disposal of property
- Profits, income or distribution of assets



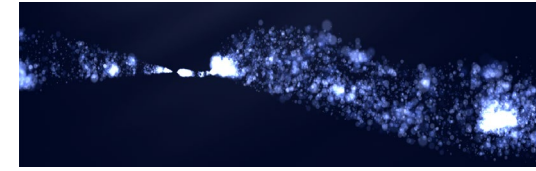
Types of trusts – Superannuation funds

- s. 41A

'superannuation fund means a complying superannuation fund, a complying approved deposit fund, a pooled superannuation fund or an eligible rollover fund.'

- s. 3

complying superannuation fund – includes complying fund per section 42 or 42A of the *SIS Act* (Cth) and other specified funds



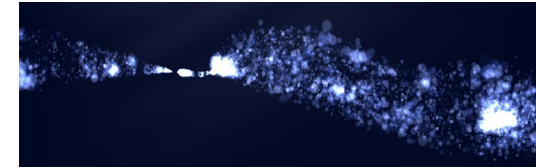
Types of trusts – Common law definition of ‘unit trust’

- *ElecNet (Aust) Pty Ltd*
 - ‘Unit trust’ (in relevant income tax provision and common usage) refers to a recognised trust relationship developed as a structure for investors to group resources for investing or trading.
 - Beneficial interest of the trust fund is divided into units.
 - Unitisation is a defining feature.
 - Units created / issued are held by persons for whom the trustee maintains and administers the trust.



Types of trusts – Importance of characterisation

- *Goletsos*
 - Hybrid trust transferred property to individual for no consideration.
 - If discretionary trust, s. 36A exemption applied.
 - If unit trust, no exemption because s. 36B exemption requirements not satisfied.
 - Beneficiaries defined by reference to sole unitholder.



Types of trusts – Importance of characterisation (cont.)

- *Goletsos (cont.)*
 - Discretion to distribute capital and income, subject to veto.
 - On vesting, return of paid up capital to sole unitholder with discretion regarding distribution of surplus.
 - VCAT – Unit trust:
 - Unitisation;
 - Provision of funds for investment;
 - Unitholders' ability to participate in income and capital distributions, and on vesting.



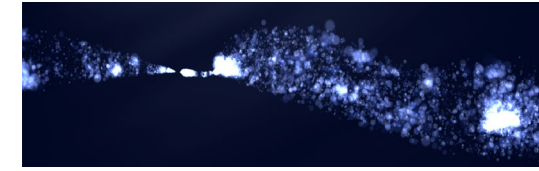
Types of trusts – Importance of characterisation (cont.)

- *Arrigo*
 - Unit trust property.
 - Plan of subdivision registered, new titles for each subdivided lot. Trustee transferred one lot to unitholder and sought 'fixed trust' exemption (together with s. 27 'partition' exemption).
 - VCAT – Trust deed created 'an initial unit trust and subsequent fixed trusts which came into existence upon the creation of the child titles.'
 - Court of Appeal upheld Commissioner's appeal – VCAT erred in this construction.
 - Relevant trust was a unit trust, not a fixed trust. Therefore s. 36 exemption did not apply.

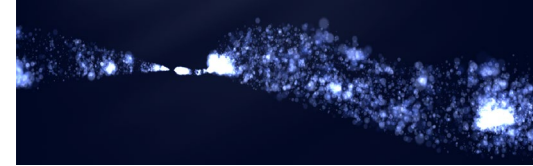


Distribution from discretionary trusts

- S. 36A – Duty exemption for property passing to beneficiary of discretionary trust (*principal trust*)
- Duty (if any) paid or will be paid for principal trust's acquisition of property
- Beneficiary:
 - was a beneficiary at the 'relevant time'; or
 - subsequently became a beneficiary by marriage, adoption, or birth

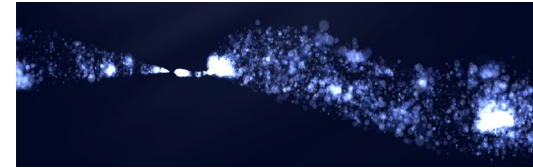


Distribution from discretionary trusts (cont.)



