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Let's chat

Structuring the Ownership of Commercial Property: Tax Pros, Cons and Pitfalls
– March 2026

With:

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Information provided is general in nature; precise application depends on specific circumstances



Overview



Commercial property - considerations



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- Owner occupied or passive investment
- Growth through income or capital yield
- Positive cashflow intended, and if so – distributions to individuals or other entities
- How will acquisition and holding costs be financed
- Multiple owners, and are they also partners in a business



Commercial property - types

- Office spaces – a room, floor or building
- Retail spaces – whether standalone, a strip of shops a shopping complex or lots in a complex
- Industrial properties – such as warehouses or distribution centres
- Special purpose properties such as hotels, motels, nursing homes and education institutions
- Multi-purpose properties
- Residential properties (whether to be converted or the 'business of investing/managing')



Business real property

Relevant for SMSFs

- Exemption to prohibition by a SMSF from acquiring an asset from a related party of the SMSF
- Exemption to the limits on a SMSF holding 'in-house assets'

Opportunities

- Member restructure ownership of asset to be held by SMSF
- Business owner may acquire commercial property to be held in their SMSF and leased to their business

Business real property

- (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.*



SMSFR 2009/1





SMSFR 2009/1 - Examples

Primary production examples

- Example 1: Vinyard with private residence and a grape supply agreement. Residence less than 2 hectares.
- Example 3: Private residence by exceeding 3 hectares
- Example 4: Dairy farmers subleasing property (which includes private residence) to an unrelated party whilst business a new accommodation for the new farmer. Total area of private residences does not exceed 2 hectares
- Example 7: Temporary agist of vacant land if no intention to rent the land in the future.

Vacant lot examples

- Example 8: Parking of trucks and machinery used in a business on vacant land without a formal lease or rental payments
- Example 9: 3 adjacent blocks; two used for business purposes with the third empty. Two blocks may be considered business real property but the vacant block would not meet the requirements.

Residential property as business real property



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Residential properties used for residential purposes

- Example 13: Owner of 2 holiday flats used for short-term accommodation. Operation not considered to be at scale where a business is being conducted.
- Example 14: Owner of 20 residential units leased to long-term residents and owner maintains the units on a full-time basis.
- Example 15: Member owns 10 residential units leased to long term residents. Real estate agent used to manage premises. Member not seen to be carrying on a property investment business

Allzams Trust and Commissioner of Taxation [2021] AATA 2767 and Allen and Commissioner of Taxation [2021] AATA 2768

- Taxpayer lodged PBR whether properties constitute business real property. ATO could not rule on the superannuation question, so taxpayer lodged two separate PBRs whether the respective taxpayers were conducting a business. ATO ruled 'no'. Taxpayer appealed to the AAT.
- Mr Allen owning 9 properties in personal name and devoting substantial time to manage and improve rental portfolio including administration duties, tenant duties, maintenance and general ad hoc duties. Includes substantial capital investment/equity (over \$3million after debt).
- Trust owns a block of 5 units. Required to provide more information in private binding ruling.

Residential property as business real property



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Single properties used for residential purposes

- **Example 16:** Motel with related entity employing a manager. The manager resides on the premises (their residence considered incidental to the business conducted).
- **Example 17:** Family (owning a large home) allowing 3 bedrooms to be used as a bed and breakfast during school holidays. Scale of operations not considered substantial.
- **Example 18:** Where four out of five bedrooms used year-round as part of a bed and breakfast business. Owner resides in remaining bedroom and undertakes various actions reflective of a business

Residential properties used for business purposes

- **Example 21:** House exclusively used for medical practice.
- **Example 23:** Mechanic operates from home garage and employs friends. House remains used for residential purposes. Not 'wholly and exclusively' used for business purposes.
- **Example 24:** Double story premises used for business purposes during business owners, but owner uses the top level for accommodation (two weeks a month). Residential use not considered incidental.



Structuring options

	Individual	Family Trust	Unit Trust	Company	SMSF
Asset protection	None	Available	Available	Available	Available
Estate planning	Will	Governing rules	Governing rules	Members	Governing rules
Funding	Bank, related party, Div 7A	Borrowing (Div 7A?) or gifting to the trust	Borrowing (Div 7A?) or issuing	Borrowing or issuing	LRBA or contributions
New partners	Transfer asset	Transfer asset	Unit issue/transfer	Share issue/transfer	Difficult
Complexity	Simple	Moderate*	Complex	Complex	Complex
Income tax	Individual rate	Beneficiary rate	Unitholder rate*	30%/25%	15% subject to Div 296
CGT discount*	Yes	Subject to beneficiary	Subject to beneficiary	No	Yes
Use of losses	Available	Retained	Retained	Retained	Retained
Access to equity*	Immediately	Distributions	Distributions and E4	Dividend	Conditions of release
Distribution flexibility	No	Yes	Potentially	Potentially	No
Other issues	Not applicable	Div 7A if company loan Section 100A	Div 7A if company loan Section 100A	Retaining franking credits	SISA and SISR compliance



Division 296 (examples)

Rates

- Additional 15% tax on earnings on account balances above \$3million (indexed)
- An additional 10% tax on earnings on account balances above \$10million (indexed)
- No longer applies to unrealised gains
- See below examples from explanatory memorandum of proposed legislation

Account balance over \$3million

- \$4million account balance with superannuation earnings of \$100,000
- Proportion of TSB above threshold = 25% ($(\$4\text{million} - \$3\text{million})/\$4\text{million}$)
- Taxable earnings for Division 296 = \$25,000 (25% of \$100,000).
- Division 296 tax = \$3,750 (15% of \$25,000)
- Add \$15,000 tax on \$100,000 to above = \$18,750



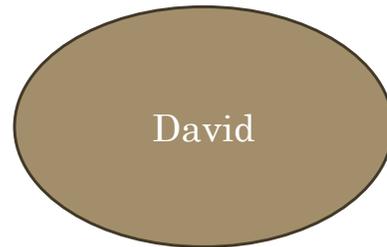
Division 296 (examples)

Account balance over \$10million

- \$12million account balance with superannuation earnings of \$500,000
- Proportion of TSB above \$3million threshold (large superannuation balance earnings) = 75%
(((\$12million - \$3million)/\$12million)
- Proportion of TSB above \$10,000 million (very large superannuation balance threshold) = 16.67%
(((\$12million - \$10million)/\$12million)
- Taxable earnings for Division 296 above \$3million = \$375,000 (75% of \$500,000).
- Taxable earnings for Division 296 above \$10million = \$83,350 (16.67% of \$500,000).
- Division 296 tax above \$3million = \$56,250 (15% of \$375,000)
- Division 296 tax above \$10million = \$8,335 (10% of \$83,350)
- Add 15% tax on \$500,000 on the aggregate of the above = \$124,585



