
Structuring the Ownership of Commercial Property – Tax Pros, Cons and Pitfalls

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1 Overview

- 1.1 Whether purchasing commercial property as a passive investor or a business owner for their own use; getting the structure correct is crucial in avoiding unexpected issues down the line.
- 1.2 Unfortunately, with a plethora of structuring options, there is no one-size-fits-all answer.
- 1.3 The most appropriate structure will differ based on client specific circumstances, as well as their key objectives and future intentions.
- 1.4 Accordingly, this paper does not seek to argue for a particular structure over another; but rather, outline the structuring options available and the various tax issues that require considerations.
- 1.5 In addition, thought and commentary will be had throughout the paper as to additional legal considerations that may influence the answer.
- 1.6 This paper seeks to explore the structuring of ownership of commercial property by considering the following:
 - (a) The distinction between “commercial property” and “business real property” and why it can matter, including whether residential premises can be classified as business real property.
 - (b) Comparing the ownership options available and the various key tax considerations, including the impact the proposed Division 296 may have on self-managed superannuation funds (**SMSFs**).
 - (c) The State and Territory tax and duty considerations when comparing the various ownership structures for commercial property.
 - (d) If the property isn't currently in the ideal tax structure, are there any potential strategies available to restructure?
- 1.7 Practical examples will be the focus of the presentation, with this paper providing supplementary commentary.
- 1.8 Given the breadth of the topic, this paper will provide a high-level overview in relation to the various issues with a focus on practical examples.
- 1.9 Further, it is noted that certainty in relation to the tax treatment of certain structures are currently either not yet finalised (as with the case of the proposed Division 296 rules) or potentially being discussed as potentially being tweaked (as may be the case with the capital gains tax discount). The contents of this paper are accordingly up to date as of 26 February 2026.
- 1.10 References to legislation in this paper has been defined as follows:
 - (a) *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**).
 - (b) *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**).
 - (c) *Superannuation Industry (Supervision) Act 1993* (Cth) (**SISA**).
 - (d) *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SISR**).
 - (e) *Duties Act 2001* (Qld) (**QLD Duties Act**).
 - (f) *Duties Act 1997* (NSW) (**NSW Duties Act**).



- (g) *Duties Act 2000* (Vic) (**VIC Duties Act**).
- (h) *Duties Act 2001* (TAS) (**TAS Duties Act**).
- (i) *Stamp Duties Act 1923* (SA) (**SA Duties Act**).
- (j) *Duties Act 2008* (WA) (**WA Duties Act**).
- (k) *Duties Act 1999* (ACT) (**ACT Duties Act**).
- (l) *Stamp Duty Act 1978* (NT) (**NT Duties Act**).
- (m) *Land Tax Act 2010* (QLD) (**QLD Land Tax Act**).
- (n) *Land Tax Management Act 1956* (NSW) (**NSW Land Tax Act**).
- (o) *Land Tax Act 2005* (VIC) (**VIC Land Tax Act**).
- (p) *Land Tax Act 2000* (TAS) (**TAS Land Tax Act**).
- (q) *Land Tax Act 1936* (SA) (**SA Land Tax Act**).
- (r) *Land Tax Assessment Act 2002* (WA) (**WA Land Tax Act**).



2 Commercial property and business real property

- 2.1 In determining the most appropriate structure for an intended acquisition of a commercial property, appreciation of the following issues should be considered:
- (a) The purpose of acquiring the commercial property: Is it to be owner occupied, or used as a passive investment.
 - (b) Where the intended growth is to be had: Is the income yield or capital yield intended to be where the increase in value lies.
 - (c) Who is to benefit from any positive cashflow: Is there intended to be income able to be distributed to individuals or other entities; or are the owners not in need of additional discretionary income.
 - (d) Whether financing is required to be injected to assist with operational expenses.
 - (e) Are there to be multiple owners of the commercial property: Further, are the owners the partners in a business (or different).
- 2.2 Types of commercial properties can include:
- (a) Office spaces – whether a room, floor or building.
 - (b) Retail spaces – whether standalone, as a strip, a shopping centre or lots within a broader shopping premises.
 - (c) Industrial properties such as warehouses and distribution centres.
 - (d) Special purpose properties that are unique in their functions, such as hotels, motels, nursing homes and educational institutions.
 - (e) Multi-purpose properties that can combine the above.
- 2.3 For some, the conversion of a residential premise for commercial use may also be appealing. Alternatively, others may consider the management of a large number of residential premises as having commercial characteristics.

Business real property

- 2.4 In determining whether to own commercial property, the concept of 'business real property' is relevant where acquiring the asset through a SMSF.
- 2.5 As discussed in later sections of this paper, ownership of a commercial premise through a SMSF offers various advantages, at the cost of additional compliance within the SIS rules. Two such rules include:
- (a) A prohibition by a SMSF from acquiring an asset from a related party of the SMSF.¹
 - (b) Limits on the SMSF holding 'in-house assets' (which includes real property subject to a lease between the SMSF and a related part of the SMSF).²
- 2.6 Where commercial property is considered 'business real property', such property will generally be exempted from the above restrictions.
- 2.7 This may allow for opportunities whereby:

¹ Section 66 SISA.

² Section 71(1)(g) SISA.



- (a) a SMSF member may restructure ownership of an asset to be held by their SMSF (subject to managing any tax/stamp duty consequences; as well as complying with any contribution/arm's length rules);
- (b) a business owner may acquire a business premises in their SMSF and lease the property to their trading entity; or
- (c) a business owner may restructure ownership of their business premises into their SMSF.

2.8 'Business real property' is defined to mean:³

- (a) *any freehold or leasehold interest of the entity in real property; or*
- (b) *any interest of the entity in Crown land, other than a leasehold interest, being an interest that is capable of assignment or transfer; or*
- (c) *if another class of interest in relation to real property is prescribed by the regulations for the purposes of this paragraph—any interest belonging to that class that is held by the entity;*

where the real property is used wholly and exclusively in one or more businesses (whether carried on by the entity or not), but does not include any interest held in the capacity of beneficiary of a trust estate.

2.9 Self Managed Superannuation Funds Ruling SMSFR 2009/1 (**SMSR 2009/1**) provides a detailed breakdown in relation to the meaning of "business real property" noting the two key conditions to be satisfied include:⁴

- (a) **Eligible Interest:** the SMSF or other entity must hold an eligible interest in real property; that is an interest identified in paragraph (a), (b) or (c) of the business real property definition; and
- (b) **Business Use Test:** the underlying land must satisfy the business use test in the definition, which requires the real property to be 'used wholly and exclusively in one more businesses' carried on by an entity.

Eligible Interest

2.10 Business real property must be an interest in one of the following:⁵

- (a) Freehold interests in real property – Where:
 - (i) 'Real property' refers to land which can be identified by reference to titles held over particular parcels of land and can include any building or fixture attached to the land.
 - (ii) 'Freehold interest' represents entitlement by the holder to ownership (being exclusive possession for an indefinite period of time) of the property.
- (b) Leasehold interests in real property – Where:
 - (i) 'Leasehold interest' conveys a right on the holder to exclusively possess the property for a period of time (either pre-determined or capable of being determined).

³ Section 66(5) SISA.

⁴ SMSFR 2009/1 at paragraph 5.

⁵ Ibid at paragraphs 11 to 18.



- (ii) Other limited rights of possession such as occupation or use do not meet the required threshold of 'leasehold' (or 'freehold') interests.
- (c) Interests in Crown land that can be assigned or transferred – Where:
 - (i) 'Crown land' is land vested in the Commonwealth, State or Territory.
 - (ii) Interests can include a leasehold interest in Crown land.

Business Use Test

- 2.11 Where an Eligible Interest is identified, the underlying land must then satisfy the Business Use Test requiring the real property to be used wholly and exclusively in one or more business, whether or not that business or those businesses are carried on by the relevant entity.
- 2.12 Whether a property is used for business purposes will depend on the facts and degree of use of the property in each case⁶ at the relevant point in time requiring determination. For example, with regards to the prohibition against acquisitions from related parties, the assessment of the Business Use Test is required to be taken at the time the SMSF acquires the Eligible Interest.⁷
- 2.13 Factors that may indicate whether a business is being carried on the property includes (but are not limited to):⁸
- (a) the keeping of business records separate to personal records;
 - (b) the size of the operation and the extent of capital investment involved;
 - (c) whether activities are conducted continuously and systematically rather than on an ad hoc basis;
 - (d) the engagement of employees;
 - (e) a purpose and intention to carry on business;
 - (f) a level of repetition and regularity of activities constituting the business;
 - (g) whether activities are carried on in a similar manner to other like businesses;
 - (h) whether activities are planned, organised and carried on in businesslike manner;
 - (i) the scale and permanency of operations; and
 - (j) the existence of a business plan.
- 2.14 Key to the Business Use Test is for the property to be 'wholly and exclusively' used, which although could be onerous to satisfy in certain circumstances, the Commissioner accepts a '*common sense approach [that] accommodates some departure from a literal application of the test*'.⁹
- 2.15 Accordingly, it is accepted to consider whether the property 'actually in use is used in one or more businesses to the exclusion of any other uses'¹⁰ noting 'minor, insignificant or trifling

⁶ Ibid at paragraph 21 and 37 with reference to other rulings outlining the Commissioner's view whether activities constitute a business: Taxation Ruling TR 97/11 and Superannuation Guarantee Ruling SGR 2005/1. It is noted 'not for profit enterprises' may still satisfy the Business Use Test – at paragraph 119.

