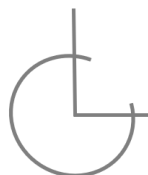

Discretionary Trusts and Queensland State Taxes - Tips and Traps

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1 Introduction

- 1.1 The use of discretionary trusts for both property and business investment can inadvertently result in a myriad of State tax issues to arise.
- 1.2 With ever-changing rules surrounding discretionary trusts for State taxes and an increased focus by State revenue authorities to audit, advisors must be aware when a lack of proper structuring may cause issues for clients down the track.
- 1.3 This paper looks to discuss and consider the impact of State taxes when using a discretionary trust for property and business structuring. The paper will specifically consider:
 - (a) structuring a discretionary trust holding Queensland land: understanding the various foreign surcharge considerations for stamp duty and land tax and what you can do for your client;
 - (b) structuring a discretionary trust holding a Queensland business: understanding the payroll tax considerations and what you can do for your client;
 - (c) amending a discretionary trust holding Queensland assets: knowing what can or can't be done; and
 - (d) other miscellaneous tips and traps in relation to Queensland state legislation and discretionary trusts.
- 1.4 As outlined above, the paper will specifically relate to Queensland State tax legislation, however, comments will be made with reference to other State tax legislation where appropriate.



Structuring a discretionary trust holding Queensland land

2 Overview

- 2.1 The introduction of surcharges for 'foreigners' buying or holding property in various States and Territories have resulted in an increased focus on property owners and their advisers to get the structure of discretionary trusts holding property right.
- 2.2 Specifically, where a foreign trust purchases or holds property in various States and Territories, additional stamp duty and land tax may be payable (on top of the general rates).
- 2.3 A summary of the current surcharge rates imposed on foreign landowners is provided in the table below:

<i>State/Territory</i>	<i>Stamp duty surcharge (minimum)</i>	<i>Land tax surcharge (minimum)</i>
Queensland	7.00%	2.00%
New South Wales	8.00%	2.00%
Victoria	8.00%	2.00%
South Australia	7.00%	N/A
Western Australia	7.00%	Commencing 01/06/2020
Australian Capital Territory	N/A	0.75%
Tasmania	3.00%	N/A
Northern Territory	N/A	N/A

- 2.4 Given that some of the surcharge rates may result in effectively foreign trusts paying double the stamp duty and land tax that a non-foreign trust would pay, getting the structure wrong is costly.
- 2.5 Further, continued changes to stamp duty and land tax legislation and the way the legislation is enforced through Revenue Authorities across Australia has meant that advisers must continue to keep up to date to ensure their clients do not inadvertently have surcharges imposed on them.
- 2.6 Recent examples of changes to State tax legislation regarding the imposition of surcharges on foreign landowners include:



<i>Change to approach</i>	<i>New approach</i>	<i>Old approach</i>
State Revenue Legislation Further Amendment Bill 2019 (NSW)	Discretionary trusts must specifically exclude foreigners as beneficiaries and prevent foreigners from benefiting	Discretionary trusts just had to ensure foreigners were not beneficiaries
Victorian State Revenue Office 'will no longer apply the practical approach' ¹	Discretionary trusts must include restrictions on foreign persons as potential beneficiaries	It was enough that a trust was unlikely to make a distribution to a foreign person – called the 'Practical Approach'.
Revenue and Other Legislation Amendment Act 2019	Introduction of new definitions on what makes a 'foreign trust' for Queensland land tax purposes	No specific rules in relation to whether a trust was an 'absentee' for Queensland land tax purposes and liable for surcharges

2.7 Ultimately, for advisors establishing a discretionary trust to hold property in Queensland, the critical structuring questions to consider are as follows:

- (a) When will a discretionary trust need to pay surcharge stamp duty rates when acquiring a Queensland property?
- (b) When will a discretionary trust need to pay surcharge land tax rates when holding a Queensland property?

2.8 In short, a discretionary trust will need to pay surcharge rates for Queensland stamp duty and land tax purposes if it is a 'foreign trust'.

2.9 In addition to considering the above queries, it is important to appreciate that what it means to be a 'foreign trust' will differ from State to State (or Territory), as well as Federally. The impact of these other legislations will also be discussed.

3 What makes a 'foreign trust' for Queensland stamp duty purposes?

3.1 The surcharge stamp duty imposed on foreigners under the Queensland stamp duty legislation is termed as '**additional foreign acquirer duty**' (**AFAD**), with the rules outlined in Chapter 4 of Qld Duties Act.

3.2 AFAD is imposed on a **transaction** if:

- (a) It relates to a specific type of property defined in section 241 of Qld Duties Act; and
- (b) The acquirer of the property defined in section 241 of Qld Duties Act is a **foreign person**.

3.3 A transaction is defined to include:

- (a) Transactions on which transfer duty is imposed; and

¹ Foreign purchaser additional duty and discretionary trusts change from March 2020, <https://www.sro.vic.gov.au/foreign-purchaser-additional-duty-and-discretionary-trusts-2020>, accessed 20 February 2020.



- (b) Relevant acquisitions on which landholder duty or corporate trustee duty is imposed.

What property will AFAD relate to?

- 3.4 The property defined in section 241(2) of Qld Duties Act includes the following:
- (a) **AFAD residential land;**
 - (b) An existing right² in AFAD residential land;
 - (c) A new right³ in AFAD residential land;
 - (d) A partnership interest that holds AFAD residential land directly or indirectly; or
 - (e) A trust acquisition or trust surrender in a trust that holds AFAD residential land directly or indirectly.
- 3.5 Section 241(3) of Qld Duties Act also allows AFAD to apply to a transaction where landholder duty or corporate trustee duty may apply provided:
- (a) With respect to landholder duty – the landholder has land holdings that include AFAD residential land; or
 - (b) With respect to corporate trustee duty – the dutiable property held on trust by the corporate trustee, or in which the corporate trustee has an indirect interest that is held on trust, includes residential land.
- 3.6 Importantly, AFAD will only be imposed when transactions relate to AFAD residential land. Therefore, if the transaction does not relate to AFAD residential land, no AFAD will be imposed.
- 3.7 AFAD residential land is defined in section 232 of Qld Duties Act to be land in Queensland:
- (a) That is used solely (or primarily) for residential purposes; **and**
 - (b) Any of the following applies:
 - (i) On the land, there is or will be a building '*designed or approved by a local government for human habitation by a single family unit*';
 - (ii) On the land, there is a building that a person will work on so that it becomes a building mentioned in above; or
 - (iii) Variations to the above conditions to factor in potential subdivisions .
- 3.8 It should be noted that land used for commercial purposes is not included in the definition of AFAD residential land.

When is an acquirer a foreign person?

- 3.9 The term **acquirer** is defined in section 233 of Qld Duties Act to be a person who:
- (a) In relation to acquiring a property – is a transferee (i.e. buyer) of property;

² Existing right means an existing right in relation to AFAD residential land: under a joint venture agreement; an existing option to acquire; an existing right of pre-emption; an existing right to acquire dutiable property; an existing right to exploit; or an existing right to the income – see section 241(b)(ii) referencing the definition of 'existing rights' in Schedule 6 of Qld Duties Act at paragraph (g) or (i) to (m).

³ New right means an option to acquire AFAD residential land – see section 241(c)(ii) referencing the definition of 'new rights' in Schedule 6 of Qld Duties Act at paragraph (c).



- (b) In relation to agreements relating to a property– under the transaction, acquires the property;
- (c) In relation to acquiring a right over property – under the transaction, acquires the new right;
- (d) In relation to acquiring a partnership interest– under the transaction, acquires a partnership interest;
- (e) In relation to creating or terminating a trust over property – either:
 - (i) starts to hold the property a trustee for a trust; or
 - (ii) starts to hold the property in another capacity other than as trustee;
- (f) In relation to acquiring or surrendering a trust interest – either:
 - (i) makes a trust acquisition; or
 - (ii) makes a trust surrender;
- (g) In relation to acquiring an interest in a landholder entity⁴ – makes a relevant acquisition⁵;
- (h) In relation to acquiring an interest in a company acting as trustee for a trust holding land – makes a relevant acquisition⁶.

3.10 A foreign person is defined in section 234 of Qld Duties Act to mean:

- (a) **A foreign individual;**
- (b) A foreign corporation; or
- (c) The trustee of a **foreign trust**.

3.11 A foreign individual is an individual other than an Australian citizen or permanent resident.⁷

3.12 A trust will be a foreign trust if at least 50% of the **trust interests** in the trust are **foreign interests**.⁸

3.13 A trust interest is defined in section 57 of Qld Duties Act to be *'a person's interest as a beneficiary of a trust, other than a life interest'*. Subsection (2) provides that for a discretionary trust *'only a taker in default of an appointment by the trustee can have a trust interest'*.

⁴ A **landholder** is defined in section 165 of Qld Duties Act to mean an entity that has landholdings in Queensland with an unencumbered value greater than \$2 million.

⁵ A **relevant acquisition** for landholder duty purposes is defined in section 158 of Qld Duties Act to mean the acquisition resulting in the acquirer having a significant interest in the landholder (whether solely or in aggregation with a related entity). A significant interest is defined in section 159 of Qld Duties Act to mean 50% or more in relation to 'private landholders' (being an unlisted company) and 90% or more in relation to 'public landholders' (being a listed company or unit trust).

⁶ A **relevant acquisition** for corporate trustee duty purposes is defined in section 207 of Qld Duties Act to mean the acquisition of a share interest (whether by becoming a shareholder or having their shareholding increase) a corporate trustee of a trust and where the acquisition allows a person to obtain (directly or indirectly) a benefit in the underlying trust property.

⁷ Section 236 of Qld Duties Act. Australian citizen and permanent resident are defined in Schedule 6 of Qld Duties Act to include persons satisfying section 4 of the *Australian Citizenship Act 2007* (Cth) and a holder of a permanent visa or a New Zealand citizen who is the holder of a special category visa as defined in the *Migration Act 1958* (Cth), respectively.

⁸ Section 237 of Qld Duties Act.