Individual



Yay

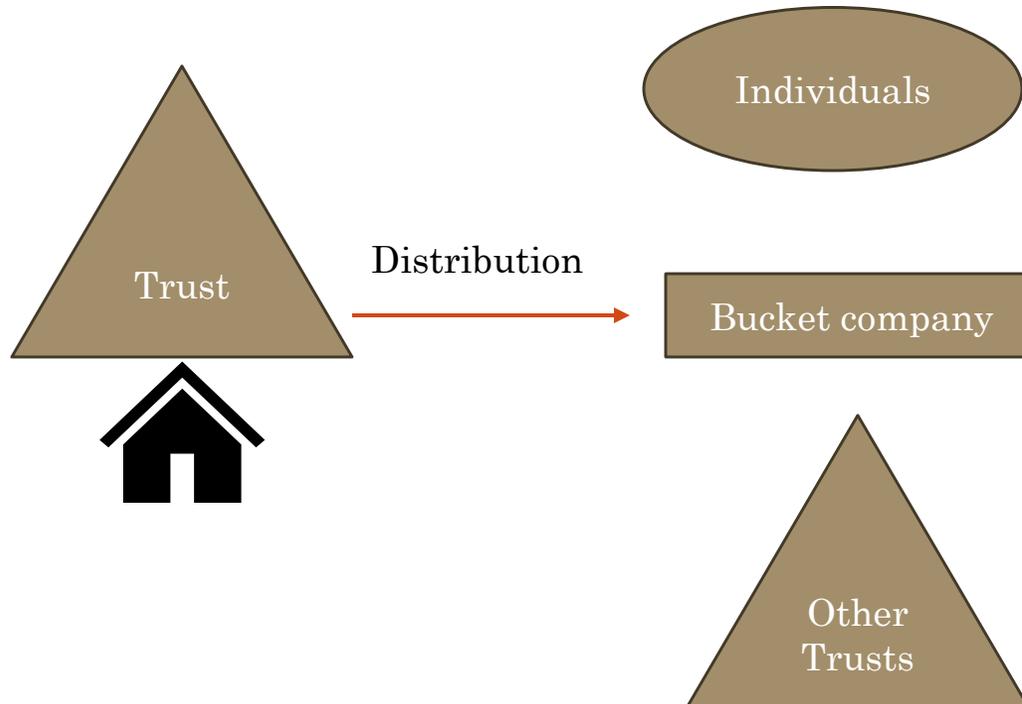
- Limited risk – operates own business on premise and business low risk
- Small/micro business
- No intention of expanding (whether intention or due to stage in life)

Nay

- Any other situation
- Consider whether SMSF preferred even in the 'Yay' scenario



Discretionary trust



Yay

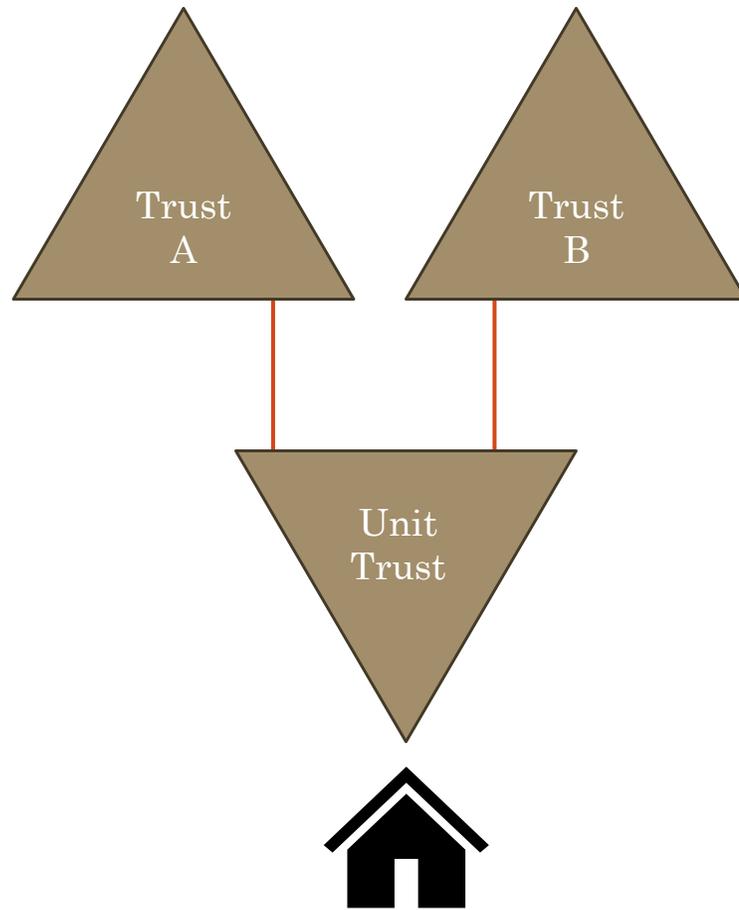
- Want to distribute income to various individual beneficiaries/flexibility to distribute to other entities
- Want potential CGT discount
- Individuals rely on income for daily needs
- Single family unit owner (no other 'partners')

Nay

- All individual beneficiaries are high income earners
- Want to avoid Division 7A issues
- Income intended to be retained for investment purposes



Unit trust



Yay

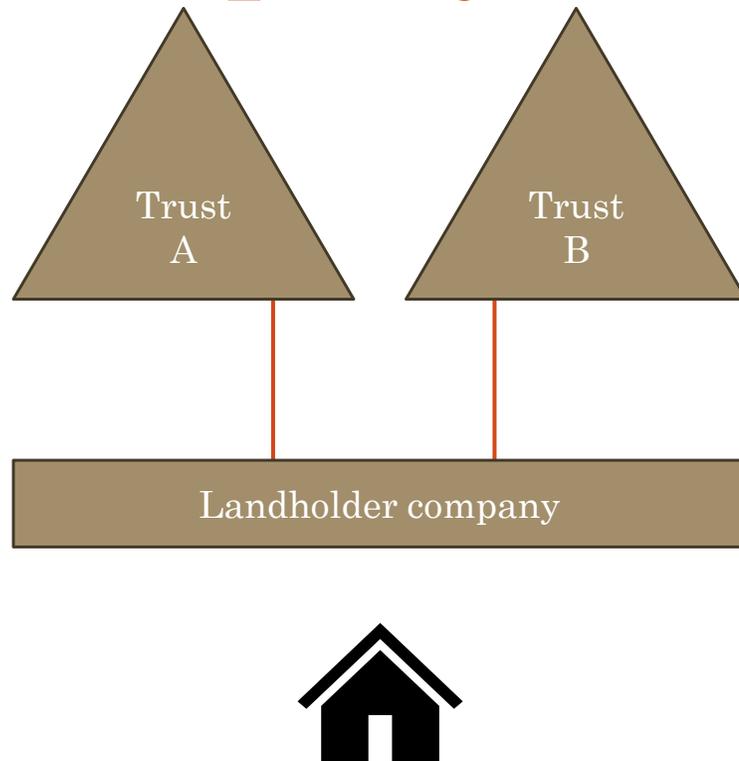
- Want benefits of discretionary trust
- Multiple owners

Nay

- Where a company structure is preferred (next slide)