⁷ Ibid at paragraph 22.

⁸ Ibid 117.

⁹ Ibid 28.

¹⁰ Ibid 30.



non-business use of the property' will not fail the test.¹¹ Where the business real property relates to 'primary production businesses', the threshold can continue to be met where the property also contains a residential dwelling and:

- (a) *"the area containing the dwelling and used primarily for domestic or private purposes does not exceed 2 hectares; and*
- (b) *the domestic or private use is not the predominant use of the property."*¹²

2.16 Further, use of a property that is 'incidental and relevant' to a business will establish the connection for the test – as may be the case where the use of the property by a hotel guest is private in nature; but is incidental and relevant to the underlying business carried on by the hotel operator.¹³

2.17 In assessing the Business Use Test at a point in time, it is noted that the mere failure at a point in time may not fail the test as it is accepted that the status of the property and its use does not regularly change by the transient or peculiar changes in circumstances.¹⁴ Contrast between:

- (a) *Temporarily vacant commercial land:*¹⁵
 - (i) Where a business vacates the property at the end of the lease and there is a vacancy, the property may still remain as business real property despite this absence – particularly where new tenants are being sourced.
 - (ii) Where a business vacates the property and the landholder chooses to keep the property vacant and abandons the search for other tenants.
- (b) *Temporarily using the property for business use:* Where the property was used as a business for a period of time prior to the relevant transactions; but such use is abandoned after acquisition.¹⁶ This may be the case in relation to residential investment property.

SMSFR 2009/1 Examples

2.18 Annexure 2 of SMSFR 2009/1 contains various examples provide guidance on the application of the above tests on whether such property is considered business real property.

2.19 This paper will seek to make reference of interesting examples of choice.

2.20 Example 1 provides an example of a vineyard with a private residence on the property and a grape supply agreement with a winery – satisfying the special primary production rule for the definition of business real property. This is to be contrasted with Example 3 where the private residence on primary production property exceeds 3 hectare (failing 2 hectare limit).

2.21 Example 4 reflects dairy farmers who have subleased part of their property (which includes their private residence) related to such operations to an unrelated party whilst building a new accommodation for the new farmer. The total area of the two private residences remain under 2 hectare, and the property is considered wholly and exclusively used in a primary production business.

¹¹ Ibid 31.

¹² Section 66(6) SISA

¹³ SMSFR 20091/ at paragraph 35.

¹⁴ Ibid 226.

¹⁵ Ibid 227 and 228.

¹⁶ Ibid 229.



- 2.22 Example 7 considers the temporary agistment of vacant land which would not meet the Business Use Test as there was no intention of renting the land to anyone in the future (and thereby failing to meet the definition of business real property).
- 2.23 Examples 8 and 9 also provide examples of a block of land being vacant and unused for business use:
- (a) Example 8 considers whether the parking of trucks and machinery used in a business on vacant land meets the required threshold; but the lack of a formal lease and rental payments does not allow the land to be Business Use.
 - (b) Example 9 considers three adjacent blocks with two of them used for business purposes and an associated car park; with the third empty. Although two of the blocks may potentially be classified as business real property, the vacant block would not meet the requirements.
- 2.24 Examples 10 and 11 provide that a Water Licence and Fishing Licence are not Eligible Interests respectively.

Can residential property be considered business real property?

- 2.25 Examples 13 to 15 consider whether properties used for residential purposes may be considered business real property:
- (a) Example 13 outlines an owner with 2 holiday flats used for short-term accommodation, looking to sell the properties in a SMSF. SMSFR 2009/1 notes that although some actions may reflect a rental property investment business is being carried on, the operation is not considered to be at a scale where a business is being conducted.
 - (b) Example 14 contrasts with the landowner owning 20 residential units leased to long-term residents; with the landowner maintaining the units on a full time basis.
 - (c) Example 15 considers a member who owns 10 residential units that are leased to long term residents. In her case, the use of a real estate agent to manage the premises does not enable her to be seen as using the units 'wholly and exclusively in a business', as the taxpayer did not carry on a property investment business.
- 2.26 The AAT decisions *Allzams Trust and Commissioner of Taxation* [2021] AATA 2767 and *Allen and Commissioner of Taxation* [2021] AATA 2768 considered the issue on whether a taxpayer was in the business of renting real estate.
- 2.27 The facts of the decisions (heard in conjunction) can be summarised as follows:
- (a) Mr Allen owned 9 properties in his personal name; with the Allzams Trust owning a block of 5 units.
 - (b) After being made redundant in April 2018, he devoted substantial time to managing and improving his rental portfolio, which included (among other things):
 - (i) administration duties such as paying for repairs and maintenance, council rates, water rates, land tax, rent reconciliation and preparation of financial statements, rent collection paid by direct credit or cash deposit by the tenants into the Trust's bank account;
 - (ii) tenant duties such as interviews, phone calls, emails and correspondence between the tenants and himself/the Trust, and preparing lease agreements which are usually of 12 month duration;



- (iii) being available for tenants contact for any assistance and arranging and undertaking all property inspections usually every six months;
 - (iv) gardening, cleaning, general ad hoc duties and travel the block of units;
 - (v) repairs and maintenance duties as required including engaging the services of electricians, building professionals and plumbers to conduct some of the repairs.
- (c) He initially sought a private ruling asking whether transferring his properties to an SMSF would qualify as business real property under s 66(2)(b) SIA.
- (d) The ATO said it could not issue a binding ruling on superannuation law and advised him to instead lodge income tax private ruling applications on whether he (and the Trust) were carrying on a business of property rental.
- (e) Following the ATO ruling against the taxpayers, Mr Allen (and the Trust) lodged applications for review with the AAT.
- (f) In ruling in Mr Allen's favour (regarding the properties held in his personal name), the AAT noted:
- (i) It was clear from Mr Allen's personal private binding ruling that his intention was to make a profit (*the nature of the activities and whether they have the purpose of profit making*).
 - (ii) Mr Allen's operations were significant as at the time the market value of the capital invested approximated \$6 million (\$3.475 million after debt) (*the volume of the taxpayer's operations and the amount of capital employed by him*).
 - (iii) The time spent by Mr Allen in managing his properties were extensive and time consuming (*the complexity and magnitude of the undertaking*).
- (g) Accordingly, the AAT found Mr Allen to be carrying on a business of renting properties in the relevant income years.
- (h) Regarding the Allzams Trust, the AAT requested the Trust make another private application in light of material additional information not originally included in the initial private binding ruling application.
- 2.28 The *Allens and Allzams* decisions should provide a basis for the depth of analysis required in determining whether one can be seen as carrying on the business of renting properties.
- 2.29 Examples 16 to 20 considers various circumstances where single properties are used for residential (living) purposes:
- (a) Example 16: Where it is proposed for a SMSF to purchase a motel with a related entity employing a manager for the motel. The manager's residence can be considered incidental and relevant to the business conducted in the motel and the property considered wholly and exclusively in the motel business.
 - (b) Example 17: Where a family (owning their large family home) allows three bedrooms to be used by guests to stay on a bed and breakfast basis during school holidays. The scale of such operations would not be sufficient to establish the existence of a business.
 - (c) Example 18: Where four out of five bedrooms are used year-round as part of a bed and breakfast business; and the owner undertakes various actions reflecting of



conducting a business (advertising the rooms with appropriate third parties as well as employing permanent part time employees, and the length in time of operations). In this example, a business may be seen as being carried on.

- (d) Example 19: Where a studio apartment is to be sold to a SMSF; with a condition that the unit is leased back to a related entity operating a hotel business. Whilst the property may be used wholly and exclusively in a hotel business and constitute business real property, care would need to be taken if any related parties intend to stay in the unit for in-house asset purposes.