- Transfer / distribution is to beneficiary:
 - absolutely; or
 - as trustee of another trust of which all the beneficiaries are relevant beneficiaries; and
- If corporate beneficiary, all shareholders are natural persons who were beneficiaries of the principal trust at the relevant time
- Not part of a sale or other arrangement under which there exists any consideration for the transfer

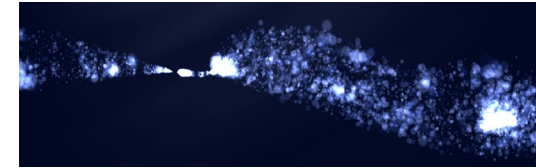
Distribution from discretionary trusts (cont.)



- ***Relevant beneficiary***
 - Natural person beneficiary at the relevant time or by marriage / adoption / birth; or
 - Corporation as trustee of a further trust, all the beneficiaries of which are such 'natural person' beneficiaries
- ***Relevant time***
 - Time at which the principal trust first acquired the property
 - Subdivision / Consolidation – relevant time based on parent title

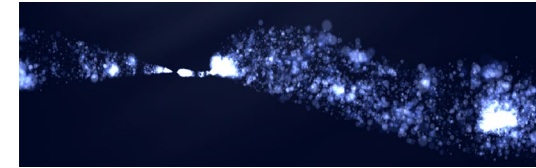
Distributions from discretionary trusts (cont.)

- Summary of elements
 - Duty was paid
 - Capital beneficiary at the relevant time
 - Transfer to the relevant beneficiary or a trust / company where all beneficiaries are relevant beneficiaries (with limitations)
 - Commissioner satisfied transfer is not part of a sale or arrangement under which consideration



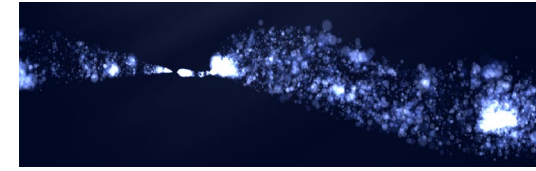
Distribution from unit trusts

- S. 36B – Duty exemption for property passing to unitholder of unit trust scheme (*principal scheme*)
- Duty (if any) paid or will be paid for principal scheme's acquisition of property
- Unitholder was a unitholder at the 'relevant time'
- 'Subsection 2' requirements satisfied
- Not part of a sale or other arrangement under which there exists any consideration for the transfer



Distribution from unit trusts (cont.)

- Dutiable value of the property transferred as a proportion of the trust's net assets does not exceed the value of the unitholder's proportion of the net assets at the relevant time *
- Value of the unitholder's unitholding is reduced by the same amount as the dutiable value of the property transferred
- Any duty under s. 7(1)(b)(vi) has been paid
 - 'any other transaction that results in a 'change in beneficial ownership' of dutiable property (other than an 'excluded transaction')



* Concession
may be available

Distribution from unit trusts (cont.)

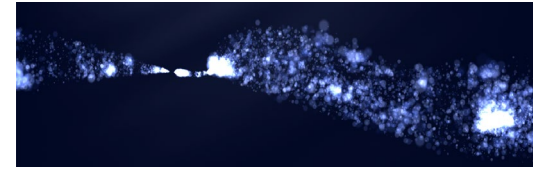
Subsection 2 requirements – Transfer is to the unitholder

- Absolutely – natural person or corporation with only natural person shareholders and no change to shareholders since the relevant time; or
- Fixed trust, discretionary trust or unit trust – all beneficiaries / unitholders are:
 - non-trustee natural persons who were beneficiaries / unitholders of that fixed / discretionary / unit trust at the relevant time (or subsequently by marriage / adoption / birth for a discretionary trust); or
 - a corporation (not as trustee) with only (non-trustee) natural person shareholders and no change to shareholders since the relevant time; or
- Superannuation fund – all the beneficiaries were beneficiaries at the relevant time.



