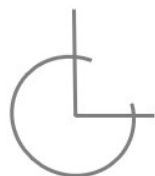


Companion Paper

QLD State Taxes – Tips and traps for 2021

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Companion Paper: QLD State Taxes – Tips and traps for 2021

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1 Introduction

- 1.1 This paper is intended to act as a complementary guide to the presentation of the same name and **is not** to be considered as a standalone technical paper. Rather, this paper seeks to summarise the key discussion points from the presentation.
- 1.2 This paper will consider changes to the following Queensland State taxes over the past year:
 - (a) Stamp duty;
 - (b) Land tax; and
 - (c) Payroll tax.

2 Stamp duty

Exemption for eligible small business restructures

- 2.1 One of the biggest deterrents to restructuring a small business in Queensland is the imposition of stamp duty payable on the business transfer.
- 2.2 This can often leave sole traders with an undesirable choice between:
 - (a) continuing to trade from their personal name and losing out of tax planning and asset protection benefits; or
 - (b) transferring the business into a company structure for added asset protection and working capital benefits, but having to pay the stamp duty associated with transferring the business.
- 2.3 Fortunately, the Queensland Office of State Revenue issued Public Ruling DA000.16.1 (**Ruling**) on 9 October 2020, offering small business owners with the potential ability to restructure their business into a company structure.
- 2.4 Broadly, the Ruling provides an exemption from stamp duty payable on transfers of business assets from certain small business entities. The Ruling also extends the exemption for associated vehicle registration duty.
- 2.5 The Ruling exempts stamp duty being payable on the following transfers of business assets valued at less than \$10 million:
 - (a) from an individual to a newly registered or dormant (since its registration) unlisted corporation, of which the individual is a shareholder;
 - (b) from a partnership to a newly registered or dormant (since its registration) unlisted corporation, of which all partners of the partnership are shareholders (in the same proportion as their interest in the partnership); and
 - (c) from a trust a newly registered or dormant (since its registration) unlisted corporation, of which all beneficiaries of the trust are shareholders (in the same proportion as their beneficial interest in the trust).
- 2.6 For the purposes of determining who the beneficiaries of a trust are:
 - (a) unitholders of a unit trust are considered the beneficiaries of that trust; and
 - (b) for the purposes of identifying a beneficiary of a discretionary trust, a taker in default of an appointment by the trustee, will be considered a beneficiary of that discretionary trust.
- 2.7 Further, the Ruling also requires the following to enable the exemption to be available:
 - (a) the transferor must have an annual turnover of not more than \$5 million and be conducted from a place in Queensland (or have its customer based in Queensland);
 - (b) if the transferee is a dormant company, that company must:
 - (i) not have held any assets or liabilities since registration;
 - (ii) not have been a party to an agreement or a beneficiary or trustee of a trust; or
 - (iii) not have issued or sold any shares or rights relating to shares;

- (c) the exemption only applies to the extent the interest of the shareholders in the transferee company equals the entity's business interest in the transferor. That is, if a shareholder's interest in the transferee company is greater than their interest in the business assets prior to the transfer – stamp duty would be payable on the difference.
- 2.8 What can be noticed from the above requirements is that although the Ruling provides an exemption to enable certain small business entities to restructure their business into a corporate structure; there are limitations to the extent of the restructure.
- 2.9 Specifically, common restructures such as:
- (a) from sole traders to a company with a discretionary trust shareholder; or
 - (b) a discretionary trust to a company with a discretionary trust shareholder, may not be available.
- 2.10 With regards to the availability of the stamp duty exemption for a transfer of business assets from a discretionary trust, the following should be appreciated:
- (a) the shareholders of the transferee company must reflect the 'takers-in-default' of a discretionary trust (also colloquially known as the 'default beneficiaries');
 - (b) who the default beneficiaries of a discretionary trust are will require an analysis of the income and capital distribution clauses relating to the beneficiaries who are entitled to any income or capital of the trust not distributed at the end of a financial year or on vesting of the trust;
 - (c) it is rare (although not impossible) for a default beneficiary of a discretionary trust to be another trust;
 - (d) if not specified as to how distributions to default beneficiaries are made, then the Ruling states that the default beneficiaries are taken to have an equal interest in the discretionary trust for the purposes of the shareholding in the transferee company.
- 2.11 Although the exemption under the Ruling may provide options for small business owners looking to restructure their affairs, there will be a range of other issues to be considered, namely:
- (a) whether there are any rollovers, concessions or exemptions to manage the capital gains tax consequences of restructuring the business;
 - (b) whether there are any exemptions available to manage the goods and services tax implications of restructuring the business (if any);
 - (c) the commercial actions (and time) required to transfer business assets to a new corporate entity.
- 2.12 Fortunately, there are some options available:
- (a) in relation to managing any capital gains tax consequences potential capital gains tax rollovers, concessions and exemptions available include:
 - (i) transferring an asset from an individual to a company with the shares held by the transferor¹ (unfortunately, the shares must be held by the individual so dividends are unable to be immediately streamed);

¹ Subdivision 122-A *Income Tax Assessment Act 1997* (Cth)
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- (ii) utilising the small business restructure rollover to move a business from one structure to another²;
 - (iii) utilising the small business CGT concessions to move business assets from one structure to another (discussed further below)³;
 - (b) in relation to managing the goods and services tax consequences, treating the transfer as a going concern may assist accordingly.
- 2.13 Despite the ability to manage the tax consequences of a business restructure, small business owners will also need to appreciate the time and effort required to transfer legal title to a new company structure.
- 2.14 Care must also be taken as the requirements for an exempt business transfer of the Ruling will not always align with potential rollovers offered from a capital gains tax perspective. For example although the 'Subdivision 122-A' rollover allows a discretionary trust to transfer its business assets to a company wholly owned by the same discretionary trust from a capital gains tax perspective, this is not possible under the Ruling for stamp duty purposes.
- 2.15 Further, most restructures relying on the Ruling will not result in the business being held in a company with a discretionary trust shareholder (as a sole trader must be the shareholder of the transferee company and default beneficiaries of discretionary trusts are rarely other discretionary trusts).
- 2.16 This is not to say the stamp duty exemption is not of use. The ability to move a business into a company offers various tangible benefits for small business owners, namely:
- (a) the ability to retain profits in the trading company and be taxed at the corporate tax rate; and
 - (b) the ability to introduce additional owners due to the ability to transfer or issue shares.
- 2.17 Further, steps could be taken to transfer the shares in the company from an individual shareholder to a discretionary trust at a later date.