2.30 Examples 21 to 24 considers examples of residential properties used for business purposes:

- (a) Example 21: Where a house is used exclusively for a medical practice. Provided such use is exclusively for business purposes, the house may be considered business real property.
- (b) Example 22: Where a multi-purpose property is used as a salon and residential property. Following the death of a tenant, where such residential rooms are considered uninhabitable due to various safety breaches; the property may be considered business use if the residential use has ceased permanently.
- (c) Example 23: Where a mechanic operates from his home garage and employs friends. As the house remains used for residential needs, the property is not 'wholly and exclusively' used for business purposes.
- (d) Example 24: Where a member frequently (2 weeks every month) uses the top level of a double story premises for accommodation purposes, whilst using the entirety of the premises for business purposes during business hours. The property will not be business real property due to the member's use of the top level as a residence for a more than incidental use.



3 Structuring options

The factors that matter

3.1 In determining the most suitable type of entity to acquire a commercial property, care and consideration is required in relation to the advantages and disadvantages of the various structures available.

3.2 Such issues will include tax and legal considerations, such as:

Legal considerations

- (a) Asset protection: Whether risk can be limited.
- (b) Succession planning: The ability to pass the commercial property as part of a succession plan.
- (c) Funding: How can the acquisition and holding costs be funded.
- (d) New partners: Whether the structure allows for the introduction of new partners.
- (e) Complexity: The simplicity of such structure and ongoing compliance costs.

Tax considerations

- (f) Income tax treatment: How is income of the commercial property taxed.
- (g) Capital gains tax treatment: How are capital gains of the commercial property taxed.
- (h) Use of losses: The ease of availability for the structure to utilise tax losses.
- (i) Access to equity: Ease to access contributed equity,
- (j) Distribution flexibility: Whether flexibility is available to the structure.
- (k) Ability to stream: Whether the structure can stream particular types of income to specific beneficiaries.
- (l) Other tax specific provisions: Whether any other tax specific provisions may impact on the practical operation of the structure.

3.3 This section will provide a brief overview in relation to the above considerations before providing practical examples.

3.4 A later section will consider the State/Territory stamp duty and land tax considerations in purchasing and holding commercial property.

Individual ownership

3.5 Seldom is it advisable for the purchasing entity to be an individual in their personal name due to the lack of asset protection and tax planning flexibility.

3.6 That said, circumstances may arise – where the value of such commercial property, and the business operations of the client – where acquiring the asset in an individual's name may ultimately be considered suitable.

3.7 For many, however, the lack of flexibility and future planning for growth in relation to the income or capital of the commercial property makes this option inappropriate.

Summary of considerations

- (a) **Asset protection:**



- (i) Any risk arising on the commercial property is linked to the individual landowner (and vice versa in relation to any risk arising from the individual's daily actions).
- (b) **Succession planning:**
 - (i) The commercial property forms part of the individual's estate
- (c) **Funding:**
 - (i) An individual may borrow money in their personal name to acquire the property and cover any holding costs.
 - (ii) Where any funding is borrowed via a related party company, Division 7A considerations arise.
- (d) **New partners:**
 - (i) No ability to introduce new partners, other than selling part of the property to the incoming party (thereby triggering tax and stamp duty considerations).
- (e) **Complexity:**
 - (i) Simple to understand as no structures established, and no external regulation required.
- (f) **Income tax:**
 - (i) Taxed at individual's rate.
- (g) **Capital gains tax:**
 - (i) Taxed at individual's rate, and subject to any capital gains tax discounts or concessions available to the individual.
- (h) **Use of losses:**
 - (i) Available (including negative gearing).
- (i) **Access to equity:**
 - (i) Available immediately.
- (j) **Distribution flexibility:**
 - (i) No flexibility available
- (k) **Ability to stream:**
 - (i) No ability to stream income or capital gains.
- (l) **Other tax specific provisions:**
 - (i) Not applicable.

Discretionary trust ownership

- 3.8 In contrast, the use of a discretionary trust structure (particularly where a corporate trustee is utilised) provides the owner with tax planning flexibility in addition to asset protection and succession law planning opportunities.
- 3.9 The nature of a discretionary trust as a pass-through entity for tax purposes (through appropriate income and/or capital distributions) means that extracting income or capital of the trust to a beneficiary is often simpler than via a corporate structure.



- 3.10 However, this same nature ensures that excess income is rarely retained by the trust (due to the top marginal tax rate applying on accumulated income). Accordingly, options to reduce any debt owned by a trust is limited through after-tax money of individuals or companies; and where a company seeks to assist in contributing to the trust – Division 7A issues are required to be managed.
- 3.11 Further, the discretionary nature of such trusts often makes them not appropriate as investment structures for multiple family groups as beneficiaries will often not have any fixed entitlements to the trust asset. Other structures that allow discrete shares may be better suited; however, a discretionary trust may be appropriate in representing a person's interest.

Summary of considerations

- (a) **Asset protection:**
- (i) Available to segregate risk from bankruptcy.¹⁷
 - (ii) Difficult to segregate from defaults where personal guarantee provided.
- (b) **Succession planning:**
- (i) Terms of the trust deed and roles associated with the trust dictate how control passes (including the roles of any company trustee).
 - (ii) Asset remains trust property despite death of underlying controller.
- (c) **Funding:**
- (i) Trust may borrow money to acquire the property and cover any holding costs.
 - (ii) Where any funding is borrowed via a related party company, Division 7A considerations arise.
 - (iii) Individual guarantees often required prior to third party financiers agreeing to lend.
 - (iv) Persons may also gift to the trust.
- (d) **New partners:**
- (i) No ability to introduce new partners, other than selling part of the property to the incoming party (thereby triggering tax and stamp duty considerations) or broadening the beneficiary class (which may impact other tax provisions, such as the trust loss rules).
- (e) **Complexity:**
- (i) Complex to understand in light of trust law (both case law and pursuant to the relevant State/Territory Trusts Act) as well as the taxation of trusts.
 - (ii) Additional complexity where company trustee utilised in light of record keeping requirements.
- (f) **Income tax:**
- (i) Taxed at beneficiary's rate, which includes the relevant corporate tax of any corporate beneficiary.

¹⁷ *Australian Securities and Investments Commission In the Matter of Richstar Enterprises Pty Ltd v Carey (No. 6)* [2006] FCA 814



- (g) **Capital gains tax:**
 - (i) Taxed at beneficiary's rate, and subject to any capital gains tax discounts or concessions available to the beneficiary.
- (h) **Use of losses:**
 - (i) Losses trapped in trust and unable to be distributed.
 - (ii) Available in the trust, subject to satisfying trust loss rules.¹⁸
 - (iii) Care should be taken where family trust election made in order for discretionary trust to receive 'income injection' from related parties to utilise prior losses.
 - (iv) Family trust election may not be required where trust generates future income to offset prior year losses (subject to the satisfaction of other trust loss rules).
- (i) **Access to equity:**
 - (i) Available via exercising of appropriate distribution powers.
- (j) **Distribution flexibility:**
 - (i) Flexibility to distribute to such beneficiaries as the terms of the trust deed allows.
- (k) **Ability to stream:**
 - (i) Ability to stream franked distributions and capital gains to specifically entitled beneficiaries.¹⁹
- (l) **Other tax specific provisions:**
 - (i) Consideration required as to the application of section 100A ITAA 1936 as well as Division 7A ITAA 1936 where a corporate beneficiary is involved.

Unit trust ownership

- 3.12 Where the advantages of a discretionary trust are preferred (being the pass-through nature of the income or capital gains) as well as the added ability to allow discrete interests in the underlying – a unit trust may be utilised.
- 3.13 Despite the advantage, similar downsides exists relating to the inability to retain profits tax effectively in the structure; as well as potential Division 7A issues where a company seeks to assist in the financing of the arrangement.
- 3.14 In addition, as discussed in a later section, the use of a unit trust may bring additional stamp duty considerations in certain States where there are changes to the unitholding proportions that may not exist through the use of other structures.