Distribution from unit trusts (cont.)

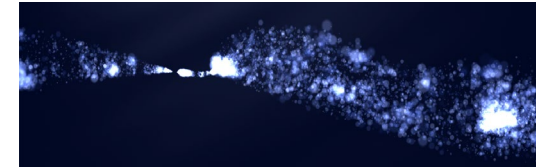
- If a unitholder would be entitled to a duty exemption but for the proportionate requirement not being satisfied, the unitholder is entitled to a duty concession to the extent of their proportionate interest in the unit trust at the relevant time.



Distribution from fixed trusts

- S. 36 – Duty exemption for property passing to beneficiary of fixed trust (*principal trust*)
- Duty (if any) paid or will be paid for principal trust's acquisition of property
- Beneficiary was a beneficiary at the 'relevant time'
- Dutiable value of the property transferred does not exceed the value of the beneficiary's interest in the principal trust *

* Concession
may be available

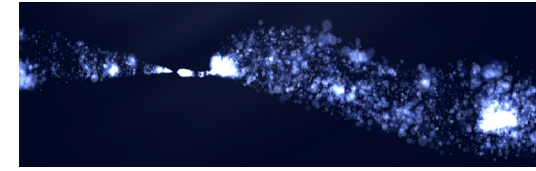


Distribution from fixed trusts (cont.)

- Transfer is to beneficiary absolutely or as trustee of another trust all the beneficiaries of which are:
 - natural persons who were beneficiaries of that other trust at the relevant time; or
 - a corporation as trustee of a further trust all the beneficiaries of which are natural persons who were beneficiaries of that further trust at the relevant time;
- Not part of a sale or other arrangement under which there exists any consideration for the transfer

Distribution from fixed trusts (cont.)

- If a beneficiary would be entitled to a duty exemption but for breach of the requirement that the property not exceed their interest in the principal trust, the beneficiary is entitled to a duty concession to the extent that the dutiable value does not exceed their interest.
- This exemption does not limit the application of the exemption in section 34 ('apparent purchaser' exemption).



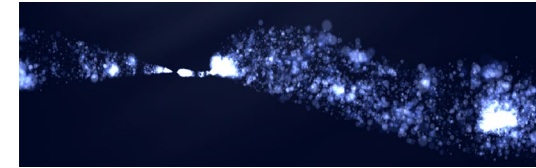
Assumption of liabilities

- S. 36C Effect of certain mortgages on trust exemptions
- Assuming liabilities ordinarily constitutes consideration for a transfer. However, if the beneficiary / unitholder gives a mortgage or assumes certain liabilities at the time of or immediately after the transfer, the duty exemption / concession can still apply.
- In effect, the Commissioner does not treat a transfer as 'part of a sale or arrangement' if he is satisfied the giving of the mortgage or assumption of liability is not part of a sale or other arrangement designed to take advantage of the relevant exemption / concession.
- Giving a mortgage – must be to secure the same or a greater amount as that outstanding under the mortgage for the property immediately before the time of the transfer.
- Assuming liabilities – Must be under the existing mortgage for the property.



Assumption of liabilities (cont.)

- This mortgage exception also applies to the concessions for fixed trusts and unit trusts.
- Commissioner will be taken to be relevantly satisfied if the mortgage:
 - was created at or before the property became a trust asset; or
 - was part of a genuine re-financing of such a mortgage; or
 - was created to secure borrowings applied to undertake improvements to the property.