- 3.14 Effectively, a 'taker-in-default' of a trust is the person who would benefit from the income or capital of the trust if the trustee failed to exercise any of its discretion. These persons are colloquially called (and defined) the 'default beneficiaries', however, the income and capital powers of the trust deed must be carefully reviewed to confirm the default recipients.
- 3.15 A trust interest will be a foreign interest if it is held by:
- (a) A foreign person; or
 - (b) A related person of a foreign person.⁹
- 3.16 Therefore, if the default beneficiaries (and their related persons) hold at least a 50% interest to the default income and capital of a discretionary trust, the discretionary trust will be considered a foreign trust for AFAD purposes.
- 3.17 Related persons are defined in section 238 of Qld Duties Act to mean the persons referred to in section 61 of Qld Duties Act or partners in a partnership.
- 3.18 Section 61 of Qld Duties Act states a person is a related person of another if:
- (a) For an individual – they are members of the same family.
 - (b) For an individual or a company – the person or a member of a person's family is a majority shareholder, director or secretary of a company;
 - (c) For an individual or trust – the person or a related person is a beneficiary of the trust; or
 - (d) For companies – they are related body corporates;
 - (e) For a company or trust – the company or a related person is a beneficiary of the trust; or
 - (f) For a trust – there is a person who is a beneficiary of multiple trusts, or a person is a beneficiary of one trust and a related person to that person is a beneficiary of another trust.
- 3.19 Practically speaking, it is uncommon to see companies and trusts listed as default beneficiaries of discretionary trusts. Therefore, what is meant to be a related person can be defined to be family members of another individual default beneficiary.
- 3.20 A member of a person's family includes a person and each of the following:¹⁰
- (a) The person's spouse¹¹;
 - (b) The parents of the person or the person's spouse;
 - (c) The grandparents of the person or the person's spouse;
 - (d) A brother, sister, nephew or niece of the person or the person's spouse;
 - (e) A child, stepchild or grandchild of the person;
 - (f) The spouse of any persons mentioned in paragraphs (d) or (e) above.

The answer

⁹ Section 237(2) of Qld Duties Act.

¹⁰ Definition of member in Schedule 6 of Qld Duties Act.

¹¹ Spouse is defined in Schedule 6 of Qld Duties Act to include a de facto partner.



- 3.21 Where default beneficiaries of a trust acquiring AFAD residential land includes persons who are:
- (a) Not an Australian citizen or permanent resident; and
 - (b) Are members of another default beneficiary's family,
- then:
- (c) The discretionary trust is likely to be considered a foreign trust; and
 - (d) AFAD will apply on the acquisition of the AFAD residential land.

4 What makes a 'foreign trust' for Queensland land tax purposes?

- 4.1 Prior to the Queensland State budget in 2019, what it meant to be a 'foreign trust' (or an 'absentee' under the land tax legislation) for Queensland stamp duty and land tax purposes differed.
- 4.2 This meant that while some 'foreign trusts' may have been liable for AFAD, those same trusts may not have been liable for a land tax surcharge for holding such land in the trust.
- 4.3 Since the introduction of *Revenue and Other Legislation Amendment Act 2019 (Qld)* following that State budget, the:
- (a) definition of being a 'foreign trust'; and
 - (b) type of landholder which a surcharge applies,
- have aligned.
- 4.4 Specifically, clause 32(b) of Qld LTA provided that the rate of land tax applying to a company or trustee includes:
- (a) The general rate provided for under the applicable schedule; and
 - (b) If the company or trustee is a foreign company or a trustee of a foreign trust – the surcharge rate provided for under Schedule 2, part 2¹².
- 4.5 The concepts about foreign companies and trustees of foreign trusts align with the definitions and terms used in the Qld Duties Act. The table below summarises the corresponding Qld LTA sections with the QLD Duties Act counterpart.

	<i>Qld LTA section number</i>	<i>Qld Duties Act section number</i>
Foreign trust	Section 18C	Section 237 (with 235 defining a foreign individual)
Foreign person	Section 18D	Section 234
Related person	Section 18E	Section 238 referencing section 61
Trust interest	Section 18F	Section 57
Beneficiary's trust interest calculation	Section 18G	Section 60

¹² Schedule 2 Part 2 of Qld LTA states that a surcharge rate is payable on the value of land held by a foreign company or trustee of a foreign trust equal to 2cents for each \$1 exceeding \$349,999.



- 4.6 Similar to our comments in relation to the Qld Duties Act, discretionary trusts where default beneficiaries include persons who are:
- (a) Not an Australian citizen or permanent resident; and
 - (b) Are members of another default beneficiary's family,
- then:
- (c) The discretionary trust is likely to be considered a foreign trust; and
 - (d) The surcharge rate will be applied to the land held by the discretionary trust.

4.7 An important distinction between the application of a surcharge under Qld Duties Act and Qld LTA is that the AFAD is only imposed when dealing with AFAD residential land. There is no such limitation on the application of the land tax surcharge for land held in Queensland (pending any application of existing exemptions).

5 **Considering the Queensland rules against other Federal/State legislations**

5.1 If the only structuring considerations required for a discretionary trust purchasing and holding Queensland land were the stamp duty and land tax surcharges, then the structuring takeaway would be to ensure that no foreign person is a default beneficiary of the trust.

5.2 However, structuring should rarely be based on a select few variables, and rather a holistic approach must be adopted. The usual factors such as:

- (a) Succession planning;
- (b) Asset segregation;
- (c) Tax planning;
- (d) Compliance needs; and
- (e) Who in fact are intended to benefit from the trust,

will also need to be considered.

5.3 In addition to the usual structuring suspects, the interplay between Queensland stamp duty and land tax legislation with other State and Federal legislation should also be a factor in how to structure a discretionary trust.

5.4 The specific issues for advisers to consider include:

- (a) Whether FATA applies and the acquiring discretionary trust needs to consider whether they meet certain thresholds where they are required to go to the Foreign Investment Review Board for approval; and
- (b) Whether there is a State by State trend that may influence the stamp duty and land tax surcharge considerations.

Foreign Investment Review Board

5.5 Before foreign investors were being hit with foreign surcharges at a State and Federal tax level, there existed legislation governing the framework relating to foreign investment screening – the *Foreign Acquisitions and Takeovers Act 1975* (defined as **FATA**).

5.6 While historically there may have been less focus on the administration and compliance of the legislation, the recent foreign surcharges have raised awareness of the framework.



- 5.7 Generally, if FATA is applicable to an investor, they are required to seek government approval of the investment. This screening and approval process are undertaken by the Foreign Investment Review Board (or more commonly referred to as **FIRB**).
- 5.8 While this paper is not intended to focus on FIRB and FATA, it is worthwhile understanding how FATA defines a foreign trust, as the approach adopted under this legislation can be found in other State tax legislations across the country.
- 5.9 Further (and as mentioned above), foreigners who acquire certain assets exceeding regulated thresholds, are required to apply for approval prior to acquisition. This process will cost time, but also an application fee will be payable.
- 5.10 For FIRB application purposes, a **foreign person** is defined in section 4 of FATA to include:
- (a) *'The trustee of a trust in which an individual not **ordinarily resident**¹³ in Australia, a foreign corporation or a foreign government holds a substantial interest'*; and
 - (b) *'The trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest'*.
- 5.11 Substantial interest is defined to mean at least a 20% interest in an entity, while aggregate substantial interest is defined to mean at least a 40% interest in an entity.
- 5.12 Therefore, if a trust has:
- (a) a 'foreigner' with a 20% interest in the trust; or
 - (b) multiple 'foreigners' with a 40% interest in the trust,
- the trust will be a foreign person and potentially required to obtain approval for any investments into Australia.
- 5.13 While exact percentages can be identifiable when trusts have fixed interests, discretionary trusts provide the trustee with the flexibility in deciding the income and capital distributions on an annual basis.
- 5.14 Section 18(3) of FATA, therefore provides a deeming rule where every beneficiary is taken to hold the maximum percentage of income or capital of the trust they could receive.¹⁴ In other words, if there is no restriction on how much income or capital can be distributed to a beneficiary, then each beneficiary is deemed to hold a 100% beneficial interest in the trust.
- 5.15 In contrast to the Qld Duties Act and Qld LTA which considers who the default beneficiaries (and therefore discretionary beneficiaries may be foreigners without causing the trust to be a foreigners), FATA will deem a discretionary trust a foreign person if any beneficiary is a foreigner.¹⁵

Other State tax legislation

¹³ Ordinarily resident is defined in section 5 of FATA to apply to Australian citizens and individuals who have been in Australia for at least 200 days in the preceding 12-month period, provided their presence in Australia was not subject to any limitation imposed by law.

¹⁴ *'For the purposes of this Act, if, under the terms of a trust, a trustee has a power or discretion to distribute the income or property of the trust to one or more beneficiaries, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or property of the trust that the trustee may distribute to that beneficiary.'* – Section 18 of FATA.

¹⁵ Provided there is no other clause in the trust deed limiting how much income or capital can be distributed to beneficiaries.



- 5.16 The FATA approach in how to define a discretionary trust as a foreigner has seen adoption in other State tax legislation (with minor variations).
- 5.17 In New South Wales under the NSW Duties Act:
- (a) **Surcharge purchaser duty** may apply when a foreign person acquires residential-related property;¹⁶
 - (b) This aligns with the Qld Duties Act in that the additional duty only applies with respect to residential properties; and
 - (c) A foreign person is defined in section 104J of NSW Duties Act to mean a person who is a foreign person under FATA with certain modifications confirming that an Australian citizen; and a New Zealand citizen holding a special category visa under section 32 of the *Migration Act 1958* (Cth) would be considered as residing in Australia.
- 5.18 In Victoria under the VIC Duties Act:
- (a) Additional duty is chargeable on residential property transferred to a foreign purchaser;¹⁷
 - (b) A foreign purchaser is defined in section 3(a) of VIC Duties Act to include the trustee of a foreign trust;
 - (c) A foreign trust is defined to mean a trust in which one or more 'foreigners' hold a substantial interest;
 - (d) A substantial interest is defined in section 3B of VIC Duties Act to be either:
 - (i) A beneficial interest of more than 50% of the capital of the estate of the trust; or
 - (ii) If the Commissioner makes a determination under section 3D of VIC Duties Act that a person has sufficient practical influence over the trust;
 - (e) Section 3B(2) of VIC Duties Act includes a similar deeming provision as found in the FATA, in relation to the interpretation of whether a discretionary beneficiary over the capital of the trust estate has the maximum percentage possible of what they can receive.¹⁸
- 5.19 In addition to the above legislative definitions, both New South Wales and Victorian revenue authorities have adopted approaches where discretionary trust deeds must explicitly exclude foreigners as beneficiaries of the discretionary trust as the only way to ensure a discretionary trust is not 'foreign'. In the case of New South Wales, such an approach was legislated requiring the exclusion to be irrevocable.
- 5.20 Western Australia and South Australia also imposes surcharge stamp duty on foreigners acquiring residential land.
- 5.21 Interestingly:

¹⁶ Section 104L of NSW Duties Act.