Company



Yay

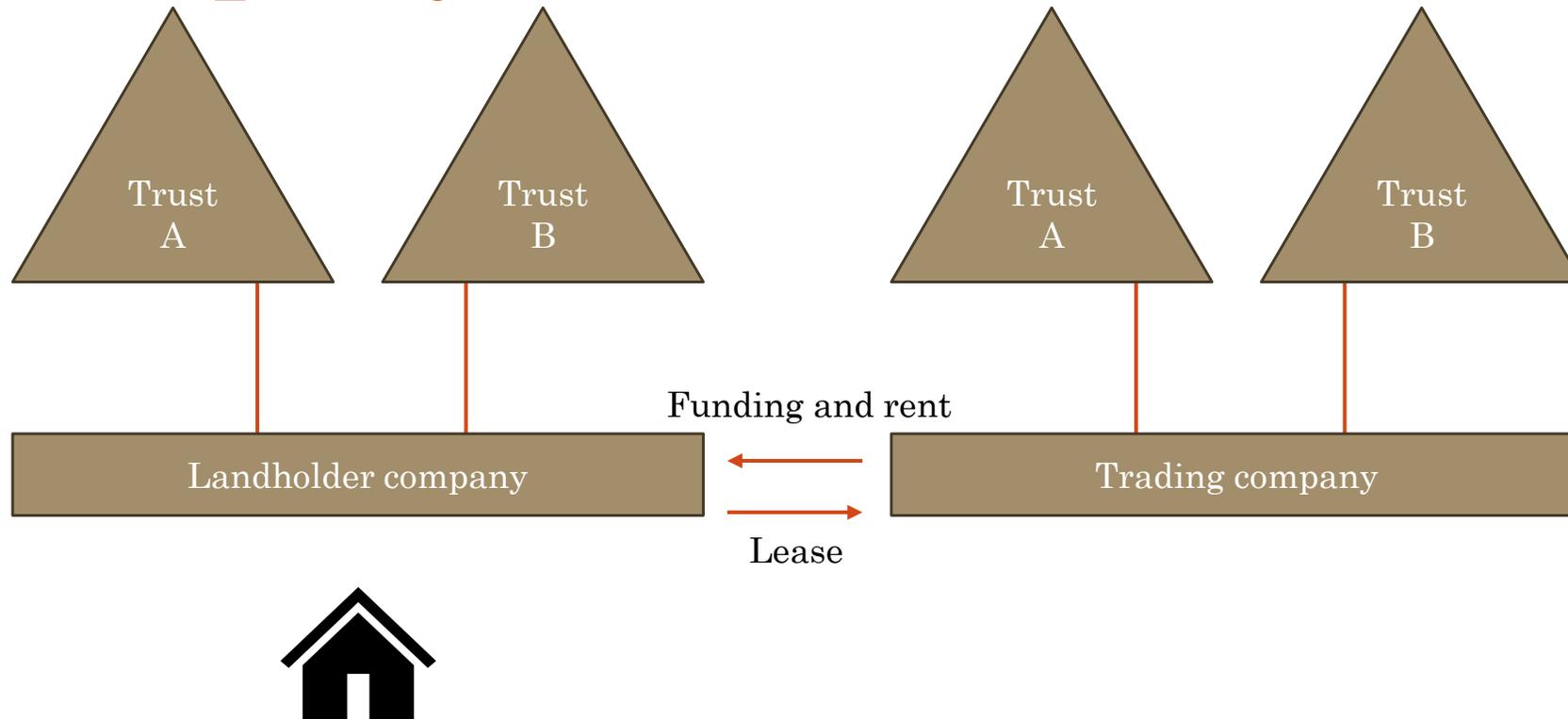
- Retention of income preferred
- Flexibility of multiple owners
- Funding from other trading entities