Care when undertaking multiple simultaneous dutiable transactions

- 2.18 Transfer duty in Queensland can range:
- (a) from \$1.50 for each \$100 over \$5,000;
 - (b) to \$5.75 for each \$100 over \$1,000,000 (plus \$38,025 for the transfer duty up to \$1,000,000).
- 2.19 Further, certain transactions in Queensland may not be a dutiable transaction.⁴ For example, the transfer of intellectual property in a business is not dutiable on its own.
- 2.20 Creative thinkers could consider separating a transfer into separate tranches to either:
- (a) utilise the lower transfer duty rate; or
 - (b) potentially have that tranche of the transfer be considered 'not dutiable'.
- 2.21 Such strategies would work, other than for provisions in the QLD Duties Act aggregating certain transactions together.

² Subdivision 328-G *Income Tax Assessment Act 1997* (Cth)

³ Division 152 *Income Tax Assessment Act 1997* (Cth)

⁴ Section 37 *Duties Act 2001* (Qld)

- 2.22 Specifically, section 30 of the QLD Duties Act allows multiple transactions to be aggregated and treated as one arrangement.
- 2.23 Whether multiple transactions are aggregated into one will depend on various circumstances, such as:
- (a) whether the transactions are contained in a single agreement;
 - (b) whether the transactions are conditional on the other;
 - (c) whether the parties to the transactions are the same;
 - (d) whether any party to the transaction is a related person of another party to any of the other transactions;
 - (e) the time over which the transactions take place;
 - (f) whether, before the transactions take place, the dutiable property the subject of the transaction was used together or dependently with one another by the transferor or transferors;
 - (g) whether, before the transactions take place, the dutiable property the subject of the transaction was used together or dependently with one another by the transferee or transferee.
- 2.24 The Commissioner has also provided guidance on the application of the provisions via Public Ruling DA030.1.2 *Transfer Duty – Aggregation of Dutiable Transactions*.
- 2.25 The tribunal decision of *Sorensen & Ors v Commissioner of State Revenue* [2020] QCAT 7 provides a recent application of the aggregation rules to a small scale property development.
- 2.26 The background to the case is as follows:
- (a) 97 Holberton Street Pty Ltd (**the Developer**) built a townhouse complex of five townhouses in 2016.
 - (b) The shareholders of the Developer at the relevant times were Mr Sorensen, Mr Walsh and Mr Rados.
 - (c) Following the development:
 - (i) 2 townhouses were transferred to Mr Sorensen;
 - (ii) 1 townhouse was transferred to Mr Walsh; and
 - (iii) 2 townhouses were transferred to Mr Rados.
 - (d) The above five transfers were executed on the same day.
 - (e) Further to the above transfers of the townhouses, steps were taken to try and obtain a stamp duty exemption under section 113 of the QLD Duties Act. Such steps were, however, held not to satisfy the relevant requirements for the exemption.
 - (f) In review of an objection decision dated 2 August 2018, the Commissioner confirmed the decision to aggregate the above transfers.
- 2.27 In confirming the Commissioner’s decision to aggregate the five transfers, the Tribunal acknowledged:
- (a) the following factors supporting the Commissioner’s decision:

- (i) the whole of the property was used for the common purpose of property development;
 - (ii) the contracts were executed as required under a company's constitution;
 - (iii) the seller in each instance was the same entity;
 - (iv) each of the contracts were all executed on the same date;
 - (v) the same solicitor was used by the seller and purchasers;
 - (vi) the contracts all contained similar conditions, including having identical settlement dates; and
 - (vii) the transfers were all executed on the same date;
- (b) the following factors supporting the Developer and its related parties:
- (i) the transactions were effected via separate documents;
 - (ii) the transactions were not conditional on each other;
 - (iii) the properties were used separately after the transfer; and
 - (iv) each of Mr Sorensen, Mr Walsh and Mr Rados were not considered as 'related persons';
- (c) crucially, the Tribunal noted that as the transfers occurred as part of an overall plan set out in the company's shareholders agreement, it was apparent that the transfers arose from and gave effect to what is substantially one arrangement (so that the company could then be wound up).

3 Land tax

Land tax surcharge for land held by a foreigner

- 3.1 Over the past few years, steps have been taken by the majority of States to impose additional stamp duty and land tax on 'foreign' buyers.
- 3.2 Interestingly, 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.
- 3.3 In fact, until the above budget, the only 'foreigners' in which a land tax surcharge was payable on land held, were individuals who were not present in Australia.
- 3.4 Since the introduction of *Revenue and Other Legislation Amendment Act 2019* (Qld) following that State budget, who is considered a 'foreigner' was amended.
- 3.5 Of interest is that the land tax surcharge applies to **all** land held by a 'foreigner' whilst the stamp duty surcharge only applies to residential land.
- 3.6 Specifically, section 32 of the Qld LTA imposes the following rates for 'foreigners':

(a) if the landowner is considered an absentee:

Total taxable value	Tax payable
Less than \$350,000	Nil
\$350,000 or more but less than \$2,250,000	\$1,450 plus 1.7 cents for each \$1 more than \$349,999
\$2,250,000 or more but less than \$5,000,000	\$33,750 plus 1.5 cents for each \$1 more than \$350,000
\$5,000,000 or more but less than \$10,000,000	\$75,000 plus 2 cents for each \$1 more than \$5,000,000
\$10,000,000 or more	\$175,000 plus 2.5 cents for each \$1 more than \$10,000,000

(b) if the landowner is considered an absentee with a surcharge payable:

Total taxable value	Tax payable
Less than \$350,000	Nil
\$350,000 or more	2.0 cents for each \$1 more than \$349,999

(c) if the landowner is a company or trust:

Total taxable value	Tax payable
Less than \$350,000	Nil
\$350,000 or more but less than \$2,250,000	\$1,450 plus 1.7 cents for each \$1 more than \$349,999
\$2,250,000 or more but less than \$5,000,000	\$33,750 plus 1.5 cents for each \$1 more than \$350,000
\$5,000,000 or more	\$75,000 plus 2.25 cents for each \$1 more than \$5,000,000

but less than \$10,000,000	
\$10,000,000 or more	\$187,000 plus 2.75 cents for each \$1 more than \$10,000,000