Summary of considerations

- (a) **Asset protection:**
 - (i) Available to segregate risk from bankruptcy subject to unitholders of the unit trust forfeiting their investment.
 - (ii) Difficult to segregate from defaults where personal guarantee provided.
- (b) **Succession planning:**

¹⁸ Schedule 2F ITAA 1936

¹⁹ Division 6E ITAA 1936 and Subdivision 215-C and 20-B ITAA 1997



- (i) Terms of the trust deed and roles associated with the trust dictate how control passes (including the roles of any company trustee).
- (ii) Asset remains trust property despite death of underlying controller.
- (iii) Where multiple unitholders (whether related or non-related), an unitholders agreement may also dictate procedures.
- (c) **Funding:**
 - (i) Unit trust may borrow money to acquire the property and cover any holding costs.
 - (ii) Where any funding is borrowed via a related party company, Division 7A considerations may arise.
 - (iii) Individual guarantees often required prior to third party financiers agreeing to lend.
 - (iv) Unit trust may issue additional units to existing or prospective members.
- (d) **New partners:**
 - (i) Ability to introduce new partners by way of issuing additional units (potentially triggering tax and stamp duty considerations).
 - (ii) Availability to sell units to the incoming party (potentially triggering tax and stamp duty considerations).
- (e) **Complexity:**
 - (i) Complex to understand in light of trust law (both case law and pursuant to the relevant State/Territory Trusts Act) as well as the taxation of trusts.
 - (ii) Additional complexity where company trustee utilised in light of record keeping requirements.
- (f) **Income tax:**
 - (i) Taxed at unitholder's rate, which includes the relevant corporate tax of any corporate unitholder.
- (g) **Capital gains tax:**
 - (i) Taxed at unitholder's rate, and subject to any capital gains tax discounts or concessions available to the unitholder.
- (h) **Use of losses:**
 - (i) Losses trapped in trust and unable to be distributed.
 - (ii) Trust loss rules required to be met, noting additional difficulty if unit trust is not a 'fixed trust' and potential family trust election required (whether at a unit trust or unitholder level).²⁰
 - (iii) Negative gearing potentially available for underlying participant where borrowed at a participant level and used to capitalise the unit trust.
- (i) **Access to equity:**
 - (i) CGT Event E4 considerations.

²⁰ Schedule 2F ITAA 1936



- (j) **Distribution flexibility:**
 - (i) Flexibility to distribute if discretionary trust unitholder.
- (k) **Ability to stream:**
 - (i) Not available.
- (l) **Other tax specific provisions:**
 - (i) Consideration required as to the application of section 100A ITAA 1936 as well as Division 7A ITAA 1936 where a corporate beneficiary is involved.

Company ownership

- 3.15 In contrast with trust structures, corporate entities enable the retention of income to be taxed in the company. This may be useful where such amounts are intended to be retained in the company to reduce any debt levels of the commercial property.
- 3.16 A result of corporate entities being treated separately, means the extraction of income or capital gains may be complicated, compared to a trust distribution resolution.
- 3.17 Further, where separate corporate entities within an owner's group seeks to assist in financing the commercial property, the use of a company landowner allows the lending of such amounts without triggering Division 7A issues.
- 3.18 The use of a corporate structure also allows certain dynamics to exist between various companies within a corporate group. Most commonly, the interposition of a holding company between the current underlying owners and company landowner allows for dividends to be declared by the landowner and distributed to the holding company for retention.
- 3.19 In this regard, it should be appreciated that receiving of dividends by the holding company from the landowner company **are not** included in the definition of 'base rate entity passive income',²¹ and in certain circumstances – such holding company may satisfy the definition of a 'base rate entity'.²²
- 3.20 As such, it should be noted that a base rate entity company receiving a dividend franked at 30% is not eligible for a refund of an excess franking credit.²³ Such base rate entity 'holding company may, however, be entitled to a tax loss for that year.²⁴
- 3.21 Alternatively, larger portfolios may consider the benefits of tax consolidation.

Summary of considerations

- (a) **Asset protection:**
 - (i) Available to segregate risk from bankruptcy subject to members of the company forfeiting their investment.
 - (ii) Difficult to segregate from defaults where personal guarantee provided.

²¹ Section 23AB *Income Tax Rates Act 1986* (Cth)

²² Section 23AA *Income Tax Rates Act 1986* (Cth). For holding companies that hold at least a 10% share in another company, the distribution of dividends to that holding company will not amount to base rate entity passive income as the dividend relates to a non-portfolio dividend; provided such dividend equates to at least 20% of the holding company's income for that particular income year.

²³ Section 67-25 ITAA 1997

²⁴ Section 36-55 ITAA 1997



- (b) **Succession planning:**
 - (i) Terms of the company constitution and director and member roles associated with the company dictates how control passes.
 - (ii) Asset remains company property despite death of underlying controller.
 - (iii) Where multiple members (whether related or non-related), a shareholders agreement may also dictate procedures.
- (c) **Funding:**
 - (i) Company may borrow money to acquire the property and cover any holding costs.
 - (ii) Individual guarantees often required prior to third party financiers agreeing to lend.
 - (iii) Company may issue additional shares to existing or prospective members.
 - (iv) Division 7A does not apply to loans from related companies.²⁵
- (d) **New partners:**
 - (i) Ability to introduce new partners by way of issuing additional shares (potentially triggering tax and stamp duty considerations).
 - (ii) Availability to sell shares to the incoming party (potentially triggering tax and stamp duty considerations).
- (e) **Complexity:**
 - (i) Complex given corporations law and obligations imposed, with recording keeping requirements.
- (f) **Income tax:**
 - (i) Taxed at company tax rate (30% or 25%, in the case of a base rate entity).
- (g) **Capital gains tax:**
 - (i) Taxed at company tax rate (30% or 25%, in the case of a base rate entity) subject to any capital gains tax concessions available (if relevant).
 - (ii) No capital gains tax discount available.
- (h) **Use of losses:**
 - (i) Losses trapped in company and unable to be distributed.
 - (ii) Company loss rules required to be met, and potential family trust election require if underlying member is a discretionary trust.
 - (iii) Negative gearing potentially available for underlying participant where borrowed at a participant level and used to capitalise the company.
- (i) **Access to equity:**
 - (i) Available via declaration of dividend.
 - (ii) Division 7A considerations in certain circumstances.
- (j) **Distribution flexibility:**

²⁵ Section 109K ITAA 1936



- (i) Flexibility to distribute if discretionary trust member.
- (k) **Ability to stream:**
 - (i) Not available.
- (l) **Other tax specific provisions:**
 - (i) Division 7A considerations if choosing to benefit from the commercial property holding company.
 - (ii) Care required to be taken to ensure franking credits retained if declaring dividends to a discretionary trust shareholder with significant revenue losses.

Partnership ownership

- 3.22 Where multiple entities are to be utilised to acquire the commercial property, a partnership may be considered as an option.
- 3.23 The type of asset involved with the partnership will ultimately dictate how each of the various considerations are dealt with.
- 3.24 Thought should be had as to the suitability of such a structure compared through the use of a company or unit trust; in light of the additional considerations as to the relevant partnership legislation.

Self-managed superannuation fund ownership

- 3.25 For certain clients, acquiring commercial property through their SMSF will be a valid structuring option.
- 3.26 Such clients include business owners looking to acquire 'business real property' (discussed above) for their own use. The acquisition of such commercial property through a business owner's SMSF provides the owner with certainty of a premises as well as assisting them build up retirement balances (that may not always happen).
- 3.27 Due to various superannuation law rules including prohibitions from borrowing, such acquisitions are commonly undertaken through a 'limited recourse borrowing arrangement' or (in the case of multiple business owners) through an unrelated unit trust.
- 3.28 This does not necessarily mean that commercial properties for passive investment cannot be acquire through a SMSF; but if seeking to utilise a SMSF care must be taken to ensure the myriad of SISA and SISR rules are met, including (but not limited to):
 - (a) Managing self-funding into the SMSF complies with contribution rules (including arrangements that may be seen as improvements of the asset²⁶).
 - (b) Ensuring the arm's length investment rules are met.²⁷
 - (c) Ensuring the investment complies with the SMSF's investment strategy.
 - (d) Ensuring the investment and subsequent arrangements do not confer any loan or financial assistance on a member or a related of a member (whether directly or indirectly).²⁸

²⁶ Taxation Ruling TR 2010/1 at paragraph 4

²⁷ Section 109 SISA

²⁸ Section 65 SISA



- (e) Ensuring the sole purpose test is considered and met.²⁹
- (f) Ensuring the SMSF does not hold 'in-house assets' exceeding 5% of the total value of the SMSF's assets.³⁰

3.29 Even if the various issues are manageable, thought should be had as to the appropriateness in light of the long term nature of SMSFs.

Summary of considerations

- (a) **Asset protection:**
 - (i) Available to segregate risk from bankruptcy.³¹
- (b) **Succession planning:**
 - (i) Terms of the SMSF deed and roles associated with the SMSF dictate how control passes (including the roles of any company trustee).
 - (ii) Binding death benefit nominations and reversionary pensions dictate what happens to any death benefits/pensions.
- (c) **Funding:**
 - (i) Member contributions.
 - (ii) General prohibition against borrowing.³²
 - (iii) Limited recourse borrowing arrangements available, noting limited financiers enter such arrangements.³³
- (d) **New partners:**
 - (i) No ability to introduce new partners, other than selling part of the property to the incoming party (thereby triggering tax and stamp duty considerations; as well as ensuring care is taken superannuation laws are complied with).
- (e) **Complexity:**
 - (i) Superannuation law (SISA and SISR) relevant consideration, as well as additional audit requirements.
 - (ii) Complex to understand in light of trust law (both case law and pursuant to the relevant State/Territory Trusts Act) as well as the taxation of trusts.
 - (iii) Additional complexity where company trustee utilised in light of record keeping requirements.
- (f) **Income tax:**
 - (i) Contributions generally taxed at 15%, noting Division 293 tax (15% on concessional contributions) where member's income and concessional super contributions exceeds \$250,000.

