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BUSINESSES ON THE MOVE: RELEVANT RESTRUCTURING

Relevant restructuring – Payroll Tax and Duty Aspects

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1 Importance of understanding the payroll tax grouping provisions

- 1.1 In 2012, the Australian Bureau of Statistics released a publication on Australian business operators which found that more than 87% of business operators identified themselves as being part of a family.
- 1.2 Small to medium enterprise business (**SME Business**) operators must be aware of the potential payroll tax implications of being involved in a business; particularly where there are multiple businesses carried on by various members of the same family.
- 1.3 For payroll tax purposes, multiple family businesses may be grouped, despite the businesses having discrete operations separate from each other. What this means, is that wages paid by each business will be aggregated with only one entity within the group (the designated group employer) being eligible for a single tax-free threshold.
- 1.4 In Queensland for example, the current tax-free threshold is \$1.1 million. This means that an entity that operates a business, would be able to make wage payments to workers up to \$1.1 million without being liable to pay payroll tax. If family businesses are inadvertently grouped and total taxable wages across the group are in excess of \$1.1 million then each entity within the group (other than the designated group employer) will have a payroll tax shortfall, notwithstanding on a stand alone basis the wages of each entity are below the threshold.
- 1.5 It is therefore critical for advisers to appreciate and understand the effects of grouping and the potential scope for family businesses to be grouped. If the issues are not identified in a timely way, then the scope for financial liability is significant given for any family business that has mistakenly assumed no payroll tax returns were necessary, the potential amendment period can extend to an unlimited period.
- 1.6 There are five grounds for grouping and this paper considers the main grounds for grouping that arise for family businesses. If businesses are grouped on one or more grounds, then consideration needs to be given as to whether exclusion orders can be sought, so that a particular business is not grouped with one or more other businesses otherwise grouped.
- 1.7 For the purposes of this paper, any reference to 'Payroll Tax Act' is a reference to the *Payroll Tax Act 1971* (Qld). The grouping provisions in each of the other States and Territories are similar, although section numbers may vary. This is because grouping was one of the eight key areas of payroll tax which the various jurisdictions agreed to harmonise which in Queensland took effect from 1 July 2008.

2 Historical context – anti-avoidance measures

- 1.8 To provide perspective on the intended operation of the grouping provisions, it is important to understand the historical context of the grouping provisions.
- 1.9 Prior to 1971 payroll tax was a Commonwealth tax. An agreement was reached whereby payroll tax would be administered by the various States and Territories. With the change in administration, there was a significant increase to the rate of the tax in the various jurisdictions.
- 1.10 The increase in the rate of tax, in addition to the high inflation levels seen in the early to mid 1970's, resulted in employers and advisors considering options to reduce their tax burden. Such options included 'splitting' businesses in hope of each business receiving a separate tax-free threshold and deduction.
- 1.11 The grouping provisions were introduced, initially in Victoria in 1974, and then by the other States and Territories shortly after to counter avoidance arrangements being entered into. To ensure the anti-avoidance provisions were effective, they were drafted in a broad way so as to capture a variety of arrangements. To counter this, the grouping provisions provide the relevant Commissioner in each jurisdiction with a discretion to exclude certain businesses, if the Commissioner is satisfied it is just and reasonable to do so.

3 Current grouping provisions

- 1.12 The current grouping provisions continue to be drafted in a very broad manner.
- 1.13 The term 'business' is defined in the Payroll Tax Act (for the purposes of the grouping provisions) to include any of the following, whether carried on by one person or two or more persons together:
- a. a profession or trade;
 - b. any other activity carried on for fee, gain or reward;
 - c. the activity of employing one or more persons who perform duties in connection with another business;
 - d. the carrying on of a trust, including a dormant trust;
 - e. the activity of holding money or property used in connection with another business.¹
- 1.14 Division 1, Part 4, Payroll Tax Act outlines the potential grounds on which businesses may be grouped together, which are:
- a. grouping of corporations;
 - b. use of common employees;
 - c. commonly controlled businesses;
 - d. groups arising from the tracing of interests in corporations; and
 - e. smaller groups subsumed into larger groups.
- 1.15 Businesses only need to be grouped on one ground alone to remain grouped. Each ground will be discussed below.