Distributions from trusts

- Distribution documentation
 - Trust deed, distribution minutes / resolutions, financials
 - Requirements of trust deed – *Daniels*
 - Must be capacity as beneficiary (not purchaser) – *Balonyi; Shop, Distributive and Allied Employees*





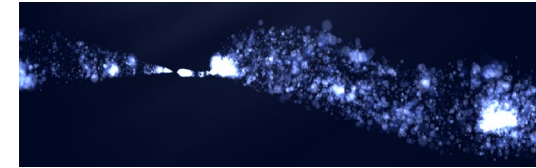
Distributions from trusts (cont.)

- Transfer to relevant beneficiary qua beneficiary
- Beneficiary of subject trust, not trust through a further link in the chain – *Morris*
- Receiving trust cannot be created or become beneficiary after relevant time – *Liu*

Distributions from trusts (cont.)

- No consideration
 - Most common pitfall
 - *Westella*
 - Reduction of unitholder / beneficiary loans constitutes 'consideration'
 - Exclusion not limited to 'sales'
 - 'Other arrangement under which there exists any consideration for the transfer'



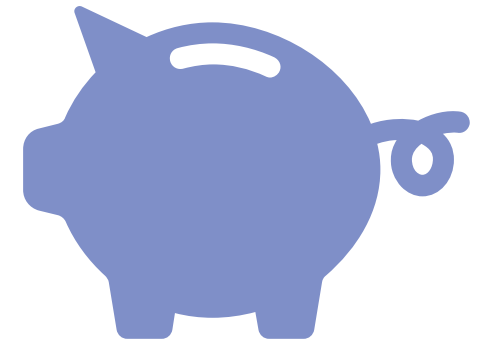


Distributions from trusts (cont.)

- Consider required accounting journal entries:
 - Nothing that could constitute ‘consideration’
 - Ensure trust will not go into deficit
- Many trusts will not have sufficient funds to qualify for an exemption:
 - Need sufficient equity
 - Nominal settlement sum can be problematic

Distributions from superannuation funds

- S. 36B – Duty exemption for property passing to beneficiaries of superannuation funds
- Duty (if any) paid or will be paid for the fund's acquisition of property
- Beneficiary was a beneficiary when the property first became part of the fund
- Dutiable value does not exceed value of beneficiary's interest in the fund
- However, beneficiary is entitled to a duty concession to the extent that the dutiable value does not exceed their interest.
- Superannuation death benefits – grey area



Transfers of family farms

- S. 56 Transfers of farms to relatives or charities
- Duty exemption for transfer of dutiable property that is exempt primary production land for land tax purposes
- Fee simple, life estate, or remainder in land
- Not an arrangement / scheme devised for the principal purpose of taking advantage of this exemption



Transfers of family farms (cont.)

- Transferor (subsection (2)):
 - Trustee for a natural person
 - Trustee of a discretionary trust – ‘capital beneficiaries’ limited to related natural persons
 - Trustee of a fixed trust – beneficiaries are relatives
 - Natural person
 - Company with only related natural persons as shareholders



Transfers of family farms (cont.)

- Transferee (subsection (3)):
 - Relative of a natural person referred to subsection (2)
 - Discretionary trust – limitations outlined below
 - Fixed trust – limitations outlined below
 - Beneficiary of transferor trust (discretionary / fixed)
 - Shareholder of transferor company



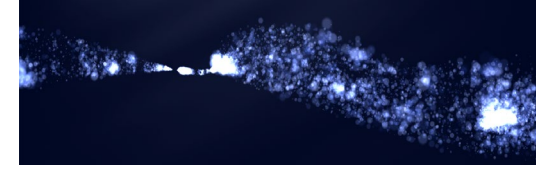
Transfers of family farms (cont.)

- ***Capital beneficiary*** (discretionary trust) – person or member of class of persons (i.e. object) that may receive a distribution of any / all capital of the trust:
 - upon exercise of a power / discretion; or
 - in default of appointment.



Transfers of family farms (cont.)