¹⁷ Section 28A of VIC Duties Act.

¹⁸ *'If, under the terms of a trust, a trustee has a power or discretion as to the distribution of the capital of the trust estate to a person or a member of a class of person, any such person is taken to have a beneficial interest in the maximum percentage of the capital of the trust estate that the trustee is empowered to distribute to that person'* – Section 3B(2) of VIC Duties Act.



- (a) The SA Duties Act adopts a different approach on when a discretionary trust is a foreign trust.¹⁹ Specifically, if a foreign person is any of the following roles in a discretionary trust, the trust will be a foreign trust:
 - (i) A trustee;
 - (ii) A person who has the power to appoint under the trust (i.e. the appointor/principal power);
 - (iii) An identified object under the trust (i.e. a named beneficiary); or
 - (iv) A person who takes capital of the trust property in default; and
- (b) The WA Duties Act also offers no consistent definition on what it means to be a foreign trust by stating that a discretionary trust is a foreign trust if:²⁰
 - (i) It is controlled by a foreign person (being a person in a position to influence, either directly or indirectly, the vesting of the whole or any part of the capital of the trust fund, or of the whole or any part of the income of the trust property); or
 - (ii) One or more foreign persons (together with their associates) are takers in default and together hold at least a 50% interest in the discretionary trust.

Practical implication

- 5.22 The broadened nature of defining what a foreign trust is in Federal and non-Queensland State legislation has meant that provisions have been embedded into discretionary trusts excluding foreigners from benefiting in any capacity (whether as a discretionary or default beneficiary).
- 5.23 This is regardless of that fact that Queensland State tax legislation technically allows foreigners to continue to be a discretionary beneficiary. Practically, however, in order to reduce any FIRB compliance or in case the discretionary trust acquires properties in other States/Territories, it is preferable to have a blanket exclusion against foreigners.
- 5.24 Advisors should also remain aware that different States/Territories have different rules, and that depending on where the property purchased is located, additional structuring considerations will need to be factored in. For example:
 - (a) Trusts acquiring residential property in New South Wales must have an irrevocable clause preventing foreigners from being a beneficiary.
 - (b) Residential properties acquired in South Australia and Western Australia should not have a foreigner in a position of influence (for example as a trustee or appointor/principal).
- 5.25 Existing trusts holding Queensland land should also be reviewed to determine if they are liable for any surcharge land tax and amended accordingly. Later sections of this paper will consider the Queensland stamp duty consequences of amending a discretionary trust deed, and when adverse stamp duty consequences may arise.

¹⁹ Section 1(14)(b) of SA Duties Act

²⁰ Section 205D of WA Duties Act.



Structuring a discretionary trust holding a Queensland business

6 Overview of the section

- 6.1 In Queensland, payroll tax is imposed on businesses whose aggregated wages exceed \$1.1 million.²¹
- 6.2 There are 'grouping' provisions contained in the Payroll Tax Act that may result in two or more businesses, whose taxable wages individually would not exceed the payroll tax tax-free threshold but combined would exceed the payroll tax-free threshold and result in a payroll tax liability owed by both businesses.²²
- 6.3 Specifically, the use of discretionary trusts in a group structure (whether as a business entity or a passive investment entity) may inadvertently result in businesses being conducted by different family members or beneficiaries being grouped.
- 6.4 Examples and solutions will be considered as part of this paper.

7 Discretionary trusts inadvertently grouping family businesses

- 7.1 In Queensland, Division 2, Part 4 of Payroll Tax Act groups employers where:
- (a) They are related body corporates;
 - (b) There are common employees;
 - (c) One or more persons have a controlling interest in the employers (**Common Controllers**);
 - (d) An entity has a controlling interest in a corporation; or
 - (e) An employer is a member of two or more groups (in which case both groups are combined) (**Common Group Member**).

Common Controllers


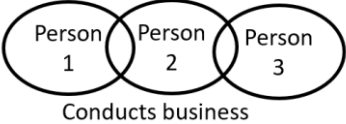
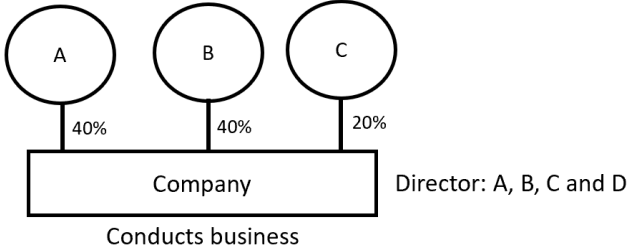
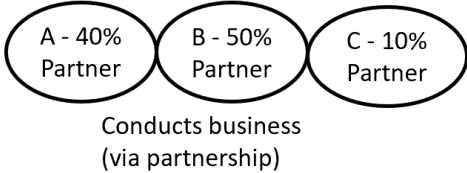
- 7.2 Structures involving discretionary trusts are most likely to be grouped under section 71 of Payroll Tax Act, which outlines the various scenarios where if a person or set of persons have a controlling interest in two or more businesses, those businesses are deemed to constitute a group.
- 7.3 A person can be said to have a controlling interest in an entity conducting a business in any of the following circumstances:

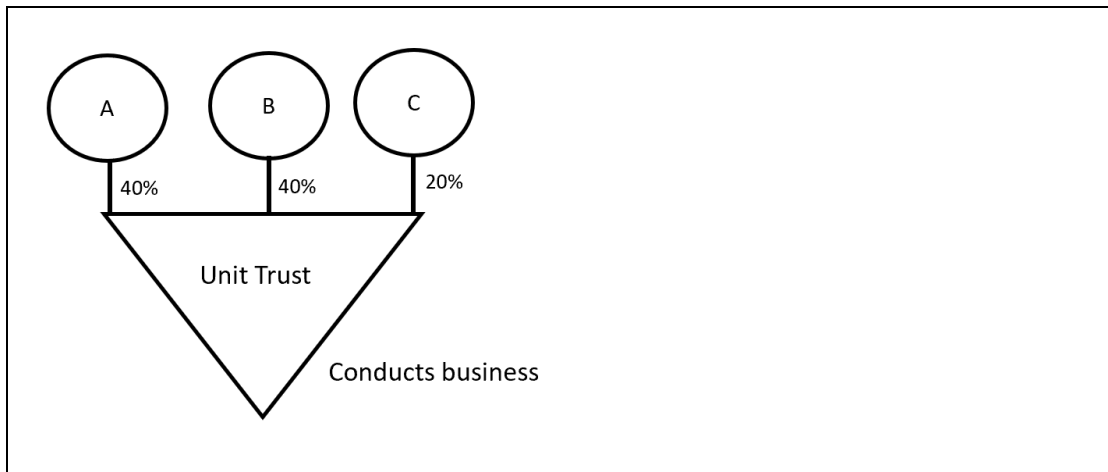
Entity conducting business	Who holds a controlling interest
Single person	That person

²¹ The maximum payroll tax payable is equal to 4.75% of the total wages. 'Deductions' are available to reduce the total taxable value of the wages subject to payroll tax until wages exceed \$5.5 million.

²² For example, business 1 pays \$800,000 in taxable wages per annum (in Queensland). No payroll tax liability would arise as the taxable wages of business 1 does not exceed the \$1.1 million threshold. If, however, business 1 is grouped with a second business paying \$500,000 in taxable wages per annum (in Queensland), then the total taxable wages of both businesses would exceed the tax-free threshold of \$1.1 million and the businesses would be liable for payroll tax

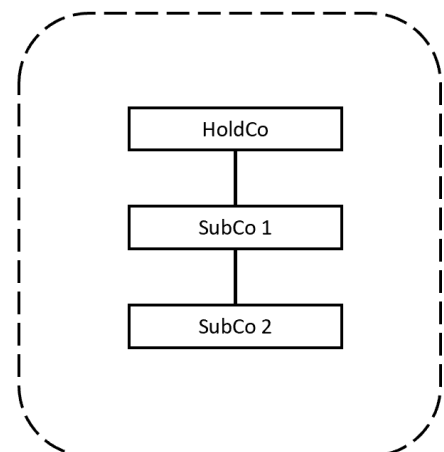
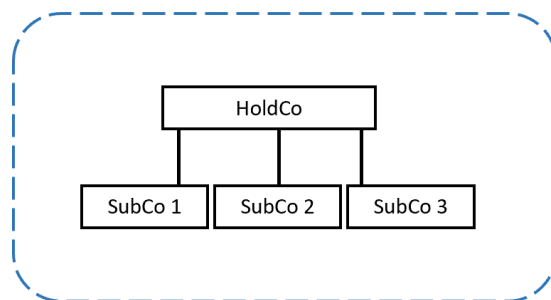


	
A set of persons	Collectively, the set of persons
	
Corporation	The person or set of persons entitled to exercise more than 50% of the voting power at a meeting of directors
Body corporate or unincorporated	The person or set of persons who constitute more than 50% of, or control the composition of, the board of management
Corporation with a share capital	The person or set of persons who can directly or indirectly, exercise, control the exercise of, or substantially influence the exercise of, more than 50% of the voting power attached to the voting shares, or a class of voting shares, issued by the corporation
	
Partnership	The person or set of persons who either own (whether beneficially or not) more than 50% of the capital or are entitled to more than 50% of the profits of the partnership
	