¹ Section 66 Payroll Tax Act

4 Grouping of corporations

- 1.16 Section 69 Payroll Tax Act provides that companies that are related bodies corporates will constitute a group for payroll tax purposes.
- 1.17 'Related bodies corporate' is defined by reference to the *Corporations Act 2001* (Cwth), which include the relationships of:
- a. being a holding company of another body corporate;
 - b. being a subsidiary of another body corporate; or
 - c. being a subsidiary of a holding company of another body corporate.²
- 1.18 This means that various businesses conducted by separate subsidiaries under a common holding company will be grouped.
- 1.19 Grouping on this basis can be readily identified by the revenue authorities by utilising data-matching software to identify relevant relationships as per Australian Securities and Investment Commission (**ASIC**) records.

² Section 50 *Corporations Act 2001* (Cth)

5 Grouping based on use of common employees

- 1.20 Section 70 Payroll Tax Act outlines three scenarios where businesses would be grouped together due to common employees:
- a. where one or more employees perform duties in connection with one or more businesses carried on by their employer and one or more other persons – then each business conducted by the employer and the other persons for which employees perform duties will be grouped;
 - b. where one or more employees are employed solely or mainly to perform duties in connection with one or more businesses carried on by one or more other persons – again, the employer and the persons who operate the other businesses will be grouped; and
 - c. where one or more employees of an employer performs duties:
 - i. in connection with one or more businesses carried on by one or more other persons; and
 - ii. in connection with, or in fulfilment of the employer's obligation under, a relevant arrangement,

– the employer and each person for whom the employee performed duties will be grouped.
- 1.21 Inadvertent grouping due to the use of common employees may arise in numerous situations, such as:
- a. Professionals (such as real estate agents, doctors, medical specialists or lawyers) who conduct their own discrete businesses but operate from common premises (such as a medical centre, barristers' chambers or real estate office) where in return for a fee they receive the right to occupy part of the premises and a right to receive particular support services – such as receptionists and other administrative support.
 - b. Family businesses – particularly where family decisions mean that newer businesses will utilise at least some or all of their labour from employees connected with more established businesses conducted by other family members. For instance bookkeeping services or cleaning services may be provided to multiple family businesses by the same employee of one particular business. Similarly, if the businesses are conducted within a particular industry, albeit focused on different segments, then qualified labour of one business may be utilised in more than one of the family businesses.
 - c. Secondment arrangements (for instance where a law firm may place a lawyer on temporary assignment with a particular client) – if an employee is placed with a particular client to undertake specific functions 'in house' then technically both the employer entity and client entity would be grouped.
 - d. Significant clients – if a business ends up performing a significant amount of work for a particular client on an ongoing basis, then they may need an employee to perform functions solely or mainly in connection to the client's business – again possibly causing the client business and employer's business to be grouped despite the employee only performing functions at the employer's premises.

- 1.22 The above examples illustrate how broadly the common employee provisions can apply to capture businesses that would otherwise be unrelated. Practically it is more difficult for revenue authorities to identify audit targets on this ground, however SME Businesses and their advisors should be conscious of the potential grouping and possible ramifications – so that any risk can be appropriately managed.