²⁹ Section 62 SISA

³⁰ Section 83 SISA

³¹ Section 116 *Bankruptcy Act 1966* (Cth) subject to clawback provisions of sections 128B and 128C *Bankruptcy Act 1966* (Cth)

³² Section 67 SISA

³³ Section 67A SISA.



- (ii) Income generated by investments taxed at 15% (unless the SMSF is in pension phase).
- (iii) Non-arm's length income taxed at 45%.
- (g) **Capital gains tax:**
 - (i) Capital gains tax discount available (1/3).
- (h) **Use of losses:**
 - (i) Losses trapped in SMSF and unable to be distributed.
- (i) **Access to equity:**
 - (i) Unavailable unless conditions of release met (including reaching preservation age or 65).
- (j) **Distribution flexibility:**
 - (i) None.
- (k) **Ability to stream:**
 - (i) None.
- (l) **Other tax specific provisions:**
 - (i) Consideration to be had in relation to SISA and SISR.

Limited recourse borrowing arrangements

- 3.30 SMSFs are generally prohibited from borrowing money (or maintaining an existing borrowing of money).³⁴
- 3.31 An exception exists where a SMSF enters into a limited recourse borrowing arrangement.³⁵
- 3.32 Such arrangements require:
- (a) money to be applied to the acquisition of a single acquirable asset, including:
 - (i) expenses incurred in connection with the borrowing or acquisition, or in maintaining or repairing the acquirable asset (but not expenses incurred in improving the acquirable asset); and
 - (ii) money applied to refinance a borrowing (including any accrued interest on a borrowing) to which this subsection applied (including because of section 67B) in relation to the single acquirable asset (and no other acquirable asset); and
 - (b) the acquirable asset is held on trust so that the SMSF trustee acquires a beneficial interest in the acquirable asset; and
 - (c) the SMSF trustee has a right to acquire legal ownership of the acquirable asset by making one or more payments after acquiring the beneficial interest; and
 - (d) the rights of the lender or any other person against the SMSF trustee for, in connection with, or as a result of, (whether directly or indirectly) default on:
 - (i) the borrowing; or

³⁴ Section 67 SISA.

³⁵ Section 67A SISA.



- (ii) the sum of the borrowing and charges related to the borrowing;
are limited to rights relating to the acquirable asset; and
 - (e) if, under the arrangement, the SMSF trustee has a right relating to the acquirable asset (other than a right described in paragraph (c))—the rights of the lender or any other person against the SMSF trustee for, in connection with, or as a result of, (whether directly or indirectly) the SMSF trustee's exercise of the SMSF trustee's right are limited to rights relating to the acquirable asset; and
 - (f) the acquirable asset is not subject to any charge (including a mortgage, lien or other encumbrance) except as provided for in paragraph (d) or (e).
- 3.33 When entering into a LRBA, care must be taken to ensure such requirements are met and SMSFR 2012/1 provides further information.
- 3.34 Of note, however, issues to consider prior to entering into a LRBA can include:
- (a) The borrowing can only be applied for the acquisition of a single acquirable asset.³⁶
 - (b) Where separate multiple proprietary rights are included, thought will need to be had as to whether it is reasonable to conclude that what is being acquired is distinctly identifiable as a single asset.³⁷
 - (c) Consideration may include whether under law the two assets must be dealt with together as well as whether there is an existence of a unifying physical object.³⁸
 - (d) For example, where two adjacent blocks are to be acquired (under separate lots), two LRBAs may be required, rather than a single LRBA.³⁹
 - (e) In contrast, a factory complex spread across three titles may be considered a single acquirable asset due to the unifying presence of the factory across the three lots.⁴⁰
 - (f) Unlike a factory/warehouse, farmland across multiple titles may struggle to be considered a single acquirable business as there would be no physical or legal impediment to deal with each title separately.⁴¹
 - (g) Borrowing may also be applied to maintain or repair an asset **but must not be applied to improve** a single acquirable asset. Accordingly, the subsequent use of the borrowings on the single acquirable asset may also warrant further consideration.⁴²

Division 296

- 3.35 In addition to the above summary, thought should also be had as to the impact of the proposed Division 296 laws.
- 3.36 Although not legislated, such proposed rules may impact the viability of SMSF ownership (or vary the calculations) as follows:
- (a) A 15% tax on earnings on account balances above \$3million.
 - (b) An additional 10% tax on earnings on account balances above \$10million.

³⁶ SMSFR 2012/1 at paragraph 10.

³⁷ Ibid 11.

³⁸ Ibid 12.

³⁹ Ibid Example 1.

⁴⁰ Ibid Example 2.

⁴¹ Ibid Example 3

⁴² Ibid 25 contains a table contrasting between what constitutes 'maintaining/repairing' and 'improving'.



- 3.37 Unlike the prior proposed legislation, such thresholds will be indexed; and earnings only applied to realised gains.
- 3.38 Whilst it is outside the scope of this paper and presentation to undertake a detailed analysis as to the proposed rules (other specialists can identify quirks and unintended consequences in certain circumstances), in considering the impact Division 296 may have for an owner, it is useful to consider the financial impact such tax may have for the taxpayer.
- 3.39 Example 1.1 of the Explanatory Memorandum to the legislation provides the following example of a taxpayer with a total superannuation balance (**TSB**) greater than \$3million:

Example 1.1 TSB greater than \$3million

Jordan has a TSB of \$4 million at the end of the 2026-27 income year. In the 2026-27 income year, their total superannuation earnings are \$100,000.

As Jordan's TSB at the end of the 2026-27 income year is greater than the large superannuation balance threshold of \$3 million, and their total superannuation earnings are greater than nil, Jordan will have taxable superannuation earnings for Division 296 purposes.

The proportion of Jordan's TSB above the threshold is 25 per cent ($(\$4 \text{ million} - \$3 \text{ million})/\$4 \text{ million}$).

Jordan's taxable earnings for Division 296 purposes are calculated as \$25,000 by multiplying their superannuation earnings by the percentage above the threshold (25 per cent of \$100,000).

This taxable earnings amount will be taxable at 15 per cent. Jordan will have a Division 296 tax liability of \$3,750 for the 2026-27 income year (15 per cent of \$25,000).

- 3.40 In the case of a member with a TSB greater than \$10million:

Example 1.2 TSB greater than \$10million

Kelly has a TSB of \$12 million at the end of 2026-27, and total superannuation earnings of \$500,000.

As Kelly's TSB is greater than the very large superannuation balance threshold of \$10 million, and her total superannuation earnings are greater than nil, Kelly will have taxable superannuation earnings – including a very large superannuation balance earnings component – for Division 296 purposes.

The proportion of Kelly's TSB above the large superannuation balance threshold of \$3 million is 75 per cent ($(\$12 \text{ million} - \$3 \text{ million})/\$12 \text{ million}$). The proportion of Kelly's TSB above the very large superannuation balance threshold of \$10 million is 16.67 per cent ($(\$12 \text{ million} - \$10 \text{ million})/\$12 \text{ million}$).

Kelly's Division 296 tax comprises two parts.

For the proportion above the \$3 million threshold, she has taxable superannuation earnings calculated as \$375,000 (75 per cent of \$500,000).

For the proportion above \$10 million, she also has a very large superannuation balance earnings component calculated as \$83,350 (16.67 per cent of \$500,000).

The amount of \$375,000 relating to the proportion above \$3 million will be taxed at 15 per cent, resulting in tax of \$56,250 (15 per cent of \$375,000). The amount of \$83,350 relating to the proportion above \$10 million will be taxed at an additional 10 per cent, resulting in tax of \$8,335 (10 per cent of 83,350).



- 3.41 In determining the impact of the proposed Division 296 tax on SMSFs acquiring commercial property, it should be appreciated that if there is a likelihood of the value of such superannuation balances growing at an exponential rate, then:
- (a) Division 296 will apply in circumstances where the value of the balance grows at a rate that grossly exceeds indexation.
 - (b) In such circumstances, the SMSF will have a tax rate on income of greater than 15%, with certain proportions of the income being taxed at 40%. While this may average to be substantially less than an individual's personal tax rate; such additional tax will need to be weighed against the added compliance complexity that arises through the use of a SMSF in acquiring commercial property.