Nay

- Where trust structure advantages preferred

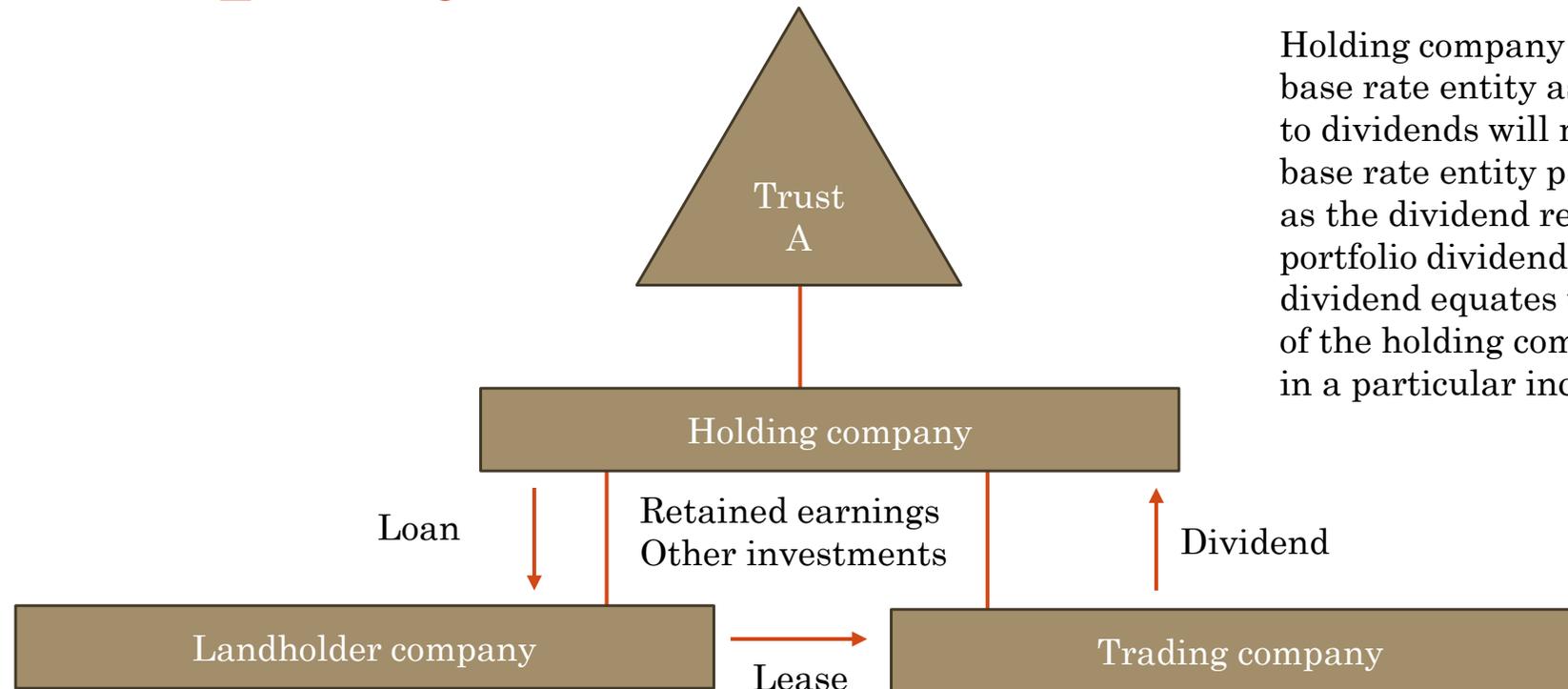


Company





Company

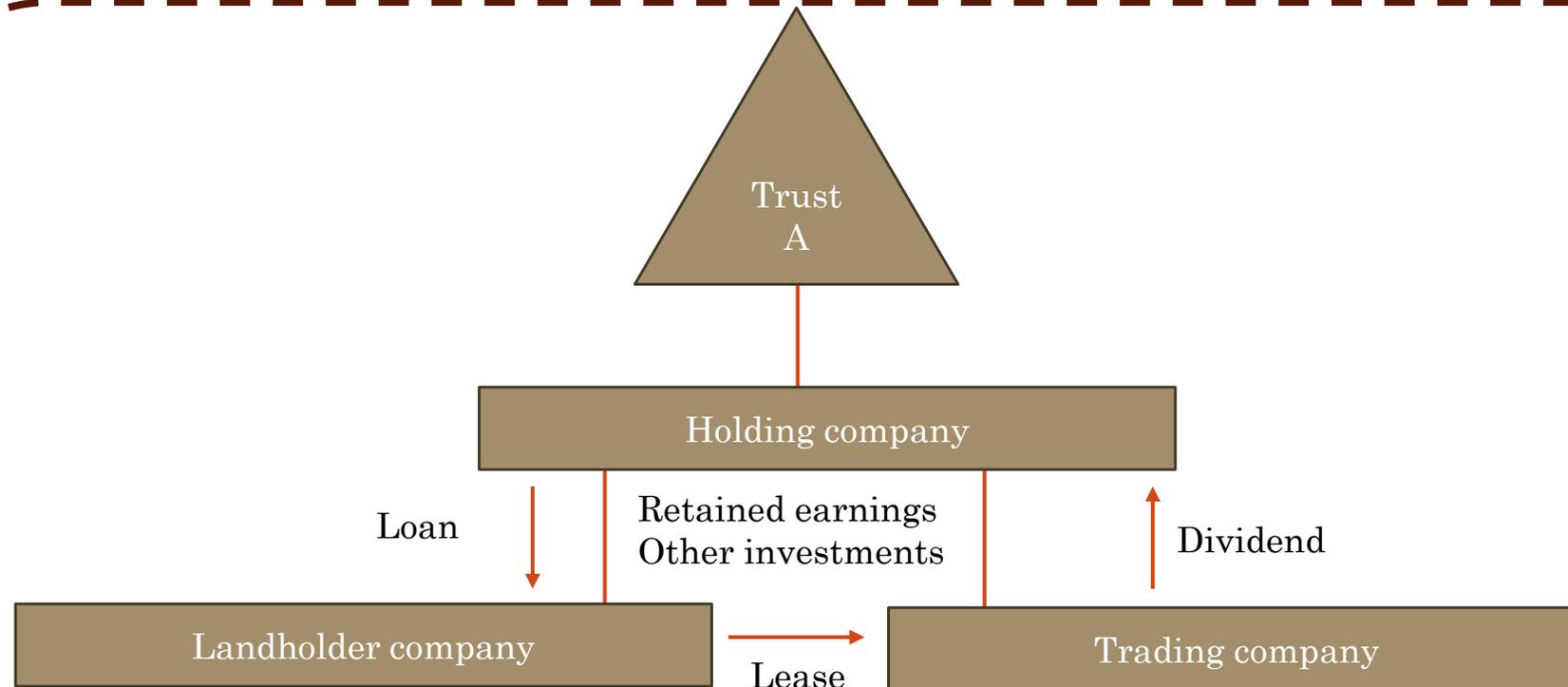


Holding company potentially a base rate entity as distributions to dividends will not amount to base rate entity passive income as the dividend relates to a non-portfolio dividend; provided sch dividend equates to at least 20% of the holding company's income in a particular income year



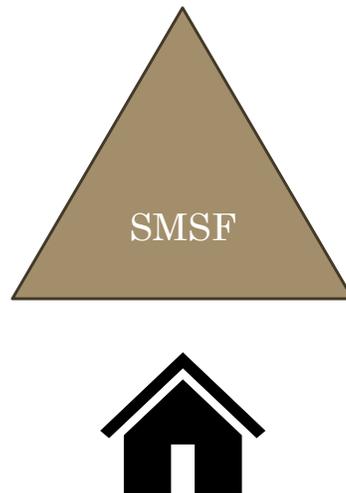


Tax consolidation?





SMSF (non-g geared)



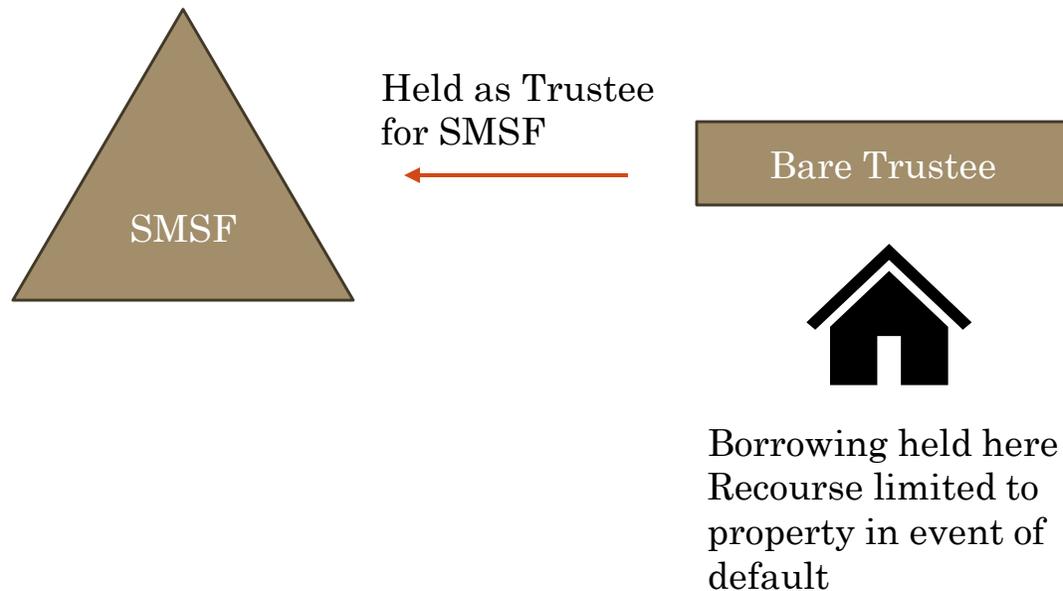
Yay

- Business owners holding business real property in SMSF to lease back to business
- Asset held in a superannuation environment

Nay

- Additional compliance costs
 - Arm's length and compliance with investment strategy
 - Sole purpose test
 - In-house asset rules
 - No borrowing general prohibition
- Inability to fund acquisition/holding cost
- Delayed access to equity

SMSF (limited recourse borrowing arrangement)