(d) if the landowner is a foreign company or a trustee of a foreign trust (in addition to the above rates):

Total taxable value	Tax payable
Less than \$350,000	Nil
\$350,000 or more	2.0 cents for each \$1 more than \$349,999

- 3.7 For the purposes of the land tax rates applying to an 'absentee', section 31 of the Qld LTA defines an 'absentee' to be a person who does not ordinarily reside in Australia with the exception that the following persons are not considered to be an absentee:
- (a) a public officer of the Commonwealth or of a State who is absent in performance of their duty;
 - (b) an individual employed by an employer in Australia for a continuous period of 1 year immediately before the employee's absence (provided certain other requirements are met);
 - (c) an Australian citizen; or
 - (d) the holder of a permanent visa under the *Migration Act 1958* (Cth), section 30 (1)
- 3.8 As outlined above, if an individual satisfies the above definition of an absentee, then the land tax rates at paragraphs 3.6(a) and 3.6(b) will apply.
- 3.9 If a company or trust is a 'foreign company' or a 'trustee of a foreign trust', then the land tax rates at paragraphs 3.6(c) and 3.6(d) will apply.
- 3.10 Section 18B of the Qld LTA defines a 'foreign company' to be:
- (a) a corporation incorporated outside Australia;
 - (b) a corporation in which foreign persons have a controlling interest.
- 3.11 A company is taken to be controlled by foreign persons if 1 or more persons who are foreign persons or related persons of foreign persons:
- (a) are in a position to control at least 50% of the voting power in the corporation;
 - (b) are in a position to control at least 50% of the potential voting power in the corporation; or
 - (c) have an interest in at least 50% of the issued shares in the corporation.
- 3.12 Section 18D of the Qld LTA states that the following are deemed to be a foreign person:
- (a) an individual who is not an Australian citizen or permanent resident;
 - (b) a foreign company;
 - (c) the trustee of a foreign trust.
- 3.13 A permanent resident is defined in Schedule 4 of the Qld LTA to include a New Zealand citizen who is a holder of a special category visa under the *Migration Act 1958* (Cth), section 32.

- 3.14 Section 18E of the Qld LTA links a person as a related person of another person (i.e. for the purposes of determining related persons of foreign persons) if:
- (a) for individuals – they are members of the same family;
 - (b) for an individual and a corporation – the person or a member of the person’s family is a majority shareholder, director or secretary of the corporation or a related body corporate of the corporation, or has an interest of 50% or more in it; or
 - (c) for an individual and a trustee – the person or a related person under another provision of this section is a beneficiary of the trust; or
 - (d) for corporations – they are related bodies corporate; or
 - (e) for a corporation and a trustee – the corporation or a related person under another provision of this section is a beneficiary of the trust; or
 - (f) for trustees:
 - (i) there is a person who is a beneficiary of both trusts; or
 - (ii) a person is a beneficiary of 1 trust and a related person under another provision of this section is a beneficiary of the other trust; or
 - (g) they are partners in a partnership.
- 3.15 The Commissioner can determine persons are not related (other than in relation to related bodies corporate) provided the Commissioner is satisfied the interests of the persons as beneficiaries in a trust:
- (a) were acquired independently and, when the liability for land tax arises, are being used independently; and
 - (b) were not acquired for a common purpose and, when the liability for land tax arises, are not being used for a common purpose.
- 3.16 Relevant in determining if there is a foreign company where a trust is a shareholder, a trustee of a foreign trust is defined in section 18C of the Qld LTA to mean a trust where at least 50% of the trust interests in the trust are foreign interests.
- 3.17 A foreign interest is considered to mean:
- (a) a trust interest of an individual who is not an Australian citizen or permanent resident; or
 - (b) a trust interest of a foreign company; or
 - (c) a trust interest of a trustee of a foreign trust; or
 - (d) a trust interest held by a related person of a person mentioned in any of paragraphs (a) to (c).
- 3.18 When analysing the trust interests of a discretionary trust, section 18F of the Qld LTA states that a taker in default of an appointment by the trustee has a trust interest. As outlined above, taker in defaults are also colloquially known as ‘default beneficiaries’.
- 3.19 For simplicity, where trusts and companies are used as vehicles to hold Qld land, care must be taken to review the following:
- (a) for a company landowner:

- (i) the shareholders of the company must be reviewed and where an individual (who is not an Australian citizen or permanent resident), foreign company or trustee of a foreign trust holds an interest, then steps must be taken to consider if other shareholders are related persons of the foreign person;
- (ii) where a shareholder is a trustee of a foreign trust, then:
 - (A) individuals who are beneficiaries of that foreign trust are related persons of the foreign trust;
 - (B) companies who are beneficiaries of that foreign trust are related persons of the foreign trust; and
 - (C) trustees of a trust who have a mutual beneficiary, are also related persons of the foreign trust;
- (b) for discretionary trust – the default beneficiaries must be reviewed to ensure they are either Australian citizens or permanent residences (where they are individuals). If a default beneficiary is not an Australian citizen or permanent residence, and other default beneficiaries are members of the same family, then the discretionary trust could be considered a ‘foreign trust’; and
- (c) for a unit trust – an analysis of the unitholders in a manner of the above must be undertaken.

