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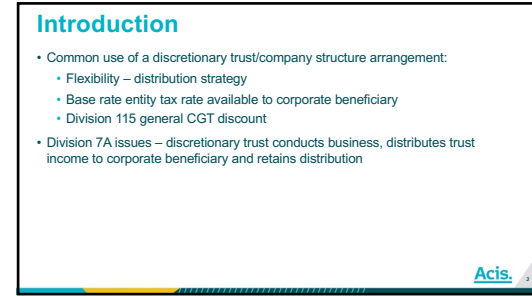
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**Introduction cont.**

- Recent tax developments of concern to the use of the 44 above structure arrangement:
  - TD 2022/11
  - Section 100A
  - Part IVA
- Other issues:
  - UPEs are not 'debt'
  - Dividend access shares – value shifting issues and Division 152 concerns



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**ASIC Standard Discretionary Trust Deed**


**4.4 Trustee makes determinations**

(a) The Trustee may determine, in relation to all, or any part of, the Income:

- to **pay, apply or Set Aside** any amount for one or more of the Beneficiaries;
- to accumulate any amount of Income.

**4.9 Amounts Set Aside**

Any amount Set Aside or held by the Trustee on behalf of a Beneficiary under this Deed, will no longer form part of the Trust Fund, but will be held by the Trustee as a separate trust fund upon trust for the relevant Beneficiary absolutely. The Trustee has the Right (but not the Obligation), pending payment to the Beneficiary, to invest or apply that amount for the benefit of the Beneficiary or deal with that fund, or any resulting Income, in any manner provided for in this Deed in relation to the Trust Fund.



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**Division 7A Concepts**

- Division 7A is an integrity regime
- Division 7A application:
  - Payments (s.109C)
  - Loan (s.109D)
  - Forgiveness (s.109F)
- Exclusions – s.109M complying loan agreements
- Many other integrity measures provided by Division 7A
- Definition of the term 'associate' – note the manner s.318(3) defines an associate of a trustee – includes any entity that might benefit to trust distributions



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**Section 109C 'Payment'**

- Definition of the term – s.109C(3)
- Relevance to UPE?
  - Forgiveness of a UPE
  - Not subject to s.109F
  - TD 2015/20 – release of an obligation
- Refer to example 1 of TD 2015/20

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**Section 109D – 'Loans'**

- Overview TR 2010/3
- Briefly compare application of TR 2010/3 with TD 2022/11
- TR 2010/3:
  - What constitutes a loan (s.109D(3)) – includes the provision of financial accommodation
  - Why the term loan applies to an UPE
- Practical outcome of TR 2010/3 subject to PS LA 2010/4:
  - PS LA 2010/4 provided for safe harbour options – 7/10 year interest only 'loans' (sub-trust arrangement) to negate s.109D consequences

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**TD 2022/11**

- **Overview:**
  - Applies to distributions post 1<sup>st</sup> July 2022
  - TR 2010/3 & PS LA 2010/4 withdrawn wrt to post 1<sup>st</sup> July 2022 arrangements
  - New ruling re sub-trust arrangements
  - No change to the division 7A treatment of 16<sup>th</sup> December 2009 UPEs
  - Reinforces concept of provision of financial accommodation for the purposes of s.109D(3)
- **Timing of loan:**
  - Knowledge of entitlement
  - Knowledge of actual amount
  - Knowledge based on when there is a 'consensual arrangement'
    - same persons are the 'directing minds' of trustee and corporate beneficiary

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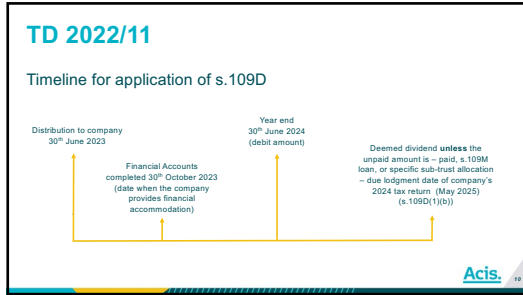
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### ASIC Trust deed – Amount set aside

- Clause 4.9 trustee when set aside distribution – creates a sub-trust for the absolute benefit of the beneficiary
- TD 2022/11 implications:
  - Constitutes the ending of the UPE
  - Practical consequences of TD 2022/11:
    - Is the sub-trust in relation to an amount specifically allocated (eg. funds deposited) – refer to Example 2 TD 2022/11; or
    - S.109D issues if the sub-trust intermingled with the trusts other assets!
- If the sub-trust amount is intermingled – the corporate beneficiary is deemed to have provided financial accommodation to the trustee:
  - Trustee must take remedial action to prevent s.109D applying to deem a dividend

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### Amount set aside – further implications

- If the sub-trust amount is represented by a specific asset:
  - No immediate s.109D issue as corporate beneficiary has not provided any financial accommodation;
  - If the corporate beneficiary 'allows' its sub-trust amount to be applied for a shareholder/associate – (eg. Trustee loans money attributable to the sub-trust to an entity) – company deemed to have made a loan
  - No subdivision EA issues (as there is no UPE)
- If the sub-trust amount is not represented by a specific asset (sub-trust amount intermingled with other trust assets)
  - Company has provided financial accommodation to trustee – s.109D implications
  - No UPE existing – therefore subdivision EA not applicable
  - Refer to Example 3 TD 2022/11

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**Actions Required**

- Be mindful of the TD 2022/11 changes re the Division 7A treatment of sub-trust transactions:
  - Complying loan agreements or payment of amounts
  - Note the relevant **timeline** when loan is made and remedial action is required.
- Review December 2009 UPEs to determine are they sub-trust amounts or UPEs – subdivision EA concerns
- Consider the longer term use of a corporate beneficiary in a trading trust scenario:
  - Cash flow implications of s.109M loan arrangements;
  - S.109M loan will progressively transfer assets into company; and
  - Restructure – move business into a company with a trust as the shareholder?



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Questions?

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**Upcoming Webinar**

**20 SEP** **Avoiding the SMSF Dangerzone**

Join Peter Johnson, Acis' SMSF Services Director, as he highlights the complexities that arise from historical issues in SMSF trust deeds and outlines practical strategies to deal with these challenges. Having focussed on the superannuation sector for most of his 30+ year career, Peter is well positioned to deliver real case studies, across various jurisdictions, that put a spotlight on the problems that can arise from issues in SMSF deeds, including:

- Re Narumen (Qld)
- Katz v Grossman (NSW)
- Munro v Munro (Qld)
- Moss Super Pty Ltd v Hayne (Vic)
- Williams v Williams (Qld)

Peter will also outline his best practice strategies for identifying these types of issues in the real world, practical steps for rectifying them and risk mitigation measures for avoiding them in the future. Register now to equip yourself with the knowledge and solutions to keep your clients out of the SMSF trust deed danger zone.



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