Other ownership

- 3.42 It is noted that variations or combinations of the above ownership structures may be utilised in acquiring commercial property.
- 3.43 Such variations or combinations could include (but are not limited to):
- (a) A SMSF holding units in an unrelated unit trust – potentially an option where there are multiple business owners wishing to acquire the commercial property through the use of their respective SMSFs.⁴³
 - (b) A SMSF holding units in an ungeared unit trust – potentially allowing related investors to invest in property without the commercial property breaching the in-house asset rules for SISA purposes.⁴⁴
 - (c) Where financing is not required, an SMSF acquiring the property jointly (as tenants in common) with a related party – where the property is not leased to a related party⁴⁵ (unless it is business real property).⁴⁶
 - (d) A hybrid trust – potentially where there are tailored objectives between income and capital beneficiaries.
- 3.44 As usual, care should be taken and in determining the appropriateness of such structures, ultimately, the various considerations should be factored as well as whether the same objectives can be achieved through a simpler structure.
- 3.45 Where such ownership structure involves a SMSF, additional care must be taken to ensure the SISA and SISR are complied with (as briefly summarised above).

⁴³ An interest in an unrelated trust does not meet the definition of an 'in-house asset', noting that the definition of 'related party' for the purposes of SISA is broad and includes the concept of a 'part 8 associate' that includes uncles, aunts, nephews and nieces (but not cousins). Where other parties to the unit trust are related by blood and through a separate entity (such as a discretionary trust), then care will need to be taken to identifying whether such unit trust is a related party or not.

⁴⁴ Reg 13.22C SISR

⁴⁵ Section 71(1)(i)

⁴⁶ Section 71(1)(g)



4 State and Territory considerations

- 4.1 While often not at the forefront of minds when structuring the acquisition entity – the impact State and Territory (referred to as States for the purposes of this section, with the greatest of respect to those from the Australian Capital Territory and Northern Territory) taxes may play can be an additional cost not considered.
- 4.2 In relation to the acquisition of property, the relevant State tax considerations generally include:
- (a) Duty payable on the acquisition of the property.
 - (b) Duty payable on the changing of any underlying ownership interest in the property (in the case of a trust landowner).
 - (c) Duty payable on the changing of any underlying ownership interest in the property (in the case of a company landowner).
 - (d) Land tax payable on the holding of the property.
- 4.3 Unfortunately, there is no single answer as each State has their own specifically drafted laws which can vary depending on whether it applies to duty or land tax; but also whether the property acquired is used for commercial purposes or residential purposes.
- 4.4 Due to the breadth of the discussion, this paper seeks to summarise the broad position; whilst flagging potential issues/considerations.⁴⁷ This section will be structured to discuss each of the above State tax considerations on a State by State basis; and in the context of the duty considerations for trusts – ‘listed trusts’ and ‘widely held trusts’ will not be considered given their non-application to commercial property acquisitions by small-medium business clients.
- 4.5 Care should be taken to seek appropriate advice, particularly in the case of lesser known provisions; or the application of anti-avoidance provisions in the legislation.⁴⁸
- 4.6 In addition to the general considerations mentioned above, where specific commercial property relates to primary production or charitable purposes; then care should also be taken to review whether stamp duty or land tax exemptions applies.

Queensland

Duty payable on the acquisition of the property

- 4.7 Transfer duty rates are levied between 3.5% and 5.7%.
- 4.8 Where residential land is acquired by foreign persons, additional duty of 8% applies.
- 4.9 The concept of foreign persons is defined to include:⁴⁹
- (a) A foreign individual – being an individual other than an Australian citizen or permanent resident (noting a permanent resident includes a New Zealand citizen who is a holder of a special category visa).

⁴⁷ It is noted that notwithstanding the author resides in Queensland, all care has been taken to provide a high level overview of the duty and land tax rules of other States and Territories.

⁴⁸ For example: See *Tao v Commissioner of State Revenue (Review and Regulation)* [2024] VCAT 637 and the application of section 82 VIC Duties Act in triggering landholder duty when changing a corporate trustee's directorship/shares.

⁴⁹ Sections 234 to 237 QLD Duties Act.



- (b) A foreign corporation – being a corporation incorporated outside Australia or in which foreign persons have a controlling interest.
- (c) A foreign trust – being a trust where at least 50% of trust interests in the trust are held by a foreign individual, foreign corporation, trustee of a foreign trust or a ‘related person of a person mentioned’.

4.10 Of relevance, a ‘trust interest’ is defined to be a person’s interest as a beneficiary of a trust. In the case of a discretionary trust, a ‘trust interest’ does not consider the general beneficiary class but considers who the taker-in-default of the trust are (more colloquially known as the ‘default beneficiaries’ in the case of a discretionary trust).⁵⁰

Duty payable on the changing of any underlying ownership interest in the property (trusts)

- 4.11 Relatively unique to Queensland is the fact that a ‘trust acquisition’ or ‘trust surrender’ constitutes a ‘dutiabale transaction’.⁵¹
- 4.12 A trust acquisition occurs when a person acquires a trust interest in a trust that holds dutiable property,⁵² with duty payable based on the value of the trust acquisition (being the greater of the consideration and the unencumbered value).⁵³
- 4.13 As there is no threshold to the application of duty to a trust acquisition or trust surrender, care must be taken when changing the unitholders of a unit trust holding Queensland property; as duty will be triggered and payable.
- 4.14 It is also noted that Queensland definition of dutiable property includes Queensland business assets.⁵⁴

Duty payable on the changing of any underlying ownership interest in the property (companies)

- 4.15 In contrast to the treatment of trusts, Queensland imposes landholder duty for a relevant acquisition in a landholder.⁵⁵
- 4.16 A relevant acquisition is defined to include circumstances where:⁵⁶
 - (a) A person acquires a significant interest in a landholder.
 - (b) The person acquires an interest in a landholder, and when aggregated with other interests owned by that person or related persons, constitutes a significant interest.
 - (c) A person increases significant interest further.
- 4.17 Importantly, the threshold for significant interest is 50% (for a private landholder) where the landholder (and their subsidiaries) hold unencumbered land-holdings of \$2million or more.⁵⁷

Land tax payable on the holding of the property

- 4.18 Queensland levies land tax at different rates (and land tax-free thresholds) depending on if the land is owner:

⁵⁰ Section 57 QLD Duties Act.

⁵¹ Section 9 QLD Duties Act.

⁵² Section 55 QLD Duties Act.

⁵³ Section 62 QLD Duties Act.

⁵⁴ Section 10 QLD Duties Act.

⁵⁵ Section 157 QLD Duties Act.

⁵⁶ Section 158 QLD Duties Act.

⁵⁷ Section 165 QLD Duties Act.



- (a) By an individual – a \$600,000 land tax free threshold applies.
 - (b) By a trustee of a trust or company – a \$350,000 land tax free threshold applies.
 - (c) By an 'absentee' – a \$350,000 land tax free threshold applies.
- 4.19 A surcharge rate of 3% also applies to a foreign company or trustee of a foreign trust (based on similar definitions of the Queensland duty legislation) holding land tax. This surcharge rates applies regardless if the underlying land is residential or commercial in nature.
- 4.20 Again, somewhat unique to Queensland is the fact that the assessment of co-owners of land is not grouped unless there are at least 5 co-owners of the land,⁵⁸ provided:
- (a) Each trust is separately assessed.⁵⁹
 - (b) The arrangement is not considered an avoidance scheme.⁶⁰
- 4.21 Accordingly, in certain circumstances, multiple entities may be utilized to acquire a single property in Queensland whilst being separately assessed.
- 4.22 Also relevant is the fact that for certain commercial properties, Queensland land tax can be passed onto the tenant to be paid (which may influence the broader calculation of how to structure the acquisition).

New South Wales

Duty payable on the acquisition of the property

- 4.23 Transfer duty rates are levied between 4.5% and 5.5%.
- 4.24 Where residential land is acquired by foreign persons, a surcharge purchase duty of 9% applies.
- 4.25 A foreign person is defined to mean a person who is a foreign person under *Foreign Acquisition and Takeovers Act 1975 (Cth) (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.⁶¹

Duty payable on the changing of any underlying ownership interest in the property (trusts)

- 4.26 Unlike Queensland, changes in unit trust interests in New South Wales fall under their landholder duty provisions.
- 4.27 Specifically, where a private unit trust scheme applies,⁶² a significant interest has been decreased from 50% to 20% interest (as of 1 February 2024).⁶³
- 4.28 A landholder is defined to include companies or unit trust schemes with landholdings exceeding \$2million.⁶⁴

⁵⁸ Section 22 QLD Land Tax Act

⁵⁹ Section 20 QLD Land Tax Act.

⁶⁰ Part 8 QLD Land Tax Act.