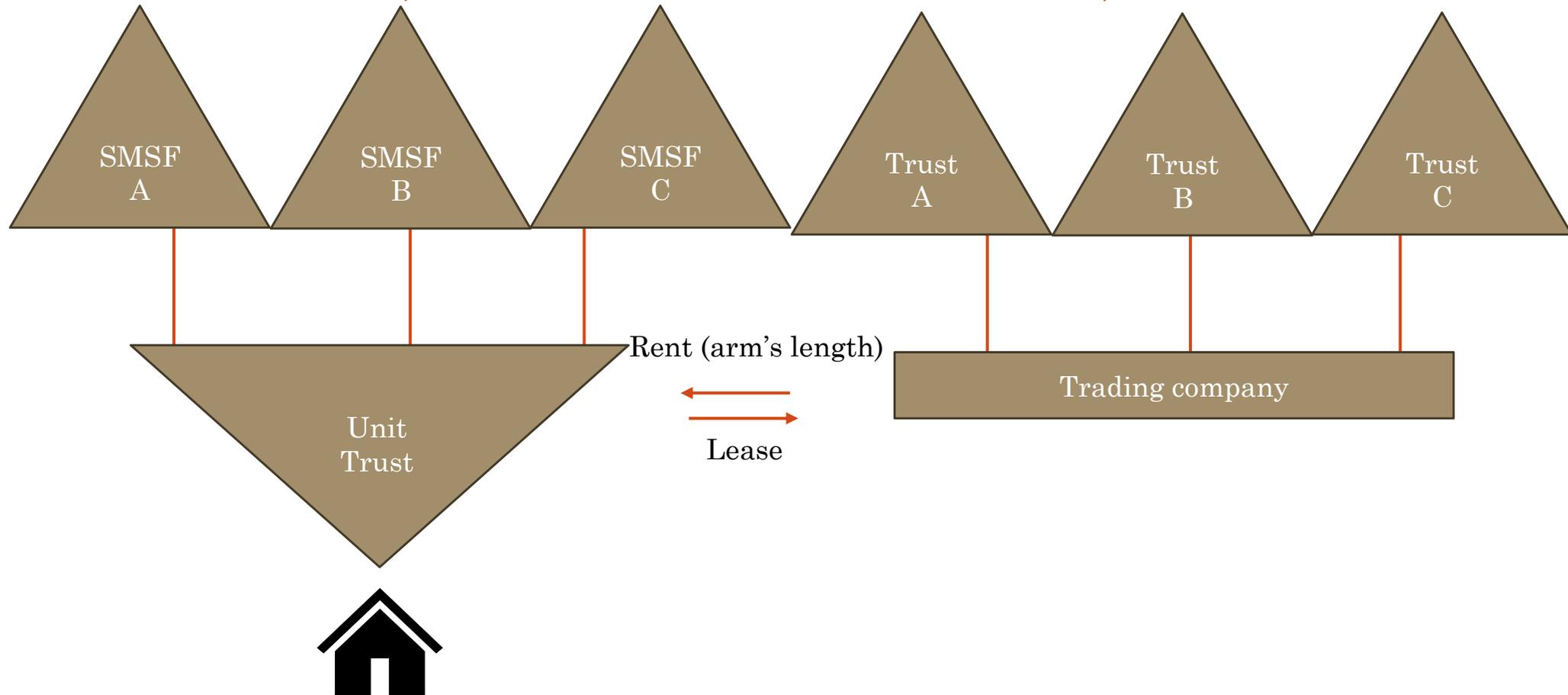


SMSFR 2012/1

- Single acquirable asset
- Where two or more lots, further review required (e.g. factory across two out of three lots)
- Borrowing not to be used to improve single acquirable asset

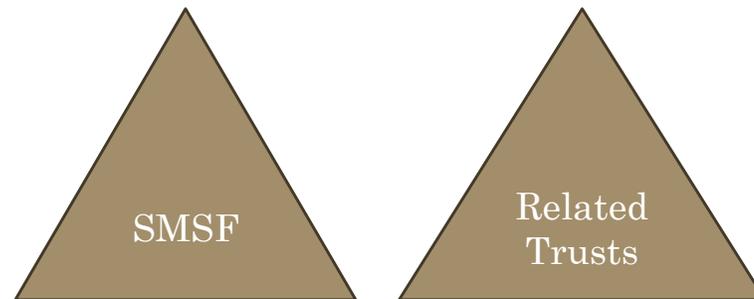


SMSF (unrelated trust)





SMSF with related parties



Not financed and held
as tenants in common



Property cannot be
leased back to a related
party unless the asset
is business real
property



State Tax considerations

- Stamp duty acquiring asset (not considered in this presentation)
- Stamp duty changing unitholdings (relevant if changing indirect ownership)
- Stamp duty changing shareholdings (relevant if changing indirect ownership)
- Land tax on holding asset
- Exemptions on a State by State basis (e.g. primary production and charitable purposes)



Landholder duty thresholds

	Landholding (companies)	Companies	Landholding (trusts)	Trusts
QLD	\$2,000,000	50%	Nil	Nil
NSW	\$2,000,000	50%	\$2,000,000	20%
VIC	\$1,000,000	50%	\$1,000,000	20%
ACT	\$2,000,000	50%	\$2,000,000	50%
TAS	\$500,000	50%	\$500,000	50%
SA	Nil	50%	Nil	50%
WA	\$2,000,000	50%	\$2,000,000	50%
NT	\$500,000	50%	\$500,000	50%



Land tax thresholds

	Individual	Company	Trust	Company Grouping	Trust Grouping
QLD	\$600,000	\$350,000	\$350,000	After 4 owners*	Potential, otherwise after 4 owners
NSW	\$1,075,000	\$1,075,000	None for 'special trust'	Yes	N/A
VIC	0.3% after \$300,000	0.3% after \$300,000	0.675% after \$25,000	Yes	N/A but yes
ACT	Only on residential Rates may apply	Only on residential Rates may apply	Only on residential Rates may apply	N/A	N/A
TAS	0.45% and 1.5%	0.45% and 1.5%	0.45% and 1.5%	Yes	In certain circumstances
SA	\$833,000	\$833,000	\$25,000	Yes	N/A but yes
WA	\$300,000	\$300,000	\$300,000	No	No clarity in legislation
NT	No land tax	No land tax	No land tax	N/A	N/A



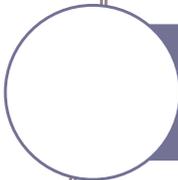
Other 'land tax' quirks



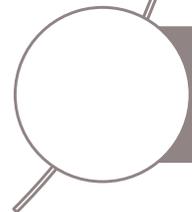
Foreign surcharges defined differently in each State



QLD: Land tax surcharges apply to commercial property (unlike most other States that apply to residential property)