Administrative practice – professional practices

- 1.23 The revenue authorities recognise the broad grouping implications the common employee provisions have on professional practices and have issued administrative guidance outlining specific circumstances in which exclusion orders will issue in instances where businesses would otherwise be grouped on the grounds of common employees.
- 1.24 Harmonised revenue ruling PTA017 acknowledges that it is the administrative practice of the various Commissioners to exercise their discretion to not group professional practices which would otherwise be grouped if the following five conditions are satisfied:
- 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, in their own right, in the administrative services business;
 - d. the administrative services business does not derive more than 60 percent of its income from one professional practice; and
 - e. there is no suggestion that such a structure is designed to avoid payroll tax.³
- 1.25 Note that harmonised revenue ruling PTA017 clearly states that the Commissioner is unable to make such an exclusion order where the persons are related body corporates to each other. This is because section 74(4) does not allow the Commissioner to issue an exclusion order to related body corporates.

³ Public Ruling PTA017.2

6 Grouping based on commonly controlled businesses

- 1.26 Section 71 Payroll Tax Act provides the various scenarios where a person or set of persons who have a controlling interest in two or more businesses are deemed to constitute a group. More commonly this is the ground on which various SME businesses will be grouped.
- 1.27 The concept of ‘controlling interest’ in a business is broad and extensive, and is summarised in the table below:

Entity conducting business	Who holds a controlling interest
Single person	That person
A set of persons	Collectively, the set of people
Corporation	The person or set of persons entitled to exercise more than 50% of the voting power at the meetings 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 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

Set of persons

- 1.28 When considering common control, it is important to consider ownership interests not only held by individuals, but also by sets of persons. Individuals may hold less than 50% of ownership/control interests in multiple entities, however if other individuals also own/hold ownership/control interests in the same entities, then combined the two individuals will be regarded as controlling multiple entities for payroll tax purposes. For instance Brother A may hold a 40% interest in a company carrying on a farming enterprise, of which he is sole director. Brother B owns 15% of the company’s shares, which he inherited when the brothers’ father passed away. Brother B operates hotels through a company, of which he is one of 3 directors, the other directors being two separate and independent business partners. The shareholding in the hotel company is 30% for each of the three business partners (including Brother B), with the remaining 10% held equally by 3 silent investors (one of which is Brother A). Notwithstanding Brother A runs the farming operations and Brother B is involved in the hotel industry, the hotel company and farming company would be grouped, because:
- Brothers A and B hold the majority (a combined 33.33%) of the Hotel Company’s shares; and
 - Brothers A and B hold the majority (55%) of the Farming Company’s shares.

Discretionary trusts – deemed control

- 1.29 Regarding who controls interests in a discretionary trust, any beneficiary of a discretionary trust can be **deemed** to hold a controlling interest in the business conducted by such a trust. This is by virtue of section 71(6) Payroll Tax Act, which states that any person who may receive a distribution from the discretionary trust is deemed to be a beneficiary of the trust in respect of more than 50% of the value of the interests in the trust.
- 1.30 Consider the following examples:
- a. Person A conducts a winery business from a discretionary trust, of which he is a beneficiary. Person A is separately part of a partnership (in which he holds over 50% of the capital in the partnership) conducting an accounting business. As Person A has a controlling interest in the discretionary trust (as he is a beneficiary of the trust, thereby having a deemed controlling interest under section 71(6) Payroll Tax Act) as well as a controlling interest in the partnership (by owning more than 50% of the capital), the wages paid by the trust in conducting the winery business and by the partners of the partnership to accounting staff would be aggregated, with only one entity receiving the benefit of the tax-free threshold.
 - b. Person B has operated an established electrical business in a trust for many years, of which his two sons are listed as primary beneficiaries. Son A has commenced a restaurant business in a discretionary trust – which specifies his two children as primary beneficiaries. Despite the businesses technically being unrelated, Son A is deemed to control the electrical business and also the restaurant business, as is any other potential beneficiary common to both trusts.
- 1.31 Deemed control over discretionary trusts is especially problematic for SME businesses where it is not uncommon for discretionary trusts to carry on businesses, or hold ownership interests in businesses (for asset protection purposes).
- 1.32 Care needs to be taken when considering the potential beneficiaries of any trust, to ensure inadvertent grouping will not arise. For instance it may be appropriate to exclude particular individuals and associated entities if it is unlikely the trust will make distributions to those individuals or entities. If such action is not taken then potentially any business carried on by that discretionary trust will automatically be grouped with any business carried on by entities associated with other beneficiaries, the effect of which is only one business within the group would be eligible for the tax-free threshold.