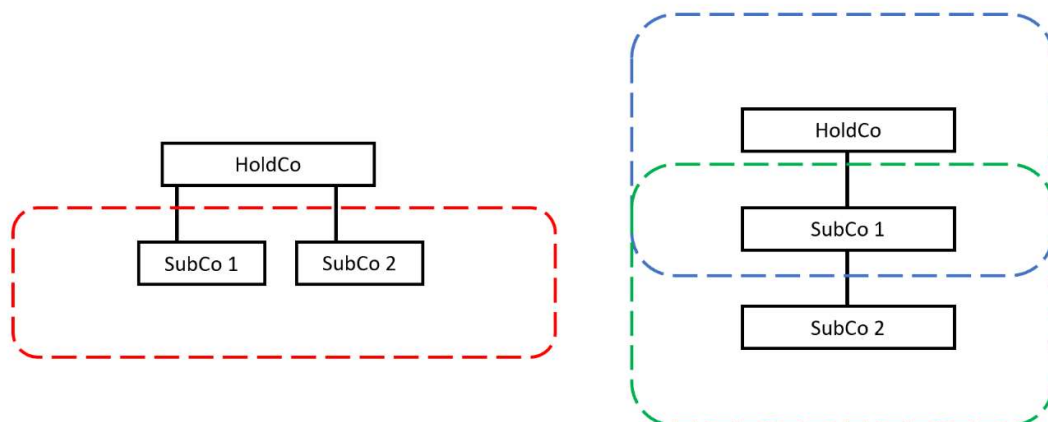
4 Payroll tax

Payroll tax grouping of entities

- 4.1 In Queensland, Division 2, Part 4 of the Payroll Tax Act groups employers where:
- (a) they are related body corporates (**Grouping of Corporations**);
 - (b) there are common employees (**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 (**Tracing of Interests**); or
 - (e) an employer is a member of two or more groups (in which case both groups are combined) (**Common Group Member**).
- 4.2 Structures involving discretionary trusts are most likely to be grouped due to Common Controllers, but given only one of the five heads of grouping needs to be satisfied, it is important that businesses and their advisors understand the context in which the other grouping provisions may be triggered. For instance, there would be little point in ensuring a discretionary trust does not trigger the Common Controllers provisions if the relevant businesses were using the same employees (for instance a common book-keeper), thereby triggering grouping on the basis of Common Employees.
- 4.3 On this basis, each grouping ground will be considered in more detail below before considering the practical impact for discretionary trusts and the ramifications when entities are grouped for payroll tax purposes.
- 4.4 Diagrammatic examples will also be provided throughout this section.

Grouping of Corporations

- 4.5 Section 69 Payroll Tax Act states that corporations constitute a group if they are related bodies corporate.
- 4.6 'Related body corporate' adopts the meaning in section 66 of the Payroll Tax Act which references section 9 *Corporations Act 2001* (Cth) (**Corporations Act**).
- 4.7 Below are examples of related bodies corporate.



4.8 A company (**first body**) is a subsidiary of another if the other company (**holding company**):

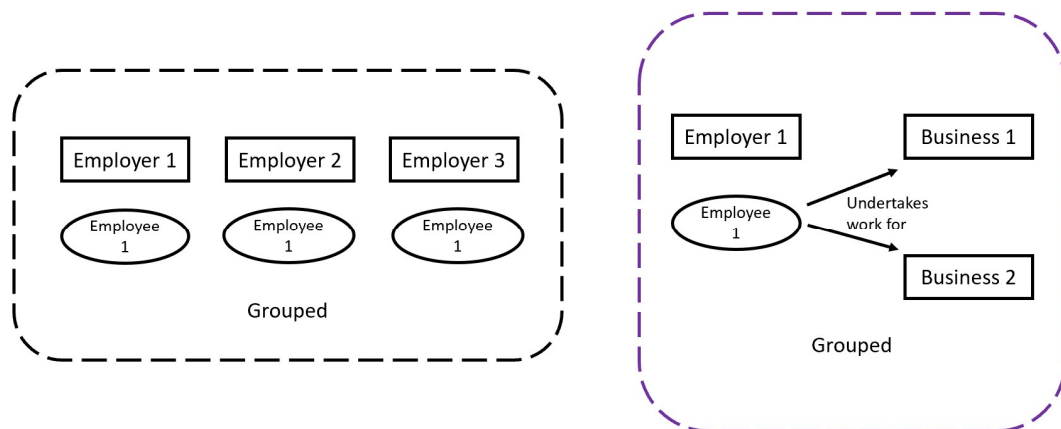
- (a) controls the composition of the first body's board;
- (b) can cast more than 50% of the votes at a general meeting of the first body; or
- (c) holds more than 50% of the issued share capital in the first body; or
- (d) if the first body is a subsidiary of a subsidiary of the holding company.⁵

4.9 As can be appreciated, data matching between various State revenue authorities and ASIC can allow for revenue authorities to easily identify when companies are grouped as related body corporates.

Common Employees

4.10 Section 70 of the Payroll Tax Act states that businesses can be grouped if:

- (a) there is at least one mutual employee performing duties for one or more businesses – all businesses with the mutual employee are grouped;
- (b) a person is employed by an entity (the **employer**) and that person performs duties solely or mainly for one or more other businesses – all business with the person carrying on work **as well as** the employer are grouped;
- (c) a person employed by the employer performs duties with another business in connection with the employer's obligation to that other business under an agreement.



4.11 The ability for Common Employees to group businesses inadvertently should not be understated, and issues can arise in numerous common circumstances such as:


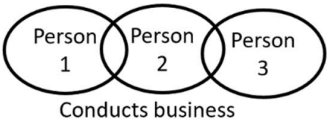
- (a) professionals who share staff (examples can include medical practitioners, barristers/lawyers, accountants, financial planners and real estate agents conducting their separate businesses from a common premises or common administrators performing work for more than one business);
- (b) family businesses where family members or particular employees perform duties for more than one business – for instance book-keeping services.

⁵ Section 46 *Corporations Act 2001* (Cth)

- 4.12 Regarding the grouping of professional practices on the grounds of Common Employees, administrative guidance (based on case law) has been issued, confirming the Commissioner will exercise their discretion to de-group professional practices using a common 'administrative entity' if certain requirements are satisfied.⁶
- 4.13 In contrast with some of the other grouping grounds, it can be difficult for revenue authorities to identify grouping by Common Employees. That said, clients and advisors must be aware for the potential for their business to be grouped to ensure they can appropriately manage any risk.

