

Trusts inadvertently grouping family businesses for payroll tax

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Overview

- History
- Grouping provisions*
- Example relating to discretionary trusts
- Solutions:
 - ‘De-grouping application’
 - Structuring solutions**

*Reference to Queensland Payroll Tax Act (**PTA**) and thresholds

** Note each solution can be a separate presentation in itself

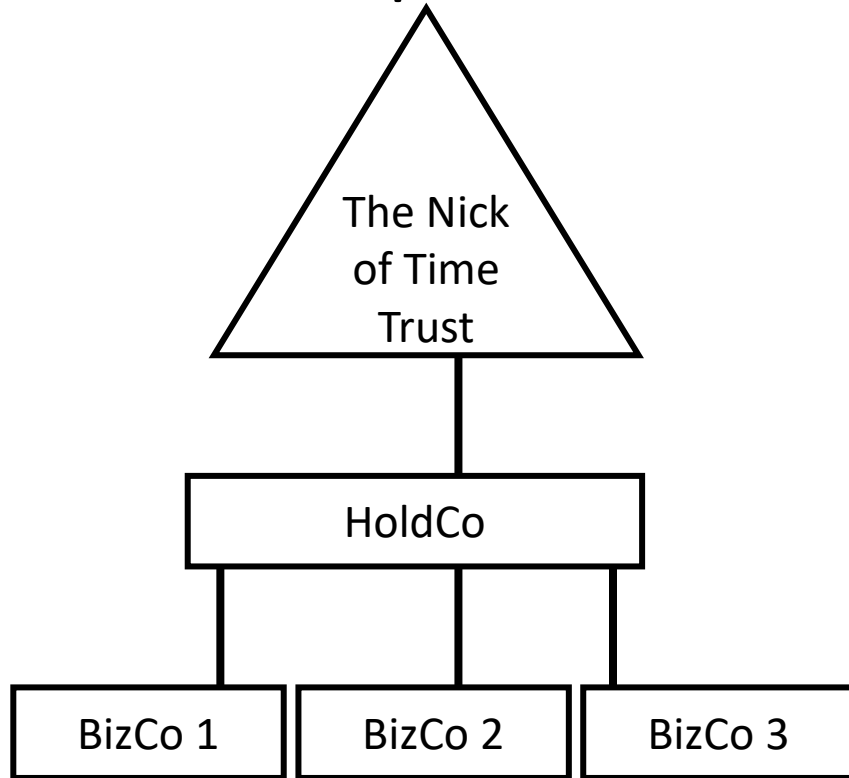
History

- Commonwealth tax
- 1971
- Separate thresholds and introduction of grouping provisions
- Harmonisation

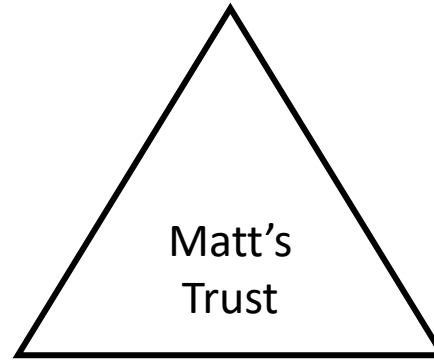
Grouping provisions – why it matters

- Context – fast food chain
- Broad nature
- Relevant:
 - Large ‘chains’
 - Families with multiple businesses
 - Business partners with multiple ventures
 - Persons working together

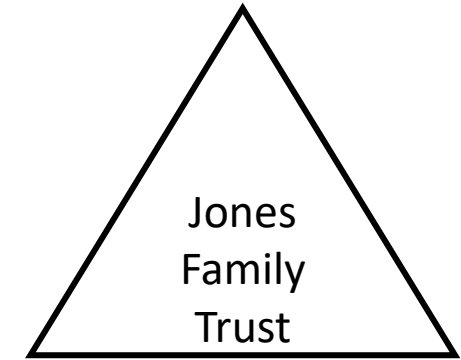
Example



Notes:
BizCo 1, 2 and 3 have aggregated taxable wages equal to \$800,000
Nick is the primary beneficiary of The Nick of Time Trust



Notes:
Matt's Trust has taxable wages equal to \$900,000
Matt is the primary beneficiary of The Matt's Trust



Notes:
Holds property and share investments
John, Jane and Nick are the primary beneficiaries of The Matt's Trust