⁶¹ Section 104J of NSW Duties Act

⁶² Defined to be a unit trust scheme that is not a public unit trust scheme or a unit trust scheme that is registered – section 157AA NSW Duties Act

⁶³ Section 150(2) NSW Duties Act.

⁶⁴ Section 146 NSW Duties Act.



Duty payable on the changing of any underlying ownership interest in the property (companies)

4.29 Unlike Queensland and the New South Wales application of the landholder duty rules to private unit trust schemes, a private company landholder's significant interest remains at 50%.⁶⁵

Land tax payable on the holding of the property

4.30 New South Wales levies land tax at different rates (and land tax-free thresholds) depending on the owner of the land:

- (a) General – a land tax free threshold of \$1,075,000 with a rate of 1.6% (noting a premium rate applying for land valued above \$6,571,000).
- (b) Special trusts (which include discretionary trusts and unit trusts) – 1.6% with no land tax free threshold.

4.31 A foreign surcharge of 5% also applies to foreign owners for any residential land owned (in contrast with any land in Queensland).

4.32 It should be noted in certain circumstances, a fixed trust (as defined in the NSW Land Tax Act and not to be confused with the ITAA 1936/ITAA 1997 definition of fixed trust) will not be treated as a special trust.⁶⁶

4.33 There are also aggregation rules where land are owned by 2 or more related companies.⁶⁷

Victoria

Duty payable on the acquisition of the property

4.34 Transfer duty rates are levied approximately between 5.5% and 6%.

4.35 Where residential land is acquired by foreign purchasers, a foreign purchaser additional duty surcharge of 8% applies.

4.36 Such foreign purchaser is defined to include:

- (a) A foreign trust is defined to include a foreign natural person, foreign corporation or the trustee of a foreign trust.⁶⁸
- (b) A foreign natural person is defined similarly to Queensland's definition of a foreign individual.
- (c) A foreign trust is defined to include a trust where a foreign purchaser holds a substantial interest where by a substantial interest is defined 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.⁶⁹

⁶⁵ Section 150(2)(b) NSW Duties Act.

⁶⁶ Section 3A(a)(c) NSW Land Tax Act.

⁶⁷ Section 29 NSW Land Tax Act.

⁶⁸ Section 3 VIC Duties Act.

⁶⁹ Section 3B VIC Duties Act.



- (d) 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.⁷⁰

4.37 Moving forward, consideration should also be had to the Commercial and Industrial Property Tax, being an annual payment of the original stamp duty payable over 10 years (and then an annual 1% tax on the land value of commercial and industrial properties in Victoria), as opposed to paying the entire stamp duty upfront.

Duty payable on the changing of any underlying ownership interest in the property (trusts)

4.38 In contrast with Queensland and New South Wales, a landholder for the purposes of landholder duty includes a 'private unit trust scheme' and private company with landholdings in Victoria with a total unencumbered value of \$1million.⁷¹

4.39 Similar to New South Wales, a significant interest is a 20% or more interest.⁷²

Duty payable on the changing of any underlying ownership interest in the property (companies)

4.40 Like New South Wales, a private company landholder's significant interest remains at 50%.⁷³

Land tax payable on the holding of the property

4.41 Victoria levies land tax at different rates (and land tax-free thresholds) depending on the owner of the land:

- (a) General – a land tax free threshold of \$50,000 before a 0.3% land tax rate commencing at \$300,000.
- (b) Trust surcharge rates - \$25,000 land tax free threshold with land tax rates commence at 0.375%, and then 0.675% by \$250,000.
- (c) Absentee - \$50,000 land tax free threshold with a 4% land tax rate.

4.42 A foreign surcharge commencing from 4.375% also applies to absentee trust owners.

4.43 Like New South Wales, Victoria groups related companies for land tax purposes.⁷⁴

4.44 In certain circumstances, land owned by separate trusts may be aggregated in Victoria (where an implied or constructive trust can be held).⁷⁵

4.45 Thought should also be had in relation to any of the other additional property related taxes in Victoria:

- (a) Vacant Residential Land Tax – applicable where the land was vacant for more than six months in the preceding calendar year.

⁷⁰ '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.

⁷¹ Section 71 VIC Duties Act.

⁷² Section 79(2)(a) VIC Duties Act.

⁷³ Section 79(2)(b) VIC Duties Act.

⁷⁴ Section 50 VIC Land Tax Act.

⁷⁵ Section 46L VIC Land Tax Act.



- (b) Windfall Gains Tax where land is rezoned by a planning scheme amendment resulting in a value uplift of more than \$100,000.

Tasmania

Duty payable on the acquisition of the property

- 4.46 Transfer duty rates are levied between 1.75% and 4.5%.
- 4.47 A foreign surcharge rate of 8% applies to residential property acquired by a foreign person, and a 1.5% rate applies to primary production property acquired by a foreign person.
- 4.48 Tasmania adopts similar definitions to foreign persons as Victoria.⁷⁶

Duty payable on the changing of any underlying ownership interest in the property (trusts)

- 4.49 A landholder for the purposes of landholder duty includes a 'private unit trust scheme' and private company with landholdings in Victoria with a total unencumbered value of \$500,000.⁷⁷
- 4.50 A private landholder includes a private unit trust scheme and private company,⁷⁸ and a significant interest for a private landholder is defined include 50% or more.⁷⁹

Duty payable on the changing of any underlying ownership interest in the property (companies)

- 4.51 Similar landholder duty rules apply to companies as to unit trusts in Tasmania.

Land tax payable on the holding of the property

- 4.52 Tasmania levies land tax between 0.45% and 1.5%.
- 4.53 A foreign surcharge of 2% also applies to foreign persons holding residential land (other than their principal place of residence).
- 4.54 Tasmania groups related companies for land tax purposes.⁸⁰
- 4.55 In certain circumstances, land owned by a trustee for multiple trusts may be aggregated in Tasmania.⁸¹

South Australia

Duty payable on the acquisition of the property

- 4.56 Transfer duty rates are levied at around 5.5%.
- 4.57 A foreign surcharge rate of 7% applies to residential property acquired by a foreign person.
- 4.58 South Australia adopts a different definition in relation to what constitutes a foreign trust – particularly in the case of a discretionary trust that requires the identification of any of the following roles as a foreign person: trustee, a person who has the power to appoint under

⁷⁶ Section 3 per definitions of 'foreign corporation', 'foreign natural person', 'foreign person', 'foreign trust' and 'foreign trustee, section 4A and section 4B TAS Duties Act.

⁷⁷ Section 61 TAS Duties Act.

⁷⁸ Section 61(2) TAS Duties Act.

⁷⁹ Section 66(2) TAS Duties Act.

⁸⁰ Section 24 TAS Land Tax Act.

⁸¹ *Nekon Pty Ltd v Commissioner of State Revenue* (2010) 19 Tas R 416



the trust, an identified object under the trust and a person who takes capital of the trust property in default.⁸²

Duty payable on the changing of any underlying ownership interest in the property (trusts)

- 4.59 There is no landholder value threshold for landholder duty to apply in South Australia.
- 4.60 A significant interest still constitutes a 50% or more interest, however, 'look-through' provisions exist to aggregate related entities in South Australia (regardless of how minority of an interest).⁸³

Duty payable on the changing of any underlying ownership interest in the property (companies)

- 4.61 Similar rules apply to companies as to trusts.

Land tax payable on the holding of the property

- 4.62 South Australia levies land tax at different rates (and land tax-free thresholds) depending on the owner of the land:
- (a) General – a land tax free threshold of \$833,000.
 - (b) Trust surcharge rates - \$25,000 land tax free threshold.
 - (c) Absentee - \$50,000 land tax free threshold with a 4% land tax rate.
- 4.63 No foreign surcharge applies to foreign landowners.
- 4.64 South Australia contains similar related corporation group provisions⁸⁴ and trust rates regime as Victoria.

Western Australia

Duty payable on the acquisition of the property

- 4.65 Transfer duty rates are levied between 4.75% and 5.15%.
- 4.66 A foreign surcharge of 7% applies to residential properties acquired by foreign purchasers.⁸⁵

Duty payable on the changing of any underlying ownership interest in the property (trusts)

- 4.67 A landholder for the purposes of landholder duty includes an entity with landholdings in Western Australia with a total unencumbered value of \$2,000,000.⁸⁶
- 4.68 An entity includes a corporation and unit trust scheme,⁸⁷ and a significant interest for a private landholder is defined to be 50% or more.⁸⁸

⁸² Section 2(14) SA Duties Act.

⁸³ Section 96 SA Duties Act with such example whereby 'Entity A holds a 75% proportionate interest in entity B which in turn holds a 60% proportionate interest in entity C which in turn holds a 40% proportionate interest in entity D. In this case entity A has a notional interest in the assets held beneficially by entity B and entity C but not in the assets held by entity D.'