Trust	The person or set of persons, whether or not as the trustee or beneficiary of another trust, who is a beneficiary in respect of more than 50% of the value of the interests in the trust



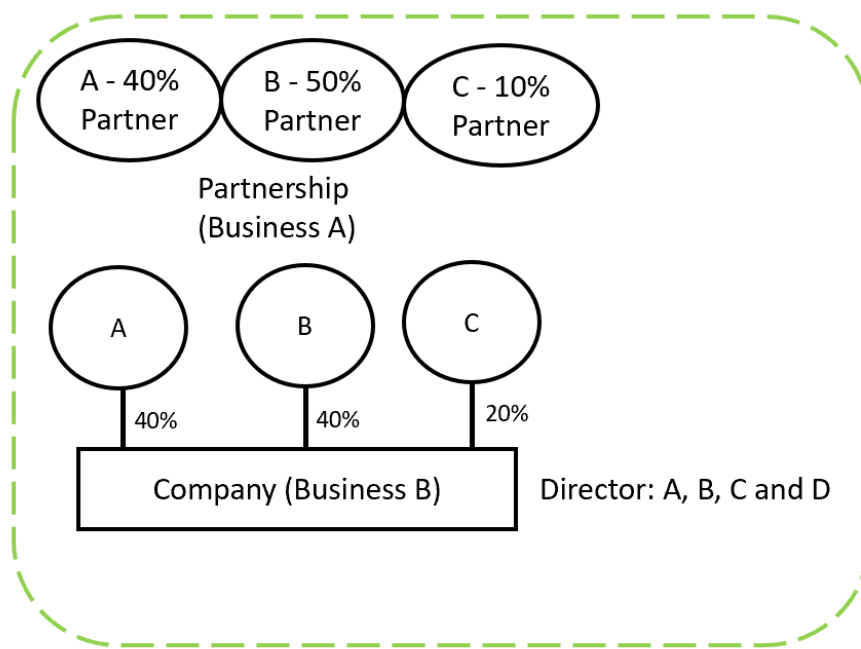
7.4 In addition to the general common ownership rules above, sections 71(3) to (8) of Payroll Tax Act states additional deeming grouping provisions, namely:²³

- (a) Section 71(3) of Payroll Tax Act – If one related bodies corporate has a controlling interest in a business, then the other related bodies corporates are deemed to have a controlling interest in that business;

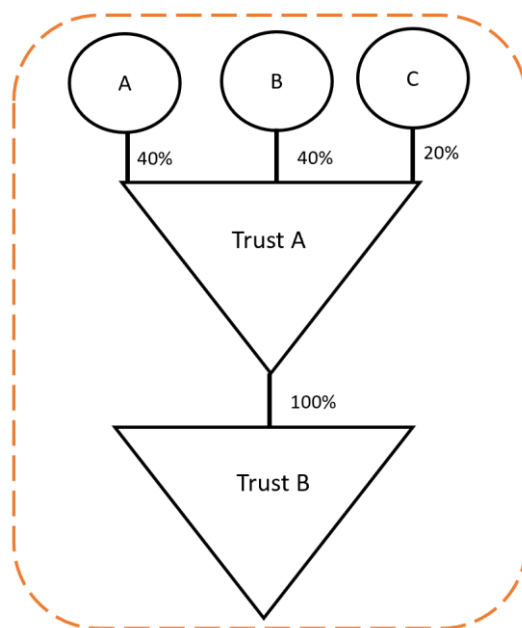


- (b) Section 71(4) of Payroll Tax Act – If a group of persons (**Group A**) has a controlling interest in a business (**Business A**) and a group of persons carrying on that business (**Group A**) has a controlling interest in another business (**Business B**), then Group A is deemed to have a controlling interest in Business B;

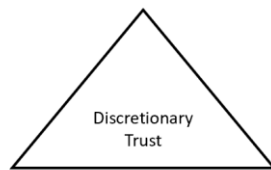
²³ Please note that defined terms in each subparagraph of this paragraph is limited to that subparagraph



- (c) Section 71(5) of Payroll Tax Act – If a group of persons (**Group A**) have a beneficial interest in a trust (**Trust A**) of more than 50% and the trustee of Trust A (whether with someone else or not) has a controlling interest in the business of another trust (**Trust B**), then Group A is deemed to have a controlling interest in Trust B;



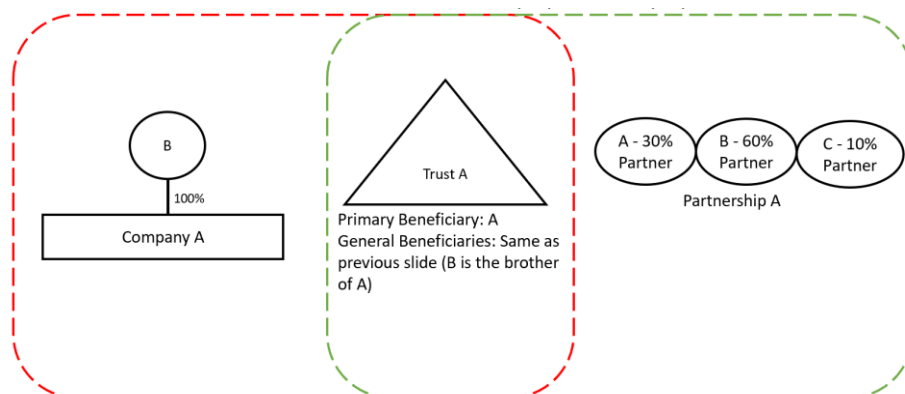
- (d) Section 71(6) of Payroll Tax Act – any person who **may benefit** from a discretionary trust as a result of the trustee exercising a power or discretion (for example a trustee exercising their power to appoint income or capital in favour of a beneficiary) or failing to exercise a power or discretion (for example by way of the default income or capital provisions contained in the trust deed), is taken to be a beneficiary of the trust in respect of more than 50% of the value of the interests in the trust. **In other words, any potential beneficiary of a discretionary trust will be deemed to have a controlling interest in that discretionary trust;**



Primary Beneficiary: A
General Beneficiaries:

1. Spouse of Primary Beneficiary
2. Lineal descendants of Primary Beneficiary
3. Parents and grandparents of Primary Beneficiary
4. Siblings, uncles, aunts, cousins of Primary Beneficiary
5. Spouse of all of the above
6. Companies that any beneficiary is a director of or has a share or interest in
7. The trustee of any trust that any beneficiary has an interest in

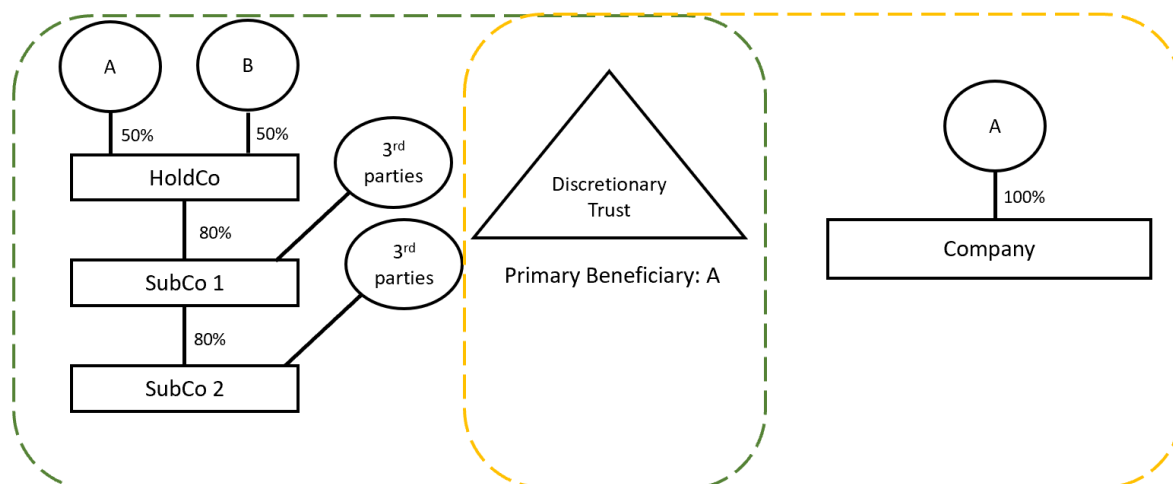
- (e) Section 71(7) of Payroll Tax Act – If a group of persons (**Group A**) has a controlling interest in the business of a trust (**Trust A**) and the trustee of Trust A (whether with someone else or not) has a controlling interest in the business of a company (**Company A**), then Group A is deemed to have a controlling interest in Company A; and
- (f) Section 71(8) of Payroll Tax Act – If a group of persons (**Group A**) has a controlling interest in the business of a trust (**Trust A**) and the trustee of Trust A (whether with someone else or not) has a controlling interest in the business of a partnership (**Partnership A**), then Group A is deemed to have a controlling interest in Partnership A.



Common Group Members – smaller groups subsumed into larger groups

7.5 Section 73 of Payroll Tax Act states that:

- (a) Two or more groups of businesses will be combined to constitute a larger group if there is a common member; or
- (b) If two or more members of a group have a controlling interest (the **Controllers**) in a business (**Business Entity**), then the Controllers and the Business Entity will be grouped.



7.6 Although this section largely follows the theme of grouping:

- (a) Common persons; and
- (b) Persons with controlling interests in a business entity,

the ability for otherwise unrelated groups of businesses to be grouped together due to a common controller or business entity emphasizes the breadth of these provisions.²⁴

7.7 Further, the broadness in what it means to control a discretionary trust per 71(6) of the Payroll Tax Act, makes it even easier for entities to be advertently grouped.

Consequences of being grouped

7.8 The consequences of having businesses grouped can be summarised as follows:

- (a) The taxable wages of each business will be aggregated and only one tax-free threshold will be applicable for the entire group;
- (b) Each member of the group is jointly and severally liable for any amount that another group member fails to pay whether or not that member was an employer during the period of the unpaid amount.²⁵

7.9 These consequences may bring cause for concern for business owners as they suddenly become liable for payroll tax when they were under the impression that the taxable wages of their business/es was below the payroll tax tax-free threshold.