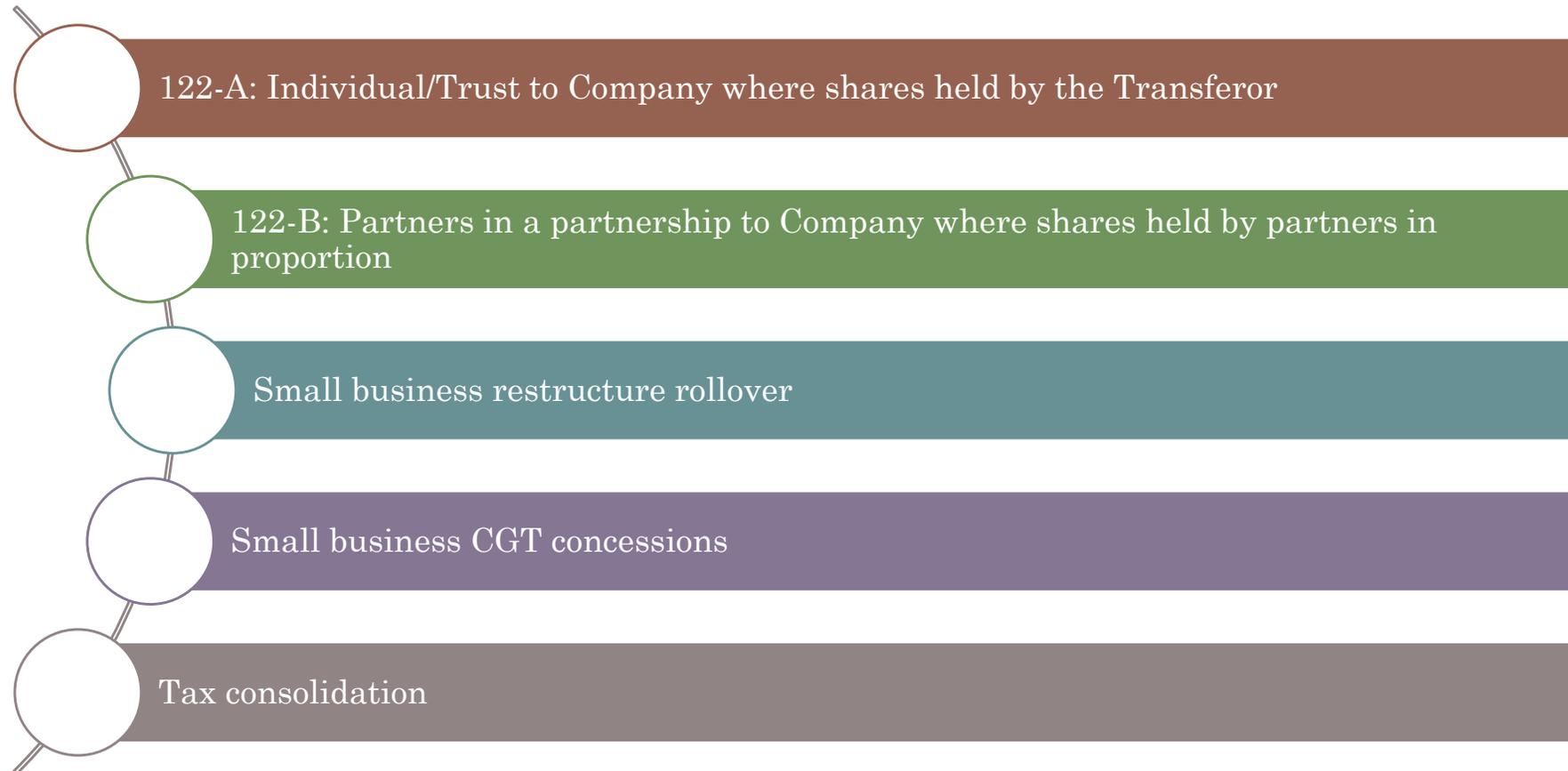
NSW: Fixed trusts obtain a land tax threshold although the definition is not to be confused with the tax law definition of fixed trust



VIC: Consider Vacant Residential Land Tax and Windfall Gains Tax

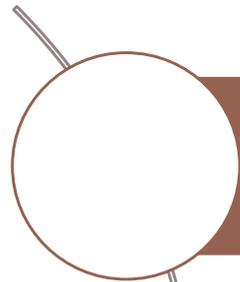


Restructure opportunities (CGT)

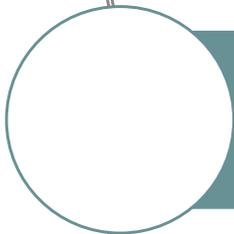




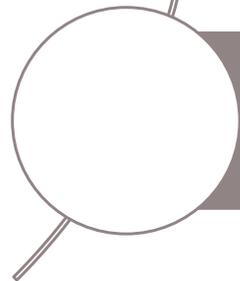
Restructure opportunities



GST considerations required, particularly where entities registered for GST



Stamp duty considerations



Where transferee is a SMSF, contribution considerations and arm's length requirements