7 Groups arising from tracing of interests in corporations

- 1.33 All Australian jurisdictions now have the tracing of interests in corporations as a ground for grouping.
- 1.34 In Queensland there were no similar provisions prior to 1 July 2008. Due to the use of broad definitions, this ground could cause individuals and entities to be grouped (in structures involving corporations or corporate trustees), despite little or no risk of grouping for periods pre 1 July 2008.
- 1.35 Section 72 Payroll Tax Act states that a **'relevant entity'** and a **'corporation'** constitute a group if the entity has a **'controlling interest'** in the corporation.
- 1.36 A **'controlling interest'** will exist if the corporation has share capital and if the relevant entity has an interest in the share capital, the value of which is greater than 50%.
- 1.37 **'Relevant entity'** is defined to mean a person, or two or more **'associated persons'**.
- 1.38 The broadness of this ground is emphasised in section 74D Payroll Tax Act, which adopts a very broad definition of **'associated persons'** and **'related persons'**. For the purposes of the provision, persons will be regarded as **'associated persons'** if they are:
- a. **'related persons'**;
 - b. individuals who are partners in a partnership;
 - c. private companies, in which common shareholders have a majority interest;
 - d. trustees of trusts of which there is a common beneficiary (other than public unit trusts);
 - e. a private company and a trustee of a trust – if a related body corporate of the company is a beneficiary of the trust.
- 1.39 **'Related persons'** are defined to include:
- a. individuals – if one is the spouse of the other (including de-facto partners and registered partners); or if the relationship between them is one of parent or sibling;
 - b. private companies – if they are related bodies corporate;
 - c. an individual and a private company, if the individual is a majority shareholder or director of:
 - i. **the company; or**
 - ii. **another private company which is a related body corporate of the company;**
 - d. an individual and a trustee of a trust (other than a public unit trust scheme) of which the individual is a beneficiary; and
 - e. a private company and a trustee of a trust – if a related body corporate of the company (or a majority shareholder or director) is a beneficiary of the trust.

- 1.40 When considering interests held by relevant entities, regard must be had to direct interests, indirect interests and aggregate interests.
- 1.41 If group structures involve corporations (including as trustees of trusts) then the tracing provisions can potentially group a wide range of individuals (including de-factos, spouses and siblings) with those corporations.

8 Subsuming smaller groups into larger groups

1.42 Section 73 Payroll Tax Act provides that where a person is a member of two or more groups, both groups can merge to form a larger group.

1.43 This can be problematic where close family groups engage in various types of discrete businesses and utilise a discretionary trust as their vehicle of choice. The fact that being a beneficiary of a discretionary trust means that you hold a controlling interest means that various separate groups, which would not otherwise be grouped, could be subsumed into one large group.

1.44 For example:

a. Person Z operates two businesses with his brothers, Persons X and Y, namely:

- i. **a supermarket business in a company; and**
- ii. **a mechanical shop in a trust,**

as Persons X, Y and Z have a controlling interest in both businesses, the businesses could be grouped for payroll tax purposes;

b. Person Z then decides to assist with the operation of his cousin's (Person A) bakery, that is operated out of a discretionary trust. Even though Person Z may not have any control over the distributions that could be made by the trustee, the fact that Person Z is a beneficiary, means that he will have a controlling interest in the bakery business;

c. As Person Z has a controlling interest in the mechanical shop and the bakery, both groups would be subsumed into a larger group under section 73 Payroll Tax Act. All three businesses will only then benefit from a single tax-free threshold.