7.10 In addition, if other entities under the business owner's control are then subsequently deemed as part of the business owner's group (regardless of whether that entity conducts the same business or not, or even an active trading business)²⁶, the assets held by those entities are at risk if the payroll tax liability is unable to be repaid.

²⁴ As will be discussed further below, the legislators appreciated the broadness of these grouping provisions and therefore provided the Commissioner of State Revenue a discretion to potentially exclude members from a group when satisfied with certain conditions - Explanatory Memorandum to the Pay-roll Tax (Harmonisation) Amendment Bill 2008, page 11 under the heading "Grouping".

²⁵ Section 51A of Payroll Tax Act.

²⁶ The definition of 'business' in section 66 of Payroll Tax Act regarding entities able to be grouped includes 'any other activity carried on for fee, gain or reward' and 'the activity of holding money or property used in connection with another business'. This means that even the investing of money to make a gain could arguable be considered the conducting of a business under the Payroll Tax Act.



8 Case study: the effect of a discretionary trust

8.1 Below is an example of how a discretionary trust could inadvertently group family businesses, creating an unnecessary risk for small business owners.

Example

8.2 **Nick** and **Matt** are brothers. Their parents are **John** and **Jane**.

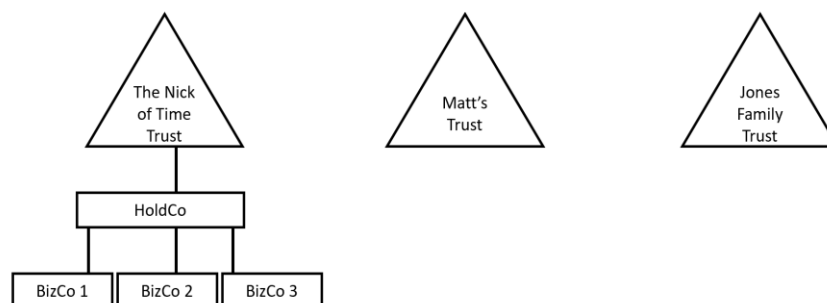
8.3 John and Jane are now self-funded retirees, relying on income from their share and property investments in the Jones Family Trust. The primary beneficiaries of the Jones Family Trust are listed as being John, Jane and Nick.²⁷

8.4 Nick operates a fast food franchise through various related corporate bodies, and although he is looking to acquire additional fast food franchises, he is currently organising his affairs so that he is able to hire additional staff as his business grows. His entities are currently paying \$800,000 in wages.

8.5 Nick's discretionary trust (**The Nick of Time Trust**) wholly owns the shares in the head company of Nick's related corporate bodies. Nick is listed as the primary beneficiary of The Nick of Time Trust.

8.6 Matt currently owns a dental clinic and operates the business through his own discretionary trust – Matt's Trust. He currently is paying approximately \$900,000 in wages to his dentists and staff and is holding off engaging new dentists until after he restructures his business. Matt is listed as the primary beneficiary of Matt's Trust; however, Matt's Trust includes the usual secondary beneficiary class of the 'primary beneficiary's parents, siblings and children'.

8.7 The following diagram summarises the structure for the family:



What could happen

8.8 From Nick and Matt's perspective it is likely that unless they have sought appropriate legal advice they each regard their respective businesses as not being liable for payroll tax.

8.9 Unfortunately, a technical grouping arises through Nick and Matt having discretionary trusts in their structure.

8.10 Without any other information regarding the terms of the trust deed or the respective family circumstances, it could be argued that Nick has a controlling interest in The Nick of Time Trust and Matt's Trust as he is a person able to potentially benefit from those trusts.²⁸

²⁷ The reason for not naming Matt as a primary beneficiary in the Jones Family Trust is due to the fact that Matt was not born at the time of the trust being established.

²⁸ This is a straight application of sections 71(2)(g) and 71(6) of Payroll Tax Act.



- 8.11 As Nick has a controlling interest in both trusts, The Nick of Time Trust and Matt's Trust are grouped under section 71(5) of Payroll Tax Act (**Group 1**).
- 8.12 As Nick has a controlling interest in The Nick of Time Trust and the Nick of Time Trust (on its own) has a controlling interest in Nick's holding company of related bodies corporate, The Nick of Time Trust and the holding company are grouped under section 71(7) of Payroll Tax Act (**Group 2**).
- 8.13 Finally, as all of Nick's business entities are related body corporates, they are grouped under section 69 of Payroll Tax Act (**Group 3**).
- 8.14 Under section 73 of Payroll Tax Act:
- (a) The Nick of Time Trust is a member of Group 1 and Group 2, thereby grouping those entities into a larger group.
 - (b) The holding company is a member of Group 2 and Group 3, thereby bringing Group 3 into the larger group containing Group 1 and Group 2.
- 8.15 Nick and Matt's business will be aggregated for payroll tax purposes and there will be a payroll tax liability to be paid that their entities are jointly and severally liable for.
- 8.16 In addition to the above potential group, there is a further technical grouping that can be argued in that Nick has a controlling interest in the Jones Family Trust, that would form part of the larger payroll tax group between Group 1, Group 2 and Group 3.
- 8.17 Whilst the Jones Family Trust will not contribute additional taxable wages to the calculation for payroll tax, John and Jane's entire retirement savings are potentially at risk if both Nick and Matt (through their business entities) are unable to pay the payroll tax liability.²⁹

9 Available solutions

- 9.1 As seen from the example above, notwithstanding that entirely unrelated family businesses can be grouped for payroll tax purposes due to discretionary trusts being used, the grouping provisions are very broad.

Degrouping

- 9.2 The legislators did acknowledge this broadness and included a discretion for the Commissioner of the relevant revenue authority to exclude certain entities from groups if certain circumstances are satisfied.³⁰
- 9.3 Broadly, the Commissioner may exclude an entity from a group if the Commissioner is satisfied that the business carried on by that entity is carried on independently and not connected with the business carried on by any other member of the group. In deciding whether a business satisfies this, the Commissioner must have regard to:
- (a) The nature and degree of ownership and control of the businesses carried on by the entity and the other members of the group;
 - (b) The nature of the businesses; and
 - (c) Any other matters the Commissioner considers relevant.
- 9.4 It is important to appreciate that under section 74(4) of Payroll Tax Act, the Commissioner cannot make an exclusion order if the entities are related body corporates.

²⁹ It is also important to appreciate that 'the carrying on of a trust, including a dormant trust', could also be a *business* able to be grouped for payroll tax purposes under section 66 of Payroll Tax Act.

³⁰ Section 74 of Payroll Tax Act.



- 9.5 Otherwise, matters that the Commissioner may consider relevant when deciding to exclude an entity from a wider group have been outlined in Harmonised Revenue Public Ruling PTA 032.2 to include:
- (a) The nature and extent of any commercial transactions between the members, including the value and percentage of the employer's total business which is conducted with other members of the group;
 - (b) The extent to which members share resources, facilities or services, including premises, staff, management and accounting services;
 - (c) The extent to which the employer controls or is involved in managerial decisions and day to day administration of the other members and the extent to which other members control or are involved in managerial decisions and day-to-day administration of the employer;
 - (d) The extent to which there are financial interdependencies, including intra-group loans or guarantees and common banking facilities, and the terms and conditions attached to such agreements;
 - (e) The degree to which there is a connection between the employer and other members of the group in the purchase or sales of goods and services;
 - (f) The extent to which there is a connection between the nature of the businesses of the employer and other members of the group; and
 - (g) The extent to which there is a connection between the ultimate owners of the employer and other members of the group.
- 9.6 In considering the above factors, the Commissioner must be satisfied that:
- (a) There is no continuous course of active and significant relationship, in a business or commercial sense, between the carrying on of the employer's business and the carrying on of businesses conducted by any other member of the group; and
 - (b) The connections which do exist are no more than casual, irregular or occasional occurrences.
- 9.7 Therefore, in circumstances where businesses may be inadvertently grouped with unwanted businesses through technical sections of the grouping provisions, steps can be taken to 'de-group' them by applying to the Commissioner to exercise their discretion. However the onus is on the applicant to prove that their business is substantially independent and not connected to any other business.
- 9.8 That said, the ability for the Commissioner to 'de-group' is merely at the Commissioner's discretion, so ideally clients and their advisors would seek advice prior to identifying structures to undertake business activities to ensure a technical grouping is not triggered in the first instance – so that the business is not in a situation where they have to rely on the Commissioner's discretion being exercised.



9.9 The difficulty in obtaining a favourable 'de-grouping' ruling with the Commissioner in cases where businesses have clear links has been highlighted in a New South Wales case.^{31, 32}

Structuring it right from the get-go

9.10 The simplest (although likely the most uncommon) way in managing discretionary trusts grouping family businesses would be to tailor the discretionary trust terms prior to establishment.

9.11 That is, ensuring the persons who are able to benefit under the trust deed are limited so unwanted family members cannot be argued as having a controlling interest in a discretionary trust.

9.12 Unfortunately, it is standard for the beneficiary class of a discretionary trust to include 'any sister or brother' of a primary beneficiary.

9.13 This potentially leaves that sister or brother of a client with a controlling interest in that discretionary trust, which, if combined with any other controlling interest they have in their own structures, would cause the client's discretionary trust to be grouped with the siblings' structure.

9.14 A similar argument could be made with respect to your client controlling their sibling's structures as well if there is a discretionary trust involved with the sibling.

9.15 To manage this risk, any new discretionary trust would have the beneficiary class tailored to only those persons who should be a 'controller' for that trust (i.e. it shouldn't include other family members if those family members are not to 'control' the trust).

9.16 Unfortunately though, this would need to apply to discretionary trusts for all family members, as well as all future discretionary trusts established within that family group. This would substantially complicate their affairs and special care would need to be taken to ensure distributions made from trusts are valid.

9.17 Let's consider this solution to our case study of Nick and Matt. A summary of how the family businesses were grouped is outlined above.