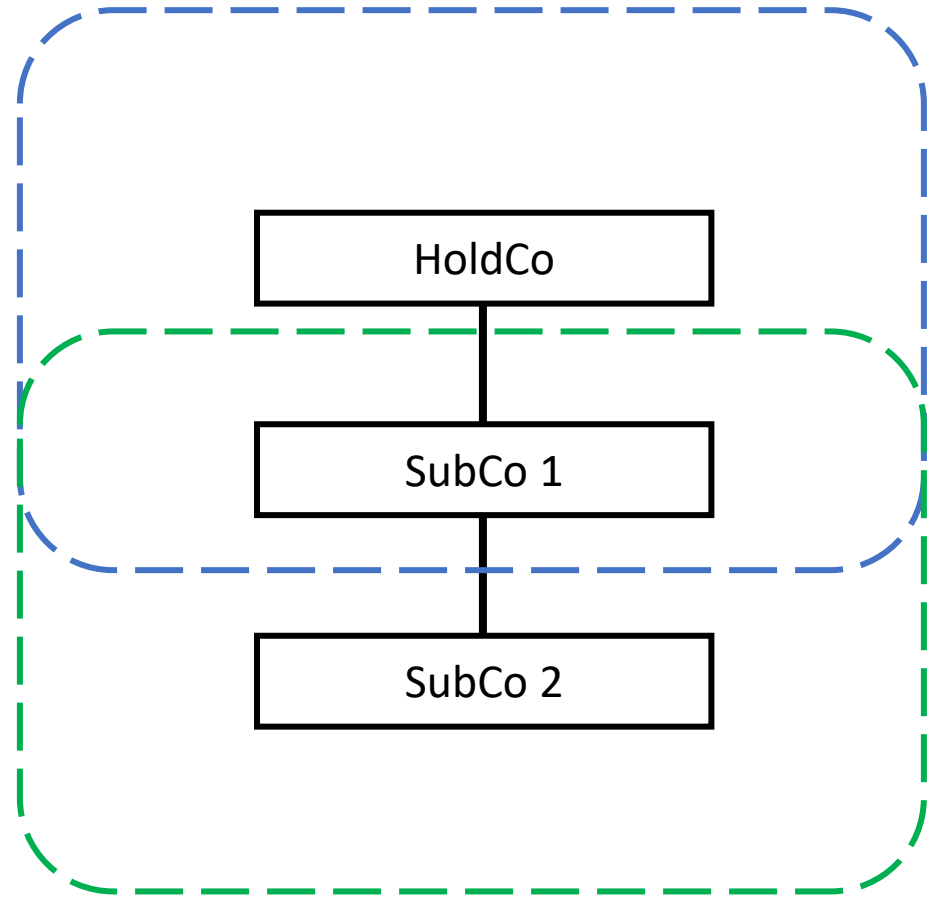
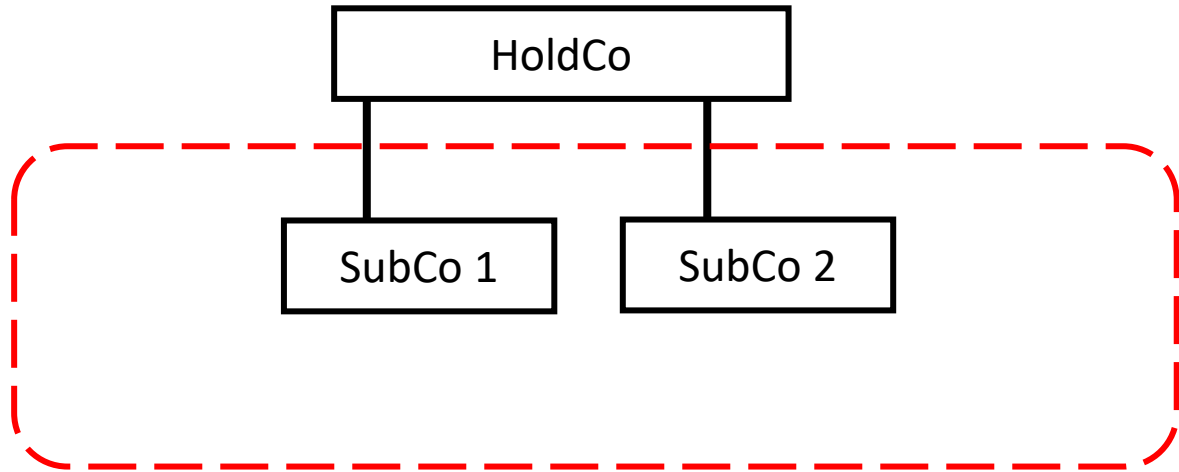
Grouping grounds

- ‘Grouping of Corporations’
- ‘Common Employees’
- ‘Common Controllers’
- ‘Tracing of Interests’
- ‘Common Group Member’

*Provisions operate independently – section 66 PTA

Grouping of Corporations

- “Corporations constitute a group if they are **related bodies corporate.**” section 69 PTA
- **Related bodies corporate** defined in *Corporations Act 2001* (Cth)
- More than 50%
- Data easily able to be matched