- Transfer to fixed trust – beneficiaries limited to any combination of the following (other than solely a natural person referred to in subsection (2)):
 - Present / future relative of a natural person referred to in subsection (2)
 - Charitable institution
 - Natural person referred to in subsection (2)



Transfers of family farms (cont.)

- **Charitable institution** – ‘corporation or body of persons associated for charitable purposes’
- **Fixed trust** – ‘identity of the beneficiaries and the quantum of their interests are ascertained’
- **Relative** –
 - Child or more remote lineal descendant of the person or the partner of the person.
 - Parent or more remote lineal ancestor of the person or the partner of the person.
 - Siblings of the person or the partner of the person.
 - Partner of the person or a partner of any person referred to above (i.e. of a child, grandchild, parent, grandparent, sibling or sibling-in-law).
 - Niece or nephew of the person or of the partner of the person.
 - Uncle or aunt of the person or of a parent of the partner of the person.
- **Partner** – person’s spouse or domestic partner.



'Apparent purchaser' exemption

- S. 34
 - Declaration of trust or transfer by an apparent purchaser in favour of a real purchaser
 - Must be a resulting trust – *Truskett; Harvey*
 - Real purchaser must provide all purchase money as a contribution to purchase price (not a loan) – *Pascu*
 - Presumption of advancement – *Bosanac*
 - Concession to extent of contributions
 - Change of legal description permitted



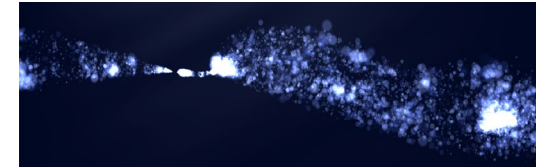
Transfers to / from a nominee

- S. 35 – exemption for transfer to / from a nominee
 - Transfer made by a transfer to a trustee / nominee to be held solely as trustee / nominee of the transferor;
 - Declaration of trust by trustee / nominee that the property is held on trust solely for the transferor;
 - Re-transfer to the original transferor
- without any change in beneficial ownership



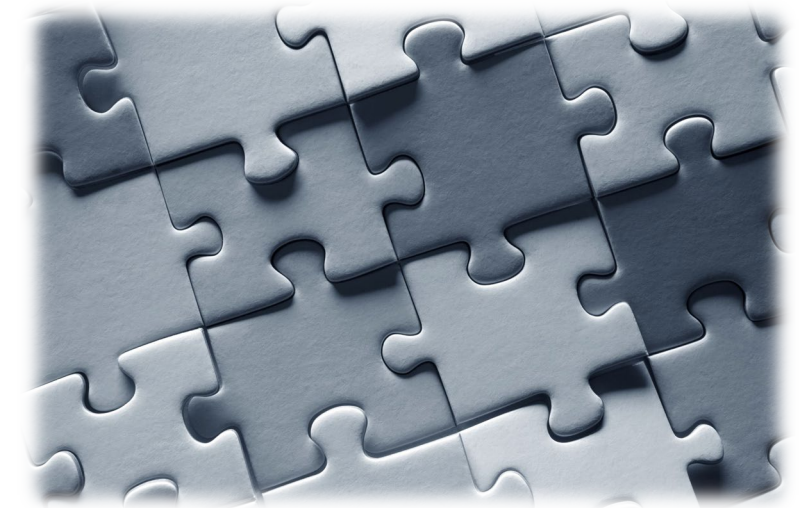
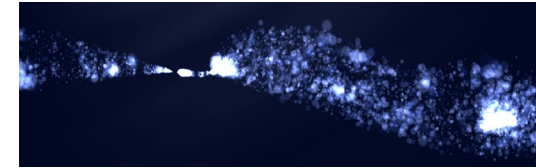
Transfers to / from a nominee (cont.)