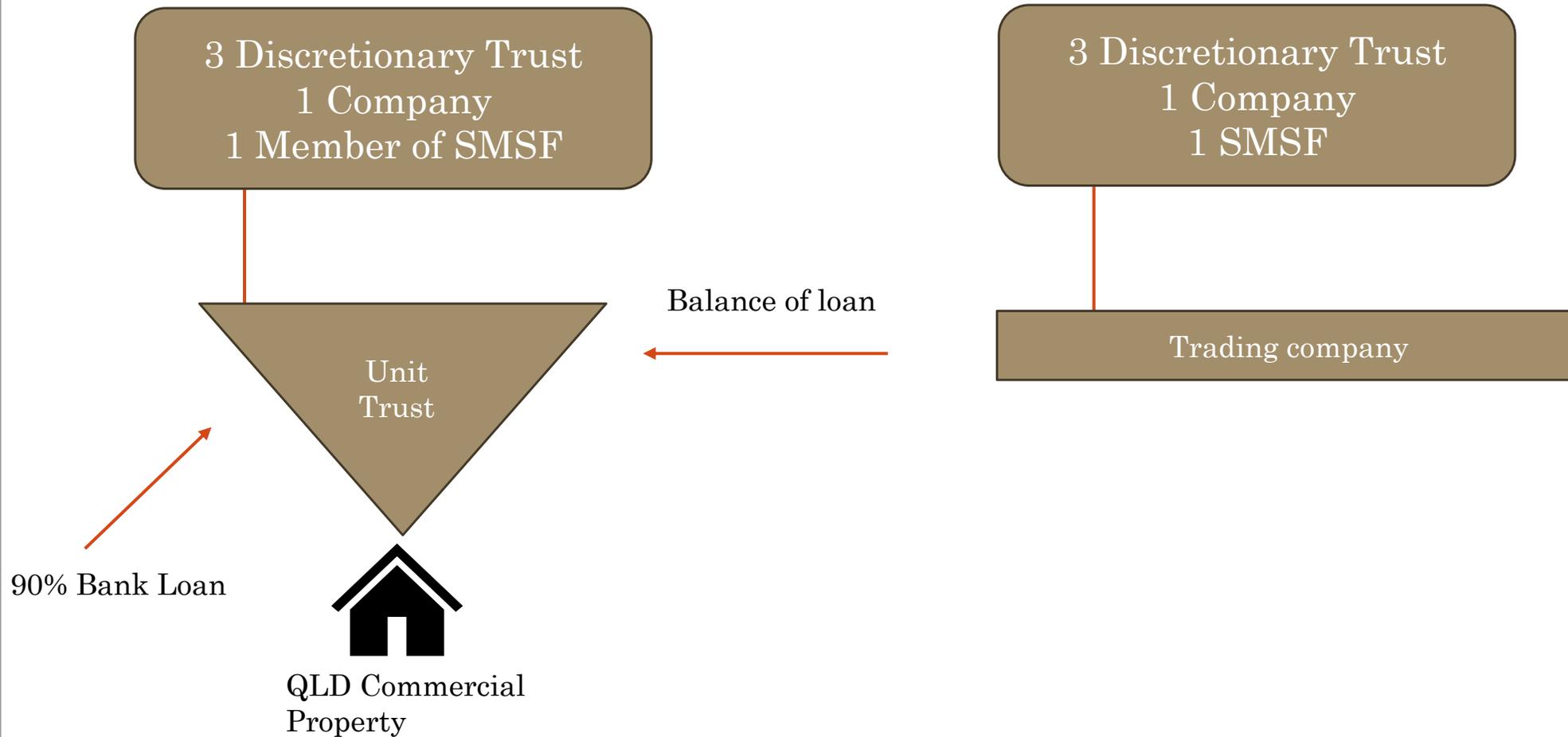


Restructure opportunities (duty)

- NSW: Member to SMSF (\$750 duty: section 62A NSW Duties Act)
- VIC: SMSF to Member (Exempt: section 41A VIC Duties Act)
- VIC: Discretionary trust to individual/unit trust to beneficiary unitholder (Exempt: section 36A/36B VIC Duties Act)
- Corporate reconstruction/consolidation duty: Transfers of 'group properties' between related companies (see each State legislation)
- QLD: Trust cloning from one discretionary trust to another



Practical example 1





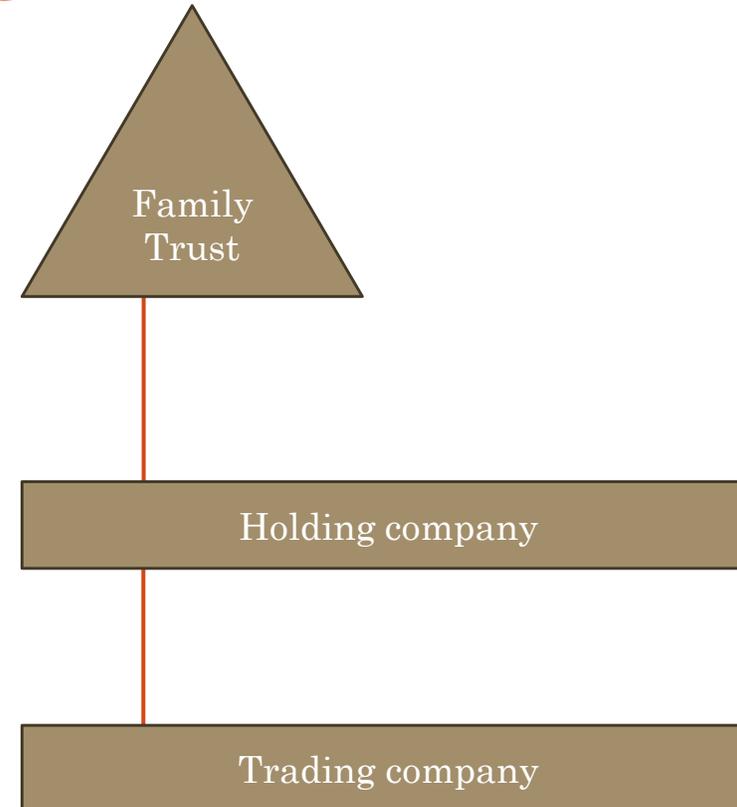
Practical example 2

The situation

- Trading company operates a commercial kitchen business
- Want to now acquire a commercial premises to operate from
- Cost is substantial
- Holding company holds significant retained earnings and lends funds as required
- Single family business

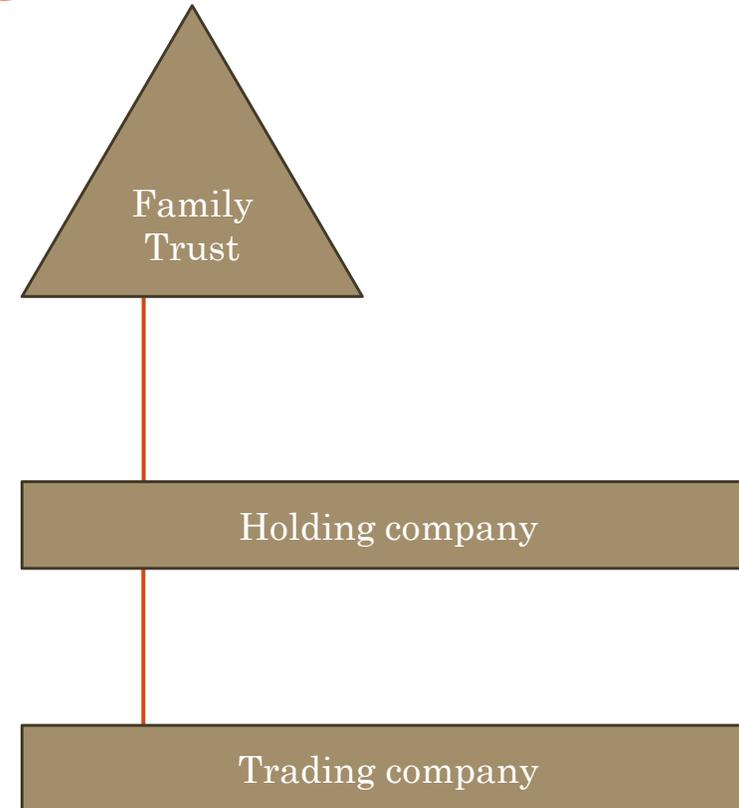
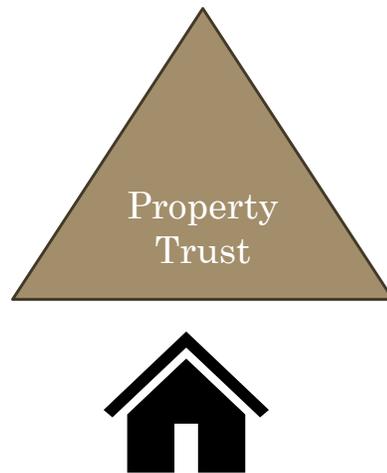
Options