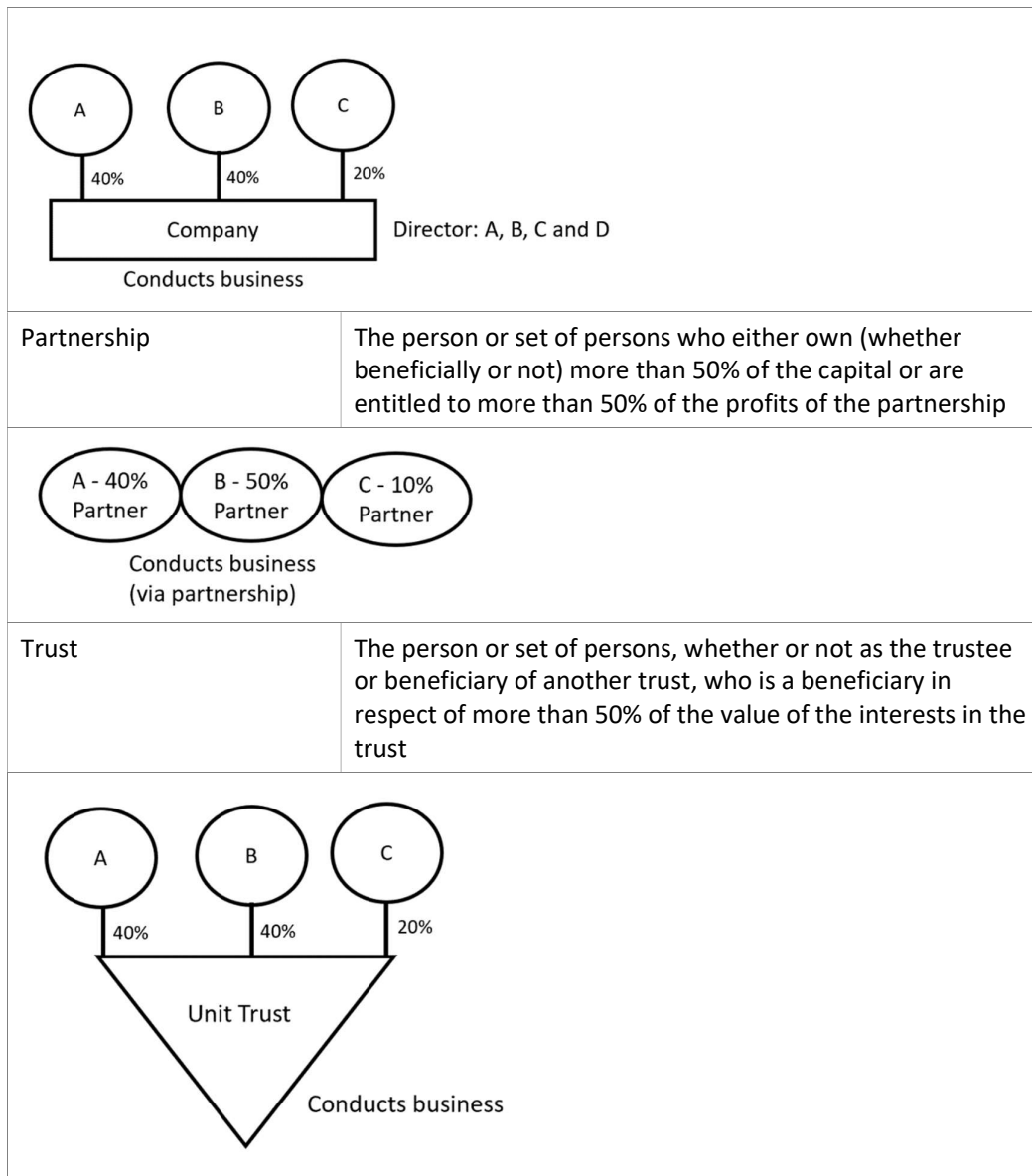
Common Controllers

- 4.14 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
	
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

⁶ Harmonised Revenue Public Ruling PTA 017 states that the Commissioner will exercise their discretion to exclude two or more professional practices with common employees from being grouped for payroll tax purposes if all of the following are met:

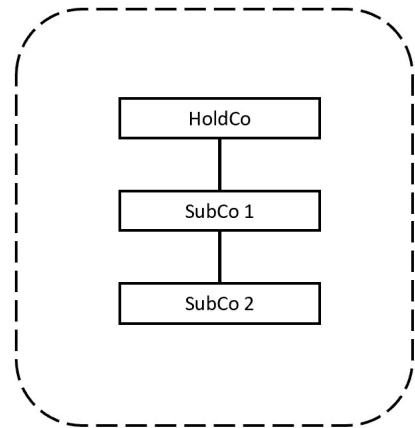
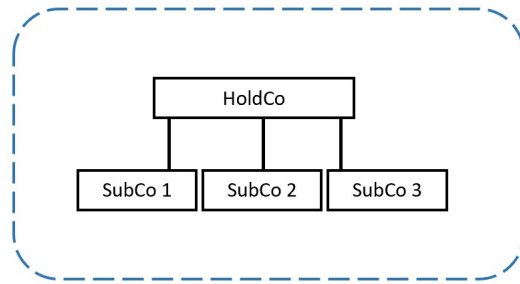
- a) none of the persons who own or operate the professional practices has a proprietary interest, whether directly or indirectly, in any of the other professional practices;
- b) the professional practices are carried on independently of, and are not connected with, each other (i.e. there is no significant financial interdependence and/or commercial transactions between the professional practices, and each professional practice is managed separately);
- c) none of the persons who own or operate the professional practices has a controlling interest (as defined in ss.71 and 72 of the Payroll Tax Act), in their own right, in the administrative services business;
- d) the administrative services business does not derive more than 60 per cent of its income from one professional practice; and
- e) there is no suggestion that such a structure is designed to avoid payroll tax



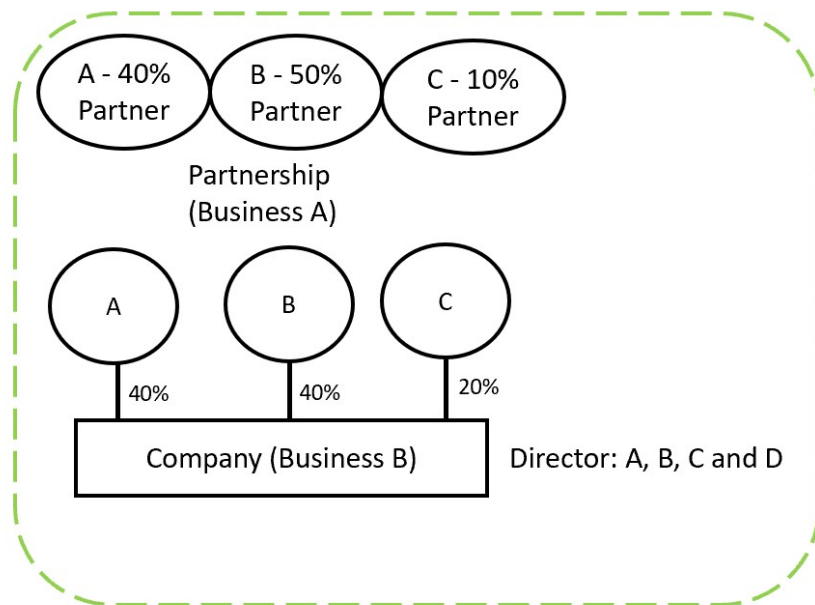
4.15 In addition to the general common ownership rules above, sections 71(3) to (8) of the Payroll Tax Act states additional deeming grouping provisions, namely:⁷