- Right of indemnity permitted
- Change of legal description permitted
- Development, not solely to hold for transferor
– *Victoria Gardens Development*
- Power to sell and earning of income alone not problematic – *MD Commercial and AJ Commercial*



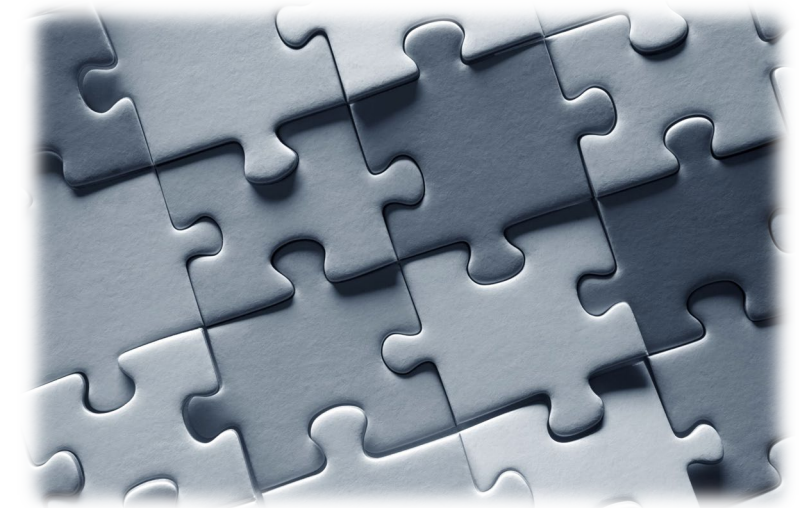
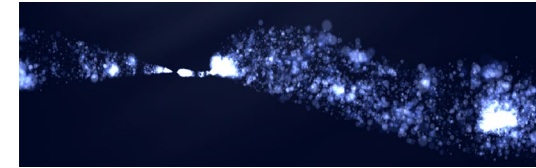
Final comments

- Exemptions / concessions differ in other jurisdictions
- Other commercial, family, tax, superannuation considerations and requirements
- Lodgment requirements
- Evidence – burden and onus of proof



Key takeouts

- The application of these exemptions is complex and very case / fact specific.
- Detailed review required – even if accountant or client says it will be exempt.
- Outside your area? – reach out to someone with expertise.



Cases cited

- *ElecNet (Aust) Pty Ltd v FCT* (2016) 259 CLR 73; [2016] HCA 51
- *Goletsos v CSR (Review and Regulation)* [2018] VCAT 730
- *CSR v Arrigo* [2016] VSCA 339
- *Morris v CSR (Taxation)* [2012] VCAT 217
- *Liu v CSR (Review and Regulation) (Vic)* [2016] VCAT 87
- *Daniels v CSR* (2007) 66 ATR 49; [2007] VCAT 480
- *Balonyi v CSR* [2015] VCAT 509
- *Shop, Distributive and Allied Employees Assoc. v CSR (Vic)* 2005 ATC 5012
- *Westella Nominees Pty Ltd v CSR* [2010] VCAT 1786
- *Truskett v Commissioner of Stamp Duties (NSW)* (1976) 6 ATR 1
- *Harvey Chief CSR (NSW)* [2021] NSWCATAD 63
- *Pascu & Ors v CSR (Review and Regulation)* [2016] VCAT 668
- *Bosanac v FCT* [2022] HCA 34
- *CSR v Victoria Gardens Developments Pty Ltd* [2000] VSCA 233; 46 ATR 61
- *MD Commercial Pty Ltd and AJ Commercial Pty Ltd v CSR* [2019] VSCA 295

Abbreviations:

- CSR → Commissioner of State Revenue
- FCT → Federal Commissioner of Taxation

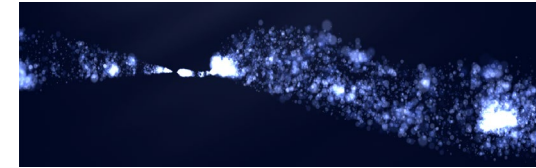
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