9 Joint and several liability

- 1.45 As part of harmonisation, the effect of grouping is that all members of a group are joint and severally liable for any amount that another group member fails to pay. Section 51A(2) Payroll Tax Act states that every member is liable for debts of group members, irrespective of whether the member was an employer during the period to which the amount relates.
- 1.46 On this basis there is potential for revenue authorities to seek payment of outstanding debts from any entity or individual that is able to be grouped with an entity with outstanding payroll tax liabilities. This may include passive individuals such as wives or siblings, or passive investment trusts.
- 1.47 Taking the above example at paragraph 8.3, consider the following additional facts:
- a. Persons Y and Z purchases an investment property and decides to hold the property between themselves as a partnership; and
 - b. Person A, who is a beneficiary of the trust conducting the bakery business, purchases the property which the bakery conducts the business
- 1.48 The investment property which Persons Y and Z hold a controlling interest in, could be a business able to be grouped within the larger group. This is on the basis that business is defined to include 'any other activity carried on for fee, gain or reward'.
- 1.49 The trust also holding the bakery could also then be subsumed into the larger group, as even though there may be no rent arrangements, potentially the trust holds a property used in connection with another business, meaning that it conducts a business able to be grouped.
- 1.50 The practical effect of this is that, should members of the group are technically liable to payroll tax, but are unable to repay the liability, then the investment property and the bakery property would potentially be exposed.

10 Structuring businesses

- 1.51 In light of the above grounds to group, it is important for advisors to ensure that appropriate structuring advice is provided from the outset.
- 1.52 This may include actions such as:
- a. having tailored entity establishment documentation prepared (such as trust deeds specifically excluding certain persons as beneficiaries) or reviewing a client's complete historical structure to identify any potential payroll tax issues; and/or
 - b. ensuring persons or sets of persons do not control more than 50% of interests in one or more entities.
- 1.53 Care should also be taken to advise SME businesses of the risk of engaging the same employees in one or more businesses.
- 1.54 If steps cannot be taken to ensure entities and individuals are not technically grouped from the outset then:
- a. payroll tax should be estimated on a group basis, reviewed on a yearly basis and budgeted into any profit forecasts, cashflows etc.;
 - b. consideration should be given to which, if any, entities or individuals should attempt to obtain exclusion orders.

Exclusion orders

- 1.55 If businesses are technically grouped on any of the five grounds discussed above, then depending on the circumstances it may be worthwhile to seek the Commissioner's discretion to exclude one or more businesses from the group.
- 1.56 In considering the power to issue an exclusion order to an entity, section 74(2) Payroll Tax Act requires the Commissioner to be satisfied that the business being conducted by the entity being excluded:
- a. is carried on independently of businesses carried on by any other member of the group; and
 - b. is not connected with the carrying on of businesses carried on by any other member of the group.
- 1.57 Such factors that the Commissioner will consider before determining whether to issue an exclusion order includes an analysis of the nature and degree of ownership and control of the businesses carried on by the owners and the other members of the group as well as the nature of the businesses.
- 1.58 Further, Commissioner has issued Revenue Ruling PTA031.2, which provides further commentary on the types of factors the Commissioner needs to consider for the purposes of section 74 Payroll Tax Act. Paragraph 10 PTA031.2 states that relevant factors to be considered 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 business 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.

1.59 Therefore, even though businesses may be technically grouped on any of the grounds discussed above, provided evidence can be supplied supporting that the businesses:

- a. are of completely different nature or had no commercial transactions between them;
- b. did not share resources, services or facilities;
- c. had different people involved with the decision making of the businesses; and
- d. were not dependent on each other financially,

among other things, then businesses may be excluded from being grouped with each other.

1.60 The entity seeking an exclusion order bears the onus of proof to satisfy the Commissioner that the business it carries on is substantially independent and not connected with any other business conducted by other entities it is grouped with. Whilst the Commissioner has a discretion allowing him/her to issue an exclusion order, there is no obligation on the Commissioner to exercise this discretion. On this basis it is preferable to try and structure businesses and family groups from the outset to ensure there is no inadvertent grouping on a technical basis for payroll tax purposes.