⁸⁴ Section 13J SA Land Tax Act

⁸⁵ Chapter 33A WA Duties Act

⁸⁶ Section 155 WA Duties Act.

⁸⁷ Section 152 WA Duties Act.

⁸⁸ Section 161 WA Duties Act.



Duty payable on the changing of any underlying ownership interest in the property (companies)

4.69 Similar rules apply to companies as to trusts.

Land tax payable on the holding of the property

4.70 Western Australia has a land tax free threshold of \$300,000. A 'metropolitan region improvement tax' is also imposed on certain property at a rate of 0.14%.

4.71 No foreign surcharge applies to foreign landowners.

4.72 Western Australia does not contain related corporation grouping provisions.

4.73 Western Australia confirms that separate lots or parcels of land can be separately assessed for different beneficiaries.⁸⁹ The legislation does not clarify if there are trust grouping provisions.

Australian Capital Territory

Duty payable on the acquisition of the property

4.74 No duty is payable on commercial property valued less than \$2million.

4.75 Different rates apply to non-commercial property conveyances.

Duty payable on the changing of any underlying ownership interest in the property (trusts)

4.76 A 'private corporation' is a landholder if it holds land in the Territory.⁹⁰

4.77 Notwithstanding no threshold, duty is only payable for the value above \$2,000,000.

4.78 A 'private corporation' includes a private company or a private unit trust,⁹¹ and a significant interest for a landholding private corporation is defined to be a majority interest in the corporation.⁹²

Duty payable on the changing of any underlying ownership interest in the property (companies)

4.79 Similar rules apply to companies as to trusts.

Land tax payable on the holding of the property

4.80 Land tax is not imposed on commercial land.

4.81 Rates, may, however, be payable.

4.82 No grouping of company or trust provisions are present.

Northern Territory

Duty payable on the acquisition of the property

4.83 Maximum stamp duty payable in Northern Territory is 5.95%.

⁸⁹ Section 11(2) WA Land Tax Act.

⁹⁰ Section 79 ACT Duties Act.

⁹¹ Section 78 ACT Duties Act

⁹² Section 86 ACT Duties Act.



Duty payable on the changing of any underlying ownership interest in the property (trusts)

4.84 A 'land-holding corporation' is a corporation entitled to land that has an unencumbered value of at least \$500,000.⁹³

4.85 A 'land-holding corporation' includes a corporation and a unit trust scheme,⁹⁴ and a significant interest for a land-holding corporation is defined to be 50% or more.⁹⁵

Duty payable on the changing of any underlying ownership interest in the property (companies)

4.86 Similar rules apply to companies as to trusts.

Land tax payable on the holding of the property

4.87 Land tax is not levied in Northern Territory.

⁹³ Section 56N NT Duties Act.

⁹⁴ Section 4 NT Duties Act

⁹⁵ Section 56Q NT Duties Act.



5 Restructuring opportunities

- 5.1 Having considered the various issues, if the property is held in a suboptimal structure; thought should be had as to any available opportunities to restructure the asset.
- 5.2 The benefits of restructuring to a more appropriate should be weighed against any CGT/stamp duty/goods and services tax implications.
- 5.3 Potential CGT rollovers, concessions and exemptions available for use include (but are not limited to):
- (a) transferring an asset from an individual or trustee of a trust to a company (with the shares held by the transferor)⁹⁶;
 - (b) transferring an asset held by partners in a partnership to a company (with the shares held by the partners accordingly)⁹⁷ – this could be relevant when it is determined that it would be better suited to hold the commercial property in a company;
 - (c) utilising the small business restructure rollover to move a business from one structure to another⁹⁸ - available where the property satisfy the relevant requirements;
 - (d) utilising the small business CGT concessions to move business assets from one structure to another⁹⁹ - available where the property satisfy the relevant requirements; or
 - (e) having assets transferred within a tax consolidated group.
- 5.4 When employing a strategy, specialist tax advice must be sought to ensure all the appropriate requirements are met. Such advice will also 'marry' the various tax considerations that intertwine when undertaking a restructure, including stamp duty and GST factors (particularly where entities are registered for GST).
- 5.5 In this regard, a common roadblock to restructuring property (unlike business assets) is the cost of stamp duty on the transfer.
- 5.6 This paper, accordingly, seeks to provide some alternative options from a duty perspective.

Duty exemptions/concessions

- 5.7 Some potential stamp duty exemptions to enable the restructuring of property includes:
- (a) In New South Wales – Section 62A NSW Duties Act imposes \$750 duty for the transfer of dutiable property from a member (or members) of a SMSF to the trustee of the SMSF only if certain requirements are met:
 - (i) there are no other members of the superannuation fund (besides the member or members transferring or agreeing to transfer the property) or the dutiable property is segregated from other fund property, and
 - (ii) the property is to be used solely for the purpose of providing a retirement benefit to the member or members transferring or agreeing to transfer the property, and

⁹⁶ Subdivision 122-A ITAA 1997

⁹⁷ Subdivision 122-B ITAA 1997

⁹⁸ Subdivision 328-G ITAA 1997

⁹⁹ Division 152 ITAA 1997



- (iii) if there is more than one member transferring or agreeing to transfer the property, the property is to be used for the benefit of those members in the same proportions as it was held by them before the transfer or agreement to transfer.

Steps must be taken to ensure such dutiable property is properly segregated from other fund assets.

- (b) In Victoria – section 41A VIC Duties Act provides an exemption on duty where a trustee of a SMSF transfers real property to a member of the SMSF in partial or whole satisfaction of their entitlements. This is met where:
 - (i) duty (if any) was paid on the acquisition of the relevant property by the fund;
 - (ii) the beneficiary (member) was a beneficiary when the property first became part of the fund; and
 - (iii) the dutiable value of the property transferred does not exceed the value of the beneficiary's interest in the fund.
- (c) In Victoria – sections 36A and 36B VIC Duties Act provides an exemption to transfer of property from a discretionary trust to an individual beneficiary; and a unit trust to a beneficiary unitholder (who is a trustee of a discretionary trust) respectively. Despite the potential for duty relief to be available:
 - (i) The strict requirements must be reviewed and appropriate documentation prepared to ensure compliance.
 - (ii) Care still must be taken in relation to both trust law obligations (such as ensuring no breaches of fiduciary duties) and managing other tax implications.
- (d) WA Duty Act includes nominal duty transactions between certain trusts and beneficiaries (including as a result of a trust vesting).¹⁰⁰
- (e) Each relevant State duty legislation should be considered as to any available exemptions between different structures. In this regard:

Corporate reconstruction

- 5.8 A corporate reconstruction/consolidation duty concession may allow transfers of 'group properties' (such as real property) between related companies.
- 5.9 Access to such exemptions/concessions often rely on transfers between parent-subsidary companies where the level of ownership exceeds certain thresholds (90% in the case of Queensland¹⁰¹).
- 5.10 As a result such restructures are utilised where the property is already held in a corporate environment; but it is preferable for the asset to be held in a separate 'clean' company.
- 5.11 If combined with tax consolidation, this transfer of property within a corporate group structure without adverse CGT/stamp duty consequences.

¹⁰⁰ Sections 114 to 116 WA Duties Act.

¹⁰¹ Section 406 QLD Duties Act.



Trust cloning (or transferring trust assets into separate structures – a Queensland unique restructure)

- 5.12 Trust cloning is a strategy used to transfer Queensland dutiable property from one trust to another.
- 5.13 It works by effectively 'cloning' a second trust on substantially similar terms as the initial trust to ensure that no dutiable transaction is triggered for Queensland stamp duty purposes.
- 5.14 If successful, it allows assets to be transferred into separate discretionary trusts, and separate succession plans implemented for each respective trust. In certain circumstances, it can be utilized to transfer assets between different type of trusts (i.e. SMSF to discretionary trust and vice versa).
- 5.15 While historically, there was a CGT exemption applied to trust cloning arrangements under section 104-55(b) and 104-60(b) ITAA 1997; such exemptions have been abolished since 2008.
- 5.16 It should be noted that although there is no explicit CGT exemption for trust cloning, there are tax legislation provisions available that may assist in managing the CGT consequences of transferring assets.
- 5.17 The use of the trust cloning arrangement is as a tool to manage adverse Queensland stamp duty consequences of moving dutiable property from one trust to another.
- 5.18 In dealing with the relevant stamp duty heads of duty under Queensland stamp duty law, trust cloning obtains an exemption by:
- (a) ensuring persons with the relevant trust interests in the original and cloned trust are identical and with the same percentages in the trust interests;
 - (b) ensuring assets are not suddenly held or ceased to be held on trust by the trustee; and
 - (c) ensuring there is no change in the legal owner of the asset.



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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