9.18 If:

(a) The beneficiaries of The Nick of Time Trust was limited to only Nick, his wife and his children and grandchildren;

(b) The beneficiaries of Matt's Trust was limited to only Matt, his wife and his children and grandchildren; and

(c) The beneficiaries of The Jones Family Trust was limited to only John, Jane and Nick, then:

(d) Nick will not be deemed to have a controlling interest in Matt's Trust;

(e) Nick would still have a controlling interest in The Nick of Time Trust;

³¹ It is noted that despite the case being a New South Wales case, unlike stamp duty and land tax, payroll tax legislation has largely been harmonised between the various States in Australia. Therefore, the rationale and analysis conducted in these cases can strongly influence the application of the Queensland payroll tax grouping provisions.

³² *Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWCATAD 368; appealed in *Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue* [2018] NSWCATAP 147.



- (f) Matt's Trust (operating Matt's dental business) and The Nick of Time Trust (which is grouped with Nick's fast food chain business) does not have Nick as a controlling interest holder;
 - (g) The two businesses will therefore not be grouped for payroll tax purposes.
- 9.19 Although technically Nick continues to have a controlling interest in The Jones Family Trust, as Matt and Nick's business are not grouped for payroll tax purposes, there will be no payroll tax liability that The Jones Family Trust would be jointly and severally liable for.
- 9.20 The example above is simplistic in that the beneficiary class of a discretionary trust is limited to a few individuals, however, the risk of even just including 'parents' as part of the beneficiary class could be catastrophic in causing the entities to be grouped. This is due to John and Jane technically having a controlling interest in all three trusts.
- 9.21 As such, should this solution be considered, sufficient thought must be given to ensure the right persons are identified as 'beneficiaries' for the discretionary trust.
- 9.22 The broad classes normally included must be removed and the classes, confined to only those likely to receive a distribution.³³

Structuring after the fact – variation of beneficiary class

- 9.23 Most clients will not have the chance to properly structure their discretionary trust terms in contemplation of the payroll tax grouping provisions. Whether it be due to them having operated a business for years, or not having contemplated expanding to such a degree, the more likely solution is to assist clients in changing the beneficiary class in their trust deed after establishment.
- 9.24 That is, rather than ensuring the beneficiary class is tailored correctly prior to establishment, this solution requires a deed of variation to be prepared to change the beneficiary class.
- 9.25 Unfortunately, varying the terms of a trust deed after the trust has been established is a much more complex affair as there may be potential capital gains tax (CGT) and stamp duty consequences that must be considered in addition to the drafting requirements.
- 9.26 We will consider when changing a beneficiary class will trigger Queensland stamp duty consequences further below.

Structuring after the fact – disclaimers and renunciations

- 9.27 Where it is not possible to vary the beneficiary class of a discretionary trust due to a lack of sufficient power under the trust deed for the trustee to exercise, beneficiaries may look to reject any interest they have in a discretionary trust.
- 9.28 It is settled that the "*law certainly is not so absurd as to force a man to take an estate against his will...and...the law will certainly, by some mode or other, allow him to renounce or refuse the gift*".³⁴
- 9.29 Whilst there are various ways in which a beneficiary may reject their interest in a discretionary trust, the two most common methods are by way of 'disclaiming' or 'renouncing'.

³³ Please consider reading the following article for other arguments in tailoring the beneficiary class of a discretionary trust: D Lam, "The discretionary beneficiary – thoughts on defining the beneficiary class", (2017) Vol 20(5) *The Tax Specialist*, 280-286.

³⁴ *Ramsden v Federal Commissioner of Taxation* [2004] FCA 632 at 71 referencing *In re Gulbenkian's Settlements (No 2)*, *Stephens v Maun* [1970] 1 Ch 408.



- 9.30 Both methods impose an onus on a beneficiary to reject their interest, however:
- (a) A successful disclaimer could take effect retrospectively,³⁵ while
 - (b) A renunciation would only be effective from the date of renunciation.
- 9.31 The effect a successful disclaimer or renunciation may have in the context of payroll tax grouping is that a person may no longer be deemed to have a controlling interest in a trust once they are no longer a beneficiary.
- 9.32 Steps would, however, need to be taken to consider the range of beneficiaries who are required to disclaim or renounce their interest.
- 9.33 In the example of Nick and Matt, it would not be enough for them to disclaim or renounce their interest in the other's trust but would also require them renouncing an interest in The Jones Family Trust. John and Jane would also be required to renounce their interest in The Nick of Time Trust and Matt's Trust to ensure they are not deemed to have a controlling interest in those trusts (and thereby grouping all three trusts).
- 9.34 Whilst the law surrounding disclaiming a trust interest is settled, it is important to appreciate that:
- (a) Notwithstanding the fact that disclaimers can take retrospective effect, the recent payroll tax case of *Smeaton Grange Holdings Pty Ltd*³⁶ has suggested that a "subsequent alternation of those relationships [being the relationship of who is a beneficiary of a discretionary trust] by the unilateral act of a discretionary object cannot change the operation of the legislation [being the payroll tax legislation]";³⁷
 - (b) Regardless of the fact that for payroll tax purposes, a disclaimer may not take effect retrospective, if a disclaiming of a trust interest is intended to affect the beneficiaries of a discretionary trust from the date of the disclaimer onwards, steps must still be taken to satisfy the settled requirements;
 - (c) It is critical for beneficiaries to disclaim their interest in a trust within a reasonable time of becoming aware,³⁸ otherwise, it may be argued that disclaimers were only made to 'undo the past';³⁹
 - (d) If disclaiming any prior distributions, then there needs to be an absolute rejection of such distribution as accepting any proportion and using it would amount to an acceptance of the distribution;⁴⁰

³⁵ *J.W. Broomhead (Victoria) Pty Ltd (in liquidation) v J.W. Broomhead Pty Ltd* [1985] VR 891, at 892 and 930 to 936 and acknowledged by the ATO in ATO ID 2010/85.

³⁶ *Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd* [2017] NSWCA 184.

³⁷ *Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd* [2017] NSWCA 184 at 147, see also paragraph 143 whereby the Court acknowledges that the "legislative scheme would be unworkable unless the determination of group membership in accordance with s 72 of the Payroll Tax Act can be undertaken by reference to the legal relationships as they exist between the relevant parties at the time the employer's liability to pay payroll tax arises. That determination must be made on the basis of the facts as they exist at the relevant time".

³⁸ *JW Broomhead (Victoria) Pty Ltd (in liquidations) v JW Broomhead Pty Ltd* [1985] VR 891 at 930 to 931.

³⁹ *Re Maurice Hannan Nominees Pty Ltd as trustee for the Maurice Hannan Family Trust & Ors v Federal Commissioner of Taxation* (2004) 57 ATR 1315 and note that in *Federal Commissioner of Taxation v Ramsden* (2005) 58 ATR 485, that a period of three years was considered well in excess of a reasonable time.

⁴⁰ *Alderton v Federal Commissioner of Taxation* [2015] AATA 807.



- (e) Although it is not necessary to document a disclaimer,⁴¹ doing so in writing and with communication to the trustee of the relevant discretionary trust will evidence that the disclaimed interest has been communicated.
- 9.35 In contrast with disclaiming an interest, as a renunciation of an interest does not purport to take effect retrospectively, the intent to reject any future interest need only be communicated to the relevant trustee of the discretionary trust.
- 9.36 In addition to communicating any rejection of an interest in a trust, it is important to properly classify the document rejecting the interest and ensure the relevant law is followed.
- 9.37 Likewise, with varying a trust deed, the income tax and stamp duty consequences must be considered in relation to disclaiming and renouncing a beneficiary's interest in a discretionary trust.

Reviewing existing employment/contractor contracts

- 9.38 Finally, where structuring the beneficiaries of a discretionary trust is not appropriate (whether due to potential adverse income tax or stamp duty consequences, or such change being uncommercial as relevant family members are unable to benefit from the trust), thought may be given in analysing the actual taxable wages.
- 9.39 A large consequence of having businesses grouped is the aggregation of taxable wages.
- 9.40 If potential grouping is a concern, then an ongoing analysis should be undertaken of taxable payments by all businesses within a potential group. If wages remain below the tax-free threshold then grouping may not need to be considered in detail. However if it looks as though a risk is materialising it might be at that point in time a review is undertaken and/or steps are taken to seek exclusion orders.
- 9.41 While a detailed explanation of what constitutes taxable wages for payroll tax falls outside the scope of this paper, below are examples when wages are excluded from being accounted:
 - (a) Where wages made to employees are exempt;⁴²
 - (b) Where certain contractor exemptions could apply to some payments made to contractors.⁴³

⁴¹ *The Federal Commissioner of Taxation v Cornell* [1946] HCA 32; 73 CLR 394 at 401.

⁴² Section 14A of Payroll Tax Act.

⁴³ Section 13B(2) of Payroll Tax Act.



Amending a discretionary trust holding Queensland assets

10 Overview

- 10.1 Over time, the initial structure of a discretionary trust may no longer be appropriate and amendments will need to be made to the discretionary trust (not least as highlighted in this paper, the need to amend the beneficiary class).
- 10.2 Some amendments and accompanying reasons that commonly trigger a need to amend to a discretionary trust are summarised in the below table.

<i>Amendment</i>	<i>Reasons</i>
Change the beneficiary class	(a) Wanting to 'delete' an ex-spouse as a beneficiary of the trust (b) Wanting to exclude 'foreigners' for surcharge purposes (c) Wanting to limit the beneficiary class to ensure businesses are not grouped (d) Wanting to add additional persons as beneficiaries
Change the trustee	(a) Wanting to appoint a company trustee for liability purposes (b) Wanting to remove a company trustee to save ongoing costs (c) Wanting to change the day-to-day management of the trust
Change the appointor/principal	(a) Wanting to change who is ultimately in charge of the trust
Change the terms of the trust	(a) Including broader income and capital distribution powers (b) Updating the vesting date (c) Including broader successor appointment powers (for succession planning purposes) (d) Making any of the above amendments

- 10.3 It is therefore important to appreciate when making an amendment may result in adverse stamp duty consequences, so that clients are advised accordingly.
- 10.4 This paper will consider the above by:
- (a) Considering the trigger points of when a trust amendment becomes a **dutiable transaction**; and
 - (b) Considering exemptions available to certain dutiable transactions; and



- (c) Providing broad take-aways on when care must be taken when amendments are made to discretionary trusts.