- (a) section 71(3) of the 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;

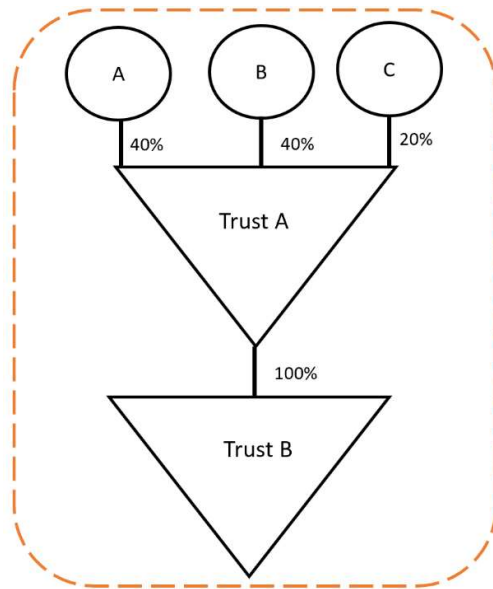
⁷ Please note that defined terms in each subparagraph of this paragraph is limited to that subparagraph
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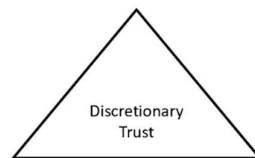
- (b) section 71(4) of the Payroll Tax Act – If a group of persons (**Group A**) has a controlling interest in a business (**Business A**) and a group of persons carrying on that business (**Group A**) has a controlling interest in another business (**Business B**), then Group A is deemed to have a controlling interest in Business B;



- (c) section 71(5) of the 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;



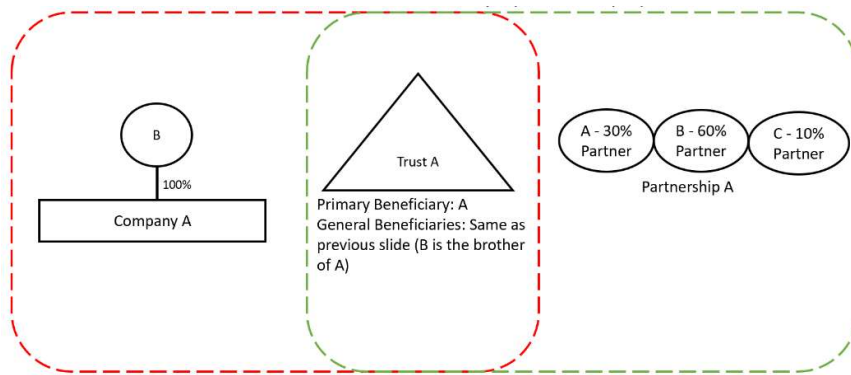
- (d) section 71(6) of the Payroll Tax Act – any person who **may benefit** from a discretionary trust as a result of the trustee exercising a power or discretion (for example a trustee exercising their power to appoint income or capital in favour of a beneficiary) or failing to exercise a power or discretion (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 the 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 the 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.



4.16 Much like the Grouping of Corporations, grouping by Common Controllers can mostly be identified by revenue authorities through data matching provided through ASIC, income tax returns and potentially information disclosed about trusts and partnerships for other purposes.

Tracing of Interests

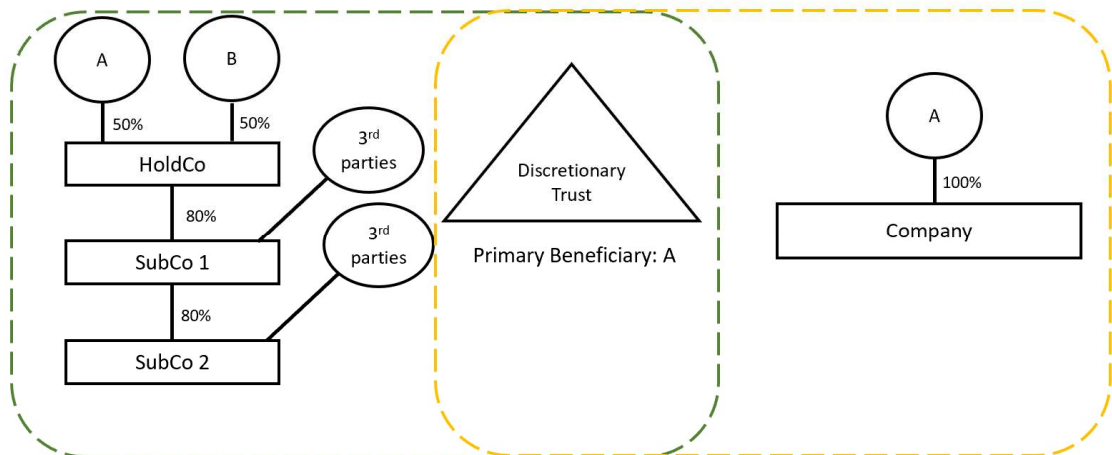
4.17 There also exists provisions of the Payroll Tax Act states that a 'relevant entity' and a company will be grouped if the 'relevant entity' has a 'controlling interest' in the company.

4.18 Interestingly, the phrase 'controlling interest' in this section adopts an entirely different definition to the term used in section 71 Payroll Tax Act. This is due to the specific relationship between an entity and a **corporation** as opposed to the various other structures mentioned in section 71 Payroll Tax Act.

Common Group Members – smaller groups subsumed into larger groups

4.19 Section 73 of the 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.



4.20 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 emphasises the breadth of these provisions.⁸

Consequences of being grouped

- 4.21 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.⁹
- 4.22 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.
- 4.23 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)¹⁰, the assets held by those entities are at risk if the payroll tax liability is unable to be repaid.

De-grouping payroll tax groups

- 4.24 The legislators did acknowledge the broad ability to capture unrelated businesses in a payroll tax group, and included a discretion for the Commissioner of the relevant revenue authority to exclude certain entities from groups if certain circumstances are satisfied.¹¹
- 4.25 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.
- 4.26 It is important to appreciate that under section 74(4) Payroll Tax Act, the Commissioner cannot make an exclusion order if the entities are related body corporates.