- Discretionary trust acquires
- Company acquires
- SMSF acquires



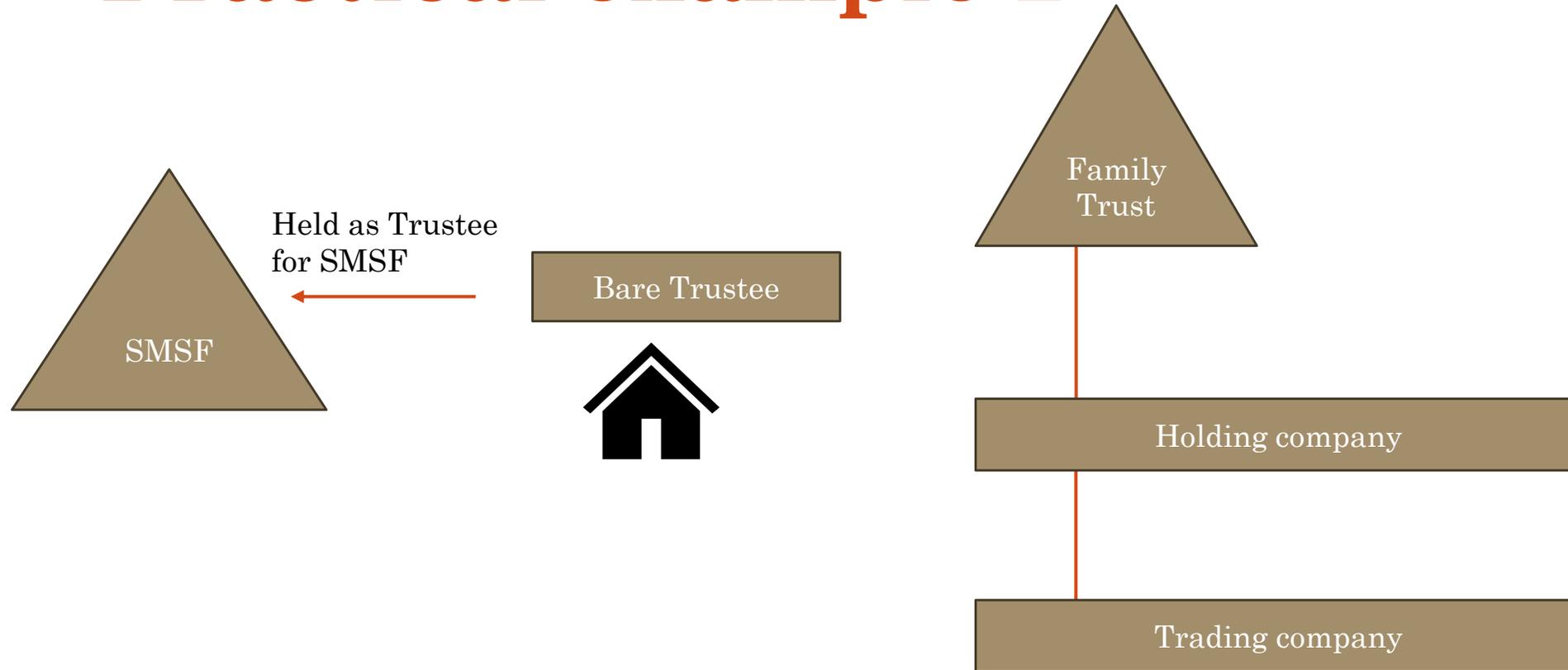


Practical example 2





Practical example 2

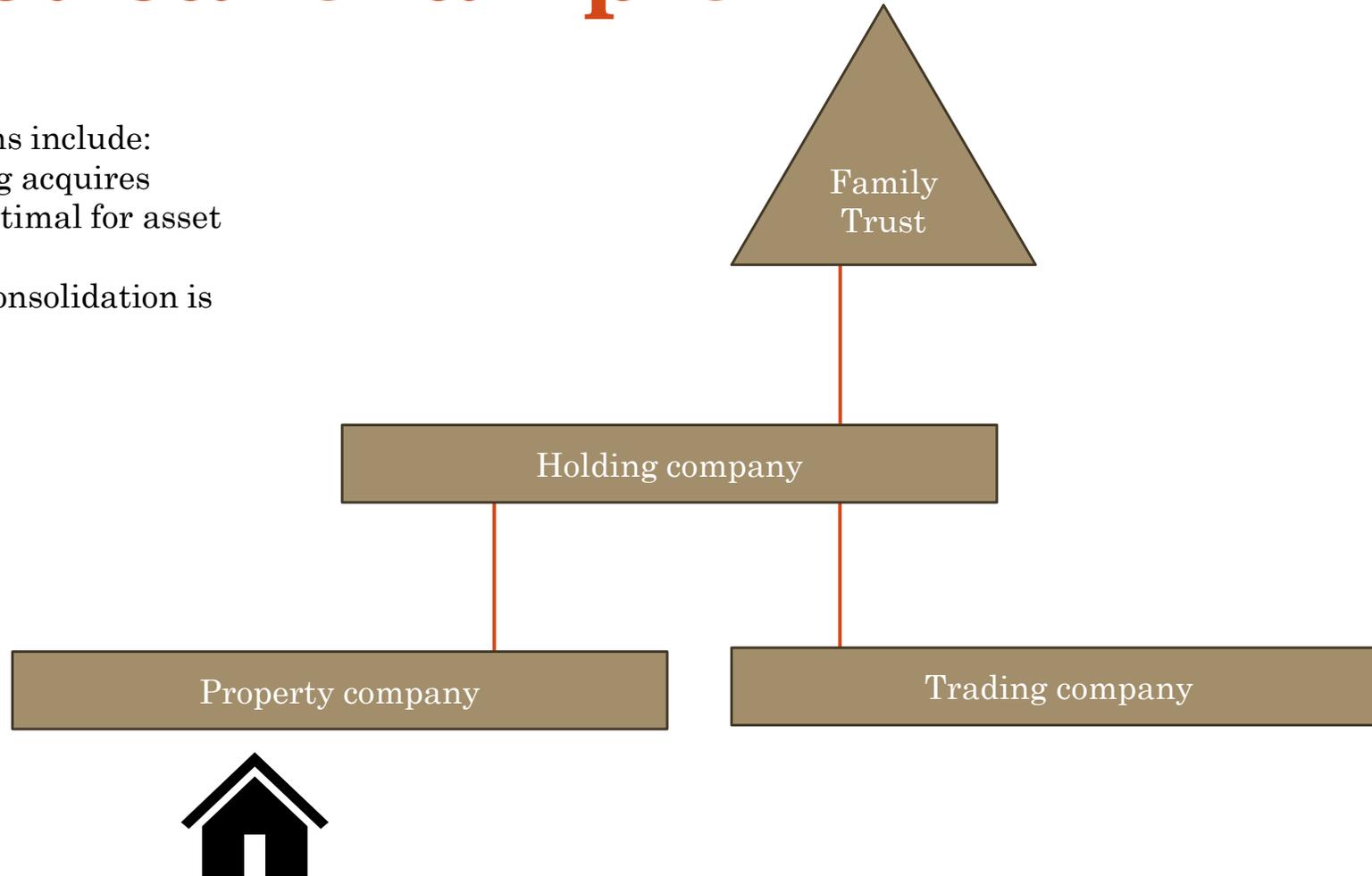




Practical example 2

Other considerations include:

- whether Holding acquires property (not optimal for asset protection)
- whether a tax consolidation is appropriate



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