11 Duty for trusts, restructures and landholders

- 1.61 In considering duty for trusts, restructures and landholders it is necessary to consider:
- a. common duty triggers for unit trusts;
 - b. common duty triggers for discretionary trusts; and
 - c. landholder duty.
- 1.62 It is also worthwhile to consider in what circumstances corporate reconstruction relief is available.

12 Common duty triggers for unit trusts

- 1.63 The common triggers for duty in relation to unit trusts in Queensland are set out below:
- a. the acquisition of dutiable property by the trustee of the unit trust (in that capacity);
 - b. a declaration of trust over dutiable property (known as a ‘trust creation’ under the Duties Act);
 - c. a transaction under which a trustee of a trust ceases to hold dutiable property as trustee and starts to hold that property in its own capacity (known as a ‘trust termination’);
 - d. transfer duty on the sale of dutiable property by the trust (including to unitholders of the trust); and
 - e. dealings in relation to units of the unit trust – including transfers of units, redemption of units and the issue of additional units (known as ‘trust acquisitions’ and ‘trust surrenders’).
- 1.64 The concepts of ‘trust acquisitions’ and ‘trust surrenders’ are unique to the Queensland Duties Act. A trust acquisition occurs where a person acquires or increases their trust interest. A trust interest is an interest (measured as a percentage) as the beneficiary of a trust that holds a direct or indirect interest in dutiable property in Queensland.⁴ For conventional unit trusts, all unitholders will hold trust interests, whereas for a discretionary trust (discussed next in this paper), only a default beneficiary has a trust interest for duty purposes.⁵
- 1.65 Duty on a trust acquisition is calculated on the percentage interest acquired, multiplied by the unencumbered value of the dutiable property of the trust. Importantly, this is not limited to landholdings but extends to all Queensland dutiable property held by the trust.
- 1.66 Conversely, a trust surrender occurs when a person surrenders a trust interest in a trust that has a direct or indirect interest in dutiable property.⁶ Where a person makes a trust surrender on which duty is paid, the corresponding increase in the proportionate trust interests by the other beneficiaries does not constitute a trust acquisition⁷ otherwise the result would be double duty.
- 1.67 Notwithstanding this, often the same trust related transaction will still trigger several dutiable transactions. Section 66 of the Duties Act provides various exemptions from double duty where this occurs. For example, where a trust is declared over dutiable property, it will constitute both a trust creation and a trust acquisition. Where duty is paid on the trust creation, no additional duty is payable on the consequential trust acquisition.
- 1.68 It is important to appreciate that Queensland has a unique set of duty rules when it comes to dealing with trust interests. Specifically, where most jurisdictions apply land rich or landholder duty rules to landholding unit trusts, dealings in such trusts in Queensland are dealt with under the transfer duty provisions (other than listed unit trusts). In practice this generally means that the acquisition of units in a unit trust that holds land in Queensland will be subject to duty regardless of the proportionate interest acquired, whereas in most other jurisdictions duty would only be applied if the relevant threshold was reached (for example, 20% to 90% depending on the jurisdiction and the type of unit trust).

⁴ Section 57(1) Duties Act.

⁵ Section 57(2) Duties Act.

⁶ Section 56 Duties Act.

⁷ Section 59(1)(b) Duties Act.

- 1.69 Another anomaly to be aware of in the duty treatment of trust dealings in Queensland is that various exemptions that are available for the acquisition of dutiable property are not available for the acquisition of an interest in a trust that holds those same assets. For example, the acquisition of chattels alone is not subject to duty⁸ however the acquisition of an interest in a trust that holds chattels in Queensland alone will be subject to duty (although in some cases *ex gratia* relief may be available).

⁸ Section 29 Duties Act. Also see similar exemptions under section 37 of the Duties Act in relation to business assets.