⁸ 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"

⁹ Section 51A *Payroll Tax Act 1971* (QLD)

¹⁰ The definition of 'business' in section 66 *Payroll Tax Act 1971* (QLD) 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 argueable be considered the conducting of a business under the *Payroll Tax Act 1971* (QLD)

¹¹ Section 74 *Payroll Tax Act 1971* (QLD)

- 4.27 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.
- 4.28 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.
- 4.29 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.
- 4.30 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.

Latitude North Hotels Pty Ltd v Commissioner of State Revenue [2021] QCAT 16

- 4.31 This case related to the grouping of various entities (due to members of a single family holding various directorship and shareholder interests directly and indirectly via trusts and other entities) in what was called the Opal Group.
- 4.32 The Tribunal considered whether certain members of the group could be excluded from the larger payroll tax group.

- 4.33 In rejecting the de-grouping submissions, the Tribunal put weight into the various financial and controlling links between the related entities:
- (a) there were substantial sums owed between related parties compared to the net profit able to be generated or assets held. In the 2013 financial year:
 - (i) an amount equal to \$394,150 was noted as owing by a taxpayer to a related entity;
 - (ii) this amount significantly exceeded the taxpayer or related entity's net profits (in the vicinity of \$120,000);
 - (iii) further, this amount was significant compared to the net assets of the borrower (-\$100,201),

additional financial statements for future financial years were also reviewed to determine the significance of other related party loans and the Tribunal agreed with the Commissioner that such owed amounts weighed against a de-grouping order;
 - (b) management fees paid between related entities showed a level of dependence for the entity receiving the management fees as failure to receive such fees would cause such entities to be at risk of insolvent trading;
 - (c) 'interest' payments between related entities compared to the loan amounts on issue and net profits were unusually high and a lack of evidence to explain such transactions caused this to be a factor to weigh against a de-grouping order; and
 - (d) curiously, weight was also placed on the sharing of a common professional advisor between the related entities.
- 4.34 Of the above reasons to reject the de-grouping order, the weight placed on a common professional advisor could be seen as alarming. A distinction could, however, be noted between:
- (a) an advisor whose involvement between related entities and advice on how transactions should occur between the related entities, is such that the entities could be considered as a single group; and
 - (b) an advisor whose engagement was purely to prepare the necessary financial statements and returns without any broader strategic advice considering all related entities as a whole.
- 4.35 Ultimately, whether a Tribunal or Judge considers a common professional advisor as a factor against de-grouping will depend on a case-by-case basis and be sensitive to the facts present.
- 4.36 As a side note, the Tribunal noted the difficulty having an undocumented loan arrangement between related parties caused the taxpayer in attempting to argue a lack of interdependence between related entities:

[77] *Latitude concedes there was no documented loan agreement and contends the amount of the loan was to be repaid. There is some conflicting evidence as to when the loan was repayable, which is not altogether surprising where loans are undocumented.*

The application for exclusion indicated it was repayable upon sale of the Railway Hotel. Latitude points to the reduction by \$367,814 from the balance as at 30 June 2013 to the balance as at 30 June 2014 to contend that this demonstrates it was not repayable on the sale of assets on the closure of the Railway Hotel.

[78] *Latitude contends that the loan* of \$27,336 as at 30 June 2014 is not a material connection and notes that although the loan amount increased by 30 June 2015 to \$141,441

it was fully repaid by 30 June 2016, so that this is strong evidence of Lemke Hotels' capacity to repay its loans. It contends that Lemke Hotels was always able to repay the loans, as it did so, which supports a finding that Lemke Hotels was not reliant upon Latitude in not calling in the loan and therefore not dependent upon the loan to operate its business.

- 4.37 At a minimum, this case should prove a reminder for advisors to consider strongly putting in place written document between related parties. Behind a transfer of funds from related entities, a purpose can be either assumed (by a revenue authority or another third party) when no evidence exists or clearly stated in a written document.

Beaumont Constructions Pty Ltd & Ors v Commissioner of State Revenue [2020] QCAT 52

- 4.38 This case related to what would have appeared to be unrelated family businesses:
- (a) Kartarzyna Group Pty Ltd – an accounting and administrative services provider;
 - (b) South Bank Surf Club Pty Ltd as trustee for South Bank SC Trust – operating South Bank Surf Club restaurant;
 - (c) Family Qld Pty Ltd as trustee for Beaumont Entertainment Trust – operating the Family nightclub;
 - (d) Empire Holdings (Qld) Pty Ltd – operating the Empire Hotel, Cloudland and the Press Club;
 - (e) Bunk (Qld) Pty Ltd as trustee for Bunk Discretionary Trust – operating Bunk Backpackers and Birdees bar; and
 - (f) Beaumont Creations Pty Ltd – operating a building business.

- 4.39 In considering the background to the case, the Tribunal noted the following mechanism in grouping the various entities:

“Broad deeming provisions operate under sections 69-73 of the PTA. By s 71(1), persons with a 69-73PTA71(1) controlling interest in two or more businesses constitute a group. By s 71(2)(g), persons who are 71(2)(g) the beneficiary of more than 50% of the value of the interest in the trust have a controlling interest in the business carried on by the trust. By s 71(6) a person who is the beneficiary of a discretionary trust is taken to be the beneficiary of more than 50% of the value of the interest in the trust and to therefore have a controlling interest in the business carried on by the trust.

In the exclusion decision the Commissioner found that the Bickle Family Trust Deed and the Beaumont Entertainment Trust Deed contained clauses in which members of the Bickle family became discretionary beneficiaries. The beneficiaries are taken to have more than 50% of the value of the interest in the trust. Thereby all beneficiaries under a discretionary trust are deemed to have a controlling interest. These clauses in conjunction with s 71(2)(g) and 71(6) of the Act deem each of the Bickle family and any entity in which they have an interest to have a controlling interest in the trust.

On this basis, SBSC and Family formed ‘Group 15’. Group 15 was subsumed into a larger group (Groups 1 to 14) because Family was common to both groups. Groups 1 to 14 were subsumed into a larger group because Bickle Investments Pty Ltd as trustee for the Bickle Family Trust was common to each group. The Commissioner also considered Bunk and Family could have been utilised to group the businesses in the same manner as the Bickle Family Trust.”