11 When will stamp duty be payable on the amendment of a discretionary trust?

- 11.1 Section 8 of Qld Duties Act states that duty is imposed on dutiable transactions.
- 11.2 Section 9 of Qld Duties Act provides that a dutiable transaction includes any of the following (summarised to include the transactions most commonly seen):
 - (a) there has been a transfer or an agreement for the transfer of dutiable property;
 - (b) there is a creation or termination of a trust of dutiable property; or
 - (c) there is a trust acquisition or trust surrender.
- 11.3 These transactions are only relevant from a Queensland stamp duty perspective where they relate over dutiable property. Dutiable property is defined in section 10 Qld Duties Act to include (but not limited to):⁴⁴
 - (a) land in Queensland;
 - (b) Queensland business assets;
 - (c) chattels in Queensland; and
 - (d) potentially indirect interests in the above.⁴⁵
- 11.4 If the discretionary trust does not hold dutiable property, then no stamp duty should apply to any amendment made to the trust (as there is nothing taxable from a stamp duty perspective).
- 11.5 If the discretionary trust does, then it is important that the changes do not trigger stamp duty.
Transfer or an agreement for the transfer of dutiable property
- 11.6 Transfer should take on its ordinary meaning in that it applies where dutiable property goes from a legal entity to another legal entity.
- 11.7 Transfer is also defined in Schedule 6 of Qld Duties Act to include an assignment and exchange.
- 11.8 In the context of discretionary trusts, the only entity that legally holds the trust property is the trustee.
- 11.9 Therefore, where trust property goes from the trustee to another person/entity, a dutiable transaction will arise. Simplistically, it there is a transfer if there is a change in the legal owner of the dutiable property.
- 11.10 It should also be noted that where a trust has multiple trustees, the trustees are taken to be a single person.⁴⁶ Practically, this means that if John and Jane are trustees of a trust and treated as a single person, John and Kate as trustees for the a trust (even as trustee for the same trust) will be treated as a separate person.

⁴⁴ Dutiable property also includes 'an existing right' which was defined above at footnote 2, although specifically applying to AFAD residential land in that footnote.

⁴⁵ Indirect interests can include a security interest, a partner's interest in a partnership, a trust interest and the interest of a discretionary object of a trust that holds property mentioned above – section 10(2) of Qld Duties Act.

⁴⁶ Section 50 of Qld Duties Act.



Creation or termination of a trust over dutiable property

- 11.11 A creation of a trust occurs when a person who does not hold dutiable property on trust, starts to hold the property as trustee.⁴⁷
- 11.12 A trust may also be created where a person holds dutiable property as trustee for one trust, and then starts to hold the same dutiable property as trustee for another trust where either:
- (a) The persons with trust interests in the two trusts are different/ or
 - (b) The same persons have a trust interest in both trusts, but their percentages are different between the two trusts.⁴⁸
- 11.13 A termination of a trust occurs when a person holding dutiable property as trustee, starts to hold the property in their own capacity.⁴⁹
- 11.14 While the transfer head of duty considers the change in legal ownership over dutiable property, the creation or termination of a trust considers if a trust has been created or terminated.⁵⁰ That is, the legal owner of the dutiable property may be the same, the question is whether there has been a change in the legal owner's capacity over the dutiable property.

Trust acquisition or trust surrender over dutiable property

- 11.15 Like the above heads of duty, this head of duty will only apply to discretionary trusts holding dutiable property.
- 11.16 There are also specific provisions imposing a 'look-through' approach for indirect interests in dutiable property (i.e. through later trust interests or partnership interests).⁵¹
- 11.17 A trust acquisition occurs when a person acquires a trust interest in a trust,⁵² while a trust surrender occurs when a person surrenders a trust interest.⁵³
- 11.18 A trust interest means a person's interest as a beneficiary of a trust, other than a life interest. Specifically, in relation to discretionary trust, the taker in default (or the default beneficiary) has the trust interest.⁵⁴
- 11.19 A taker in default's proportionate interest in the trust is calculated under section 60 of Qld Duties Act to be:
- (a) The percentage of the trust income or trust property the beneficiary would receive in default of appointment by the trustee; or
 - (b) If the beneficiary would receive both trust income and trust property in default of appointment by the trustee, the greater percentage of the trust income or trust property the beneficiary would receive.

⁴⁷ Section 53(1) of Qld Duties Act.

⁴⁸ Section 53(2) of Qld Duties Act.

⁴⁹ Section 54 of Qld Duties Act.

⁵⁰ Similar to CGT event E1 ITAA 1997.

⁵¹ Section 58 of Qld Duties Act.

⁵² Section 55 of Qld Duties Act.

⁵³ Section 56 of Qld Duties Act.

⁵⁴ Section 57 of Qld Duties Act.



- 11.20 It is noted that there are provisions to avoid a double-up in duty payable on a trust acquisition or trust surrender. Specifically, if duty is paid on a trust surrender, then no duty is paid on a trust acquisition as a result of the trust surrender.⁵⁵
- 11.21 The dutiable value of a trust acquisition or surrender will be based on the greater of the following:
- (a) The consideration for the acquisition or surrender so far as the consideration relates to dutiable property, or an indirect interest in dutiable property, held by the trust; or
 - (b) The value of the acquisition or surrender worked out under section 63 of Qld Duties Act.⁵⁶
- 11.22 In contrast with the above two heads of duty relating to changes of legal ownership or the changing of capacity to hold dutiable property as trustee – the dutiable transaction relating to trust acquisitions and surrenders considers change to the underlying beneficial ownership.

Summary

- 11.23 The heads of duties affecting discretionary trusts can be summarised as follows:
- (a) Duty payable on a change of legal ownership;
 - (b) Duty payable when legal ownership remains the same, but trusts are created or terminated; and
 - (c) Duty payable when beneficial ownership changes.

12 Exemptions for trusts

- 12.1 Division 2, Part 13, Chapter 2 of Qld Duties Act contains various stamp duty exemptions available for trusts.
- 12.2 The below will consider the most commonly relied upon exemptions for discretionary trusts
- Exemption – change of trustee**
- 12.3 As outlined above, stamp duty is payable where there has been a change of legal ownership over dutiable property.
- 12.4 This includes circumstances when the trustee of a trust is changed, and even if there is a remaining trustee.
- 12.5 Section 117 of Qld Duties states that stamp duty will not be imposed “*for the sole purpose of giving effect to a change of a trustee if:*
- (a) *The transaction is not part of an arrangement:*
 - (A) *Involving a change in the rights or interest of a beneficiary of the trust; or*
 - (B) *Terminating the trust; and*
 - (b) *Transfer duty has been paid on all trust acquisitions or trust surrenders for which transfer duty is imposed for the trust before the transaction.”*

⁵⁵ Section 58 of Qld Duties Act.

⁵⁶ Section 63 of Qld Duties Act looks at the unencumbered value of the underlying dutiable property held in the discretionary trust.



- 12.6 Commonly, a change of trustee is not often coupled with a changing of a beneficiary's interest in the trust, and as such they will comply with the necessary requirements for the exemption.
- 12.7 The exemption can be claimed through completing an appropriately worded statutory declaration and submitting such declaration when lodging the change of trustee for stamping.
- 12.8 Where the change of trustee is part of a broader transaction that involves beneficiaries of the trust being changed, then care will need to be taken to ensure that the requirements at section 117(2) Qld Duties Act are met, specifically:
- (a) *“Transfer duty has been paid on all trust acquisitions or trust surrenders:*
 - (i) *Of trust interests in the trust made under the arrangement; and*
 - (ii) *For which transfer duty is imposed; and*
 - (b) *Transfer duty has been paid on all trust acquisitions or trust surrenders for which transfer duty is imposed for the trust before the transaction; and*
 - (c) *The change of trustee is not part of an arrangement to avoid the imposition of duty.”*
- 12.9 In such a circumstance, provided stamp duty is paid on the change of beneficiary aspect of the transaction, the general change of trustee exemption may still be available.
- Exemption – trust acquisition or surrender in family trust**
- 12.10 Section 118 of Qld Duties Act allows a change of taker in default in a discretionary trust to be exempt from stamp duty provided it relates to a family unit.
- 12.11 Specifically:
- Transfer duty is not imposed on a dutiable transaction that is a trust acquisition or trust surrender of a trust interest if:*
- (a) *The trust is established and maintained as a discretionary trust primarily for the benefit of the members of a particular family or a family company; and*
 - (b) *The person acquiring or surrendering the trust interest is a member of the family who, or is a family company that, does not benefit in the capacity of trustee.*⁵⁷
- 12.12 A discretionary trust is established and maintained primarily for the benefit of the members of a particular family or a family company if:
- (a) *“The primary beneficiaries of the trust consist only of members of the family or the family company; and*
 - (b) *The takers in default of an appointment for capital by the trustee of the trust consist only of members of the family or the family company.”*⁵⁸
- 12.13 The requirements can therefore be summarised as follows:
- (a) The primary beneficiaries of a trust must only consist of members of a family or the family company;
 - (b) The capital default beneficiaries of a trust must only consist of members of a family or the family company; and

⁵⁷ Section 118(1) of Qld Duties Act

⁵⁸ Section 118(3) of Qld Duties Act



- (c) Changes to the default beneficiaries must only be between members of a family or the family company.
- 12.14 It is therefore important to appreciate, who is a member of a family (as well as what a family company is).
- 12.15 A person is a member of a particular family of another person if they are spouses or any of the following in relation to the first person or the spouse:
 - (a) child, stepchild or adopted child;
 - (b) grandchild or great grandchild;
 - (c) brother, sister, aunt, uncle or cousin;
 - (d) parent, step-parent, adoptive parent, grandparent or great grandparent.⁵⁹
- 12.16 A family company is defined to be a corporation in which all its directors and shareholders are members of the relevant family for which the trust is established and maintained for.⁶⁰
- 12.17 Therefore, changes to the default beneficiaries between the above persons/entities, may be exempt provided the other requirements are satisfied.
- 12.18 It should also be noted that section 118(2) of Qld Duties Act considers trust acquisitions or surrenders being triggered due to the death or birth of family members, and allows for an exemption to be made.