13 Common duty triggers for discretionary trusts

1.70 The common triggers for duty in relation to discretionary trusts (similar to those for unit trusts) are as follows:

- a. the acquisition of dutiable property by the trustee in its capacity as trustee for the discretionary trust;
- b. a declaration of trust over dutiable property (known as a 'trust creation');
- c. a transaction under which a trustee of a trust ceases to hold dutiable property as trustee and starts to hold that property in its own capacity (known as a 'trust termination');
- d. dealings in relation to the beneficial entitlements of the trust – i.e. becoming a default beneficiary or ceasing to be a default beneficiary of the trust (known as 'trust acquisitions' and 'trust surrenders');
- e. transfer duty on the sale of dutiable property by the trust (including to beneficiaries of the trust); and
- f. dealings in the shares of a corporate trustee of a discretionary trust that holds dutiable property in Queensland (i.e. corporate trustee duty – which is beyond the scope of this paper).

1.71 As noted above, although all potential beneficiaries under a discretionary trust will be considered 'beneficiaries', only a default beneficiary has a 'trust interest' for duty purposes.⁹ Therefore the addition or removal of a non-default beneficiary to a discretionary trust will not trigger a duty liability.

⁹ Section 57(2) Duties Act.

14 Landholder duty

- 1.72 Landholder duty is triggered by dealings in the shares of a 'landholder' company. A company will be a landholder in Queensland if it owns, either directly or indirectly through its subsidiaries or through trusts in which it has an interest, land in Queensland with an unencumbered value of \$2 million or more. Landholder duty is triggered where an investor acquires an interest which, when aggregated with interests held or acquired by the investor or related persons, or when aggregated with interests acquired as part of the same arrangement, result in a percentage ownership interest in the landholder company of 50% or more (or 90% or more for a listed landholder).

15 Corporate reconstruction

- 1.73 Under the Duties Act, no duty is payable on the transfer of dutiable property where the transfer is for the purposes of a corporate reconstruction and involves a transfer of group property between members of a corporate group.
- 1.74 Although the details of the corporate reconstruction exemption are beyond the scope of this paper, generally, an exemption will be available where the transaction is undertaken for the purpose of a genuine corporate reconstruction (i.e. this excludes the packaging of assets for future sale) but does include transactions for the purpose of changing a corporate structure to make internal adjustments to corporate arrangements. Since the case of *Orica*¹⁰ there has been an increased focus on this purpose test.
- 1.75 The transaction must be between members of a corporate group which requires a 90% ownership of shares and voting rights. The transaction must also relate to 'group property'. The most common ways that property will qualify as group property are as follows:
- a. where the transferor and the transferee have been group members for three years or more (the 'pre association test');
 - b. where the transfer is between a parent and subsidiary and the subsidiary became a subsidiary either:
 - i. **on its incorporation; or**
 - ii. **at a time when the subsidiary was dormant; and**
 - c. where the transaction is between a parent and a subsidiary and the parent became the parent under an interposition transaction under section 409 of the Duties Act.
- 1.76 The corporate reconstruction exemption also extends to cover landholder duty under section 409 of the Duties Act. Section 409 specifically provides the ability to interpose a new holding company above an existing company where the existing company is a landholder, without triggering duty on either the acquisition of shares in the existing (landholder) company by the new holding company or the issue of shares in the new holding company to the shareholders of the existing company.
- 1.77 Importantly, the benefit of the corporate reconstruction exemption from duty will be lost if the parties to the transaction (other than an interposition) cease to be members of the same corporate group within three years of the exempt transaction (the 'post association test'). The Commissioner will issue a reassessment of the duty that would have been payable, including possible unpaid tax interest and penalties.

¹⁰ *Orica IC Assets Pty Ltd & Anor v Commissioner of State Revenue* [2011] QSC 001.

16 Disclaimer

This paper covers legal and technical issues in a general way. It is not designed to express opinions on specific cases. This paper 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 publication.