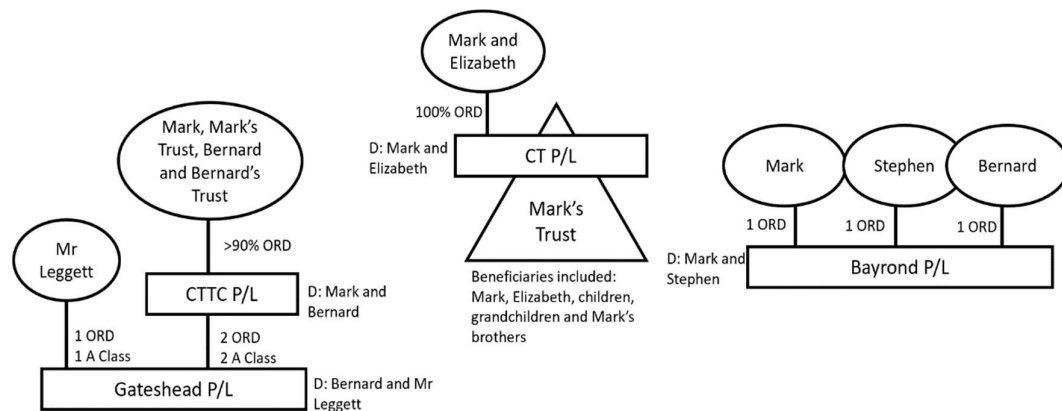
- 4.40 In summary, a single discretionary trust caused the grouping of various entities, due to the ability for any potential beneficiary to be deemed a controller of the discretionary trust.
- 4.41 Whilst broad in the application of the rules, the Tribunal noted:¹²
- (a) *Unlike other similar legislation, there is no requirement in the Queensland legislation to exclude a member from a group because it is just and reasonable.*
 - (b) *There is no requirement that the discretion must be exercised beneficially in any case of an anomaly or injustice. Section is silent in regard to intention to avoid the imposition of payroll tax. Accordingly a decision to exclude should not be made on the basis that there has been no intention to split businesses in order to avoid payroll tax. It is not necessary for the Tribunal to find an intention to avoid payroll tax.*
- 4.42 Further, it was noted that entities could still be grouped for payroll tax purposes regardless if they have employees or are carrying on a business.
- 4.43 Attempts were subsequently made to de-group the entities, however, the Tribunal rejected such arguments.
- 4.44 In rejecting the de-grouping arguments significant weight was made in relation to the following:
- (a) the fact that the majority of the grouped entities were party to the same supply agreements beverages - doing so:
 - (i) demonstrated that many of the grouped entities were connected in the strategic business decisions as various rebates, exclusivity and volume purchase targets were only possible by entering into the supply agreement;
 - (ii) the supply agreement held each of the grouped entities as jointly and severally liable; and
 - (iii) the fact that alcohol is considered a significant income generator and expense for licenced premises that a joint supply agreement showed dependence and material commercial connection between the group entities;
 - (b) the fact that many of the grouped entities' business had strong common elements in the provision of food and alcohol, and were all in the hospitality industry.
- 4.45 This was despite the fact that the businesses did not share a common office, professional service or website with each other.

Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue [2018] NSWCATAP 147

- 4.46 Although a few years old and in relation to New South Wales payroll tax legislation (which is substantially the same), this case is an example of how a discretionary trust can cause wide ranging grouping.
- 4.47 While originally founded in the 1950s by Mr O'Neill in the Hunter Valley, the 'O'Neills Tyres' business expanded throughout Newcastle and the Hunter Valley region and was subsequently passed down to Mr O'Neill's three sons, Mark, Bernard and Stephen.

¹² *Beaumont Constructions Pty Ltd & Ors v Commissioner of State Revenue [2020] QCAT 52* at paragraph 245
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4.48 Specifically, the structure of the businesses conducted by the brothers can be diagrammatically shown as follows:



4.49 The Chief Commissioner of State Revenue (**CCSR**) grouped the brothers' business on the following grounds:^{13,14}

- Group 1 - Mark's Trust and Bayrond P/L formed a group because Mark and Bernard held a controlling interest in Mark's Trust (by way of both being a potential beneficiary) as well as a controlling interest in Bayrond P/L's business (as together they held more than 50% of the voting shares in Bayrond P/L);
- Group 2 – CTTC P/L and Gateshead P/L were grouped by way of being related body corporates;
- Group 3 – CTTC P/L and Bayrond P/L were grouped through the tracing of interests in corporations because Mark and Bernard (as brothers) are related persons and therefore associated persons. As associated persons, they held a controlling interest of more than 50% in each of CTTC P/L (greater than 90%) and Bayrond P/L (66%).
- Group 1 and Group 3 are merged into a larger group because Bayrond P/L is a common member (Group 1+3).
- Group 2 and Group 1+3 are merged because CTTC P/L is a common member.

4.50 Relevant in the context of discretionary trusts and grouping for payroll tax purposes:

*"The basis for the taxpayer [Mark's Trust] being in Group 1 was the commonality of the beneficiaries of MOFT [Mark's Trust]. This is because the objects included the brothers (here Bernard) of the specified beneficiary/principal (here Mark) and s72(2)(g) and (6) were invoked."*¹⁵

4.51 The analysis does not distinguish whether Bernard was a beneficiary who received income or capital of Mark's Trust. It is enough to be a potential beneficiary, for the relevant control deeming provisions to apply.

4.52 Unfortunately, the brother's attempts at de-grouping the businesses were unsuccessful (due to a variety of reasons from invalid trust amendment documents and various linked business arrangements).

¹³ *Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWCATAD 368 at [38]

¹⁴ *Payroll Tax Act 1971* (QLD) contains identical wording to the sections 72 to 74 *Payroll Tax Act 2007* (NSW) referred to in *Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWCATAD 368 at sections 71 to 73 *Payroll Tax Act 1971* (QLD)

¹⁵ *Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWCATAD 368 at [39]

5 Defined Legislation

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

- (a) Duties Act 2001 (Qld) (Qld Duties Act).
- (b) Land Tax Act 2010 (Qld) (Qld LTA).
- (c) Payroll Tax Act 1971 (Qld) (Payroll Tax Act).

6 Disclaimer

6.1 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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