13 When to be aware when amending a discretionary trust

- 13.1 Adverse stamp duty consequences, in the context of amending a discretionary trust, will commonly arise when:
 - (a) There has been a change of legal ownership – usually when a change of trustee occurs; and
 - (b) There has been a change of beneficial ownership, which in the context of Qld Duties Act is a change in the takers in default, or the default beneficiaries – usually when beneficiaries are being amended.
- 13.2 In both circumstances above, there are exemptions available, which are mainly for the benefit of allowing a trust to remain in the family unit without triggering adverse stamp duty consequences.
- 13.3 In the context of the initial amendment table considered above, some conclusions can be drawn:

<i>Amendment</i>	<i>Comments</i>
Change the beneficiary class: <ul style="list-style-type: none">(a) Deleting an ex-spouse'(b) Wanting to exclude 'foreigners' for surcharge purposes(c) Wanting to limit the beneficiary class to	Stamp duty arises only if a default beneficiary is being changed. Where beneficiaries are being removed, consider whether such beneficiaries are 'named' in the trust deed as the naming of beneficiaries in modern trust deeds are often linked with being the persons who benefit from the income or capital of the trust when the trustee fails to make a decision.

⁵⁹ Section 118(6) of Qld Duties Act.

⁶⁰ Section 118(7) of Qld Duties Act



<p>ensure businesses are not grouped</p> <p>(d) Wanting to add additional persons as beneficiaries</p>	<p>If beneficiaries being removed are default beneficiaries, consider if the 'family trust exemption' applies.</p> <p>Where adding beneficiaries, consider only adding them in the discretionary class to reduce a trust acquisition/surrender being triggered.</p>
<p>Change the trustee:</p> <p>(a) Wanting to appoint a company trustee for liability purposes</p> <p>(b) Wanting to remove a company trustee to save ongoing costs</p> <p>(c) Wanting to change the day-to-day management of the trust</p>	<p>Stamp duty only arises if the change of trustee is coupled with a change in beneficial interest.</p> <p>Otherwise, the general change of trustee exemption is available.</p> <p>The prepared documents will still need to be stamped and then steps taken to legally change ownership of the assets in the trust, so it is still preferable to get the structure of a discretionary trust right from the start to avoid unnecessary fees and time spent liaising with third parties.</p>
<p>Change the appointor/principal - Wanting to change who is ultimately in charge of the trust</p>	<p>As the appointor/principal has no legal or beneficial ownership in a trust, the change of the appointor/principal will not result in any stamp duty consequences arising.</p>
<p>Change the terms of the trust:</p> <p>(a) Including broader income and capital distribution powers</p> <p>(b) Updating the vesting date</p> <p>(c) Including broader successor appointment powers (for succession planning purposes)</p> <p>(d) Making any of the above amendments</p>	<p>Changes to the terms of the trust will only trigger stamp duty consequences if it affects the current trustee of the trust, or the default beneficiaries of the trust.</p> <p>As outlined above, exemptions may be available.</p>



Other tips and traps

14 A selection of Queensland tax legislative provisions to consider

14.1 While the paper has considered three common areas of consideration relating to discretionary trusts and State taxes, there still remains various miscellaneous provisions located in the Qld Duties Act, Qld LTA and Payroll Tax Act.

14.2 A selection of some lesser considered sections is provided below.

Corporate trustee duty

14.3 While it is commonly known that stamp duty only applies in relation to a transfer of shares in a private company landholder,⁶¹ advisers must be careful when transferring shares in a corporate trustee of a trust holding dutiable property (including land valued at less than \$2 million).

14.4 Section 205 of Qld Duties Act imposes duty on certain acquisitions in a corporate trustee.

14.5 Duty is imposed on transactions where:⁶²

- (a) A person acquires an interest⁶³ as a shareholder in a corporate trustee; and
- (b) The acquisition is part of an arrangement in which that person obtains a benefit relating to the property held by the corporate trustee.

14.6 Corporate trustee duty applies to any dutiable property held in the discretionary trust and with no minimum threshold. For example, transferring shares in a corporate trustee of a discretionary trust operating a trading business, or holding a residential investment property valued under \$2 million will trigger duty to apply.

14.7 Exemptions are available, however, for corporate trustee duty. Like the change of trustee and family trust exemptions discussed above, similar exemptions are available when changing the shares in a company trustee. Specifically:

- (a) Section 224 of Qld Duties Act provides an exemption from corporate trustee duty if the change in shareholding of a corporate trustee relates to a change of trustee; and
- (b) Section 225 of Qld Duties Act provides an exemption from corporate trustee duty if the change in shareholding is between family members.

Family home in a discretionary trust

14.8 Common arguments against holding the family home in a discretionary trust is the fact that the main residence CGT exemption is lost, and land tax would be payable by the discretionary trust based on the land value of the family home.

14.9 With both arguments, however, they should be met with an asterisk, as ultimately, the devil can be in the detail.

14.10 From an annual perspective, advisers who have clients owning their family home through a discretionary trust, should consider if their client is able to claim the home exemption for land tax purposes.

⁶¹ Being a company holding more than \$2 million unencumbered worth of land.

⁶² Section 207 of Qld Duties Act, and section 208 of Qld Duties Act that defines what a share interest is.

⁶³ Section 212 of Qld Duties Act states that 'acquiring' can include either becoming a shareholder of the corporate trustee, or having an existing share interest increase.



- 14.11 Without a family home exemption being claimed for a property held in a discretionary trust, the trustee of the trust is liable to pay land tax for a family home with a land value exceeding \$350,000.
- 14.12 Given that land tax is an annual tax, being able to claim the family home exemption is a simple, yet valuable solution for clients.
- 14.13 Without consider the requirements of the exemption providing what constitutes a home, section 41(1)(b)(ii) of Qld LTA allows the exemption to be available for a trustee of a trust (other than an absentee) where the home is used by all of the beneficiaries.
- 14.14 Section 24 of Qld LTA outlines who the QLD LTA considers to be a beneficiary of a discretionary trust, namely, *“the persons in whose favour a power of appointment has been exercised during the 12-month period ending when the liability arises”*.
- 14.15 This means additional documents are required to evidence the power of appointment on an annual basis in order to nominate a beneficiary for the discretionary trust.
- 14.16 Section 43 of Qld LTA also states that the home exemption will not be available for trustees of a trust (**trust 1**) where:
- (a) Another trust (**trust 2**) owner the home; and
 - (b) A beneficiary of trust 1 is a prescribed relative⁶⁴ of a beneficiary of trust 2.
- 14.17 There is discretion for the Revenue Authorities to disregard section 43 of Qld LTA if they believe trust 1 and trust 2 were not established by the same person.
- 14.18 Where clients have been incorrectly paying land tax for their home held in a discretionary trust, they may wish to consider the viability of obtaining a refund for the land tax paid for a number of years.

Employment agent agreements

- 14.19 *Freelance Global Ltd v Chief Commissioner of State Revenue* [2014] NSWSC 127 (**Freelance Global**) continues to remain as one of the leading payroll taxes regarding the use of a discretionary trust in the context of an **employment agency contract**.⁶⁵
- 14.20 Historically, employment agency contract provisions were brought into payroll tax legislation to combat arrangements being structured to have the payment and services between worker and underlying client being interposed by an ‘employment entity/agent’ resulting in wages not being accounted for.
- 14.21 To combat a rise of such arrangements, employment agency provisions provided that an employment agent would be deemed to be the employer in such scenarios, and the wages still captured in the payroll tax environment.⁶⁶
- 14.22 An employment agency contract will arise where:
- (a) There is an employment agent;
 - (b) There is an agreement;

⁶⁴ A prescribed relative is defined in Schedule 4 of Qld LTA to be a person’s spouse, parent, step-parent, brother, sister, step brother or stepsister.

⁶⁵ See comments at footnote 30 about the harmonisation of payroll tax legislation across States.

⁶⁶ See Public Ruling PTA029.2 Recruitment agencies / placement agencies / job placement agencies – for a difference between such arrangements and an employment agency contract.



- (c) The agreement results in services of a service provider being provided to a client of the employment agent; and
 - (d) No contract of employment exists between the service provider and the employment agent's client.
- 14.23 Freelance Global was a case where a discretionary trust acted as an employment agent. The transaction between the employment agent, service providers and clients were as follows:
- (a) Freelance Global engaged independent contractors who wanted to provide services to clients of Freelance Global;
 - (b) Freelance Global would link the independent contractors to the clients of Freelance Global;
 - (c) The independent contractors and clients would negotiate the agreed fee and work separate from Freelance Global;
 - (d) Freelance Global would issue invoices to the client;
 - (e) Freelance Global would then make trust distributions to the independent contractors accordingly.
- 14.24 The question was whether those trust distributions were taxable wages, and it was held that the above arrangement was one such that the employment agency contract provisions applied.



15 Conclusion

- 15.1 Queensland State tax legislation and discretionary trusts can bring a minefield of potential issues.
- 15.2 Unfortunately, there is no one-size-fits-all approach in addressing the treatment of discretionary trusts within the various tax legislations.
- 15.3 Rather, the approach adopted will ultimately depend on the specific problem or solution at hand.

16 Defined legislation

16.1 References to legislation has been defined in this paper as follows:

- (a) *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**).
- (b) *Duties Act 2001* (Qld) (**Qld Duties Act**).
- (c) *Land Tax Act 2010* (Qld) (**Qld LTA**).
- (d) *Foreign Acquisition and Takeovers Act 1975* (Cth) (**FATA**).
- (e) *Duties Act 1997* (NSW) (**NSW Duties Act**).
- (f) *Duties Act 2000* (Vic) (**VIC Duties Act**).
- (g) *Stamp Duties Act 1923* (SA) (**SA Duties Act**).
- (h) *Duties Act 2008* (WA) (**WA Duties Act**).
- (i) *Payroll Tax Act 1971* (Qld) (**Payroll Tax Act**).

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18 Disclaimer

18.1 This paper covers legal and technical issues in a general way. It is not designed to express opinions on specific cases. It is intended for information purposes only and should not be regarded as legal advice. Further advice should be obtained before taking action on any issue dealt with in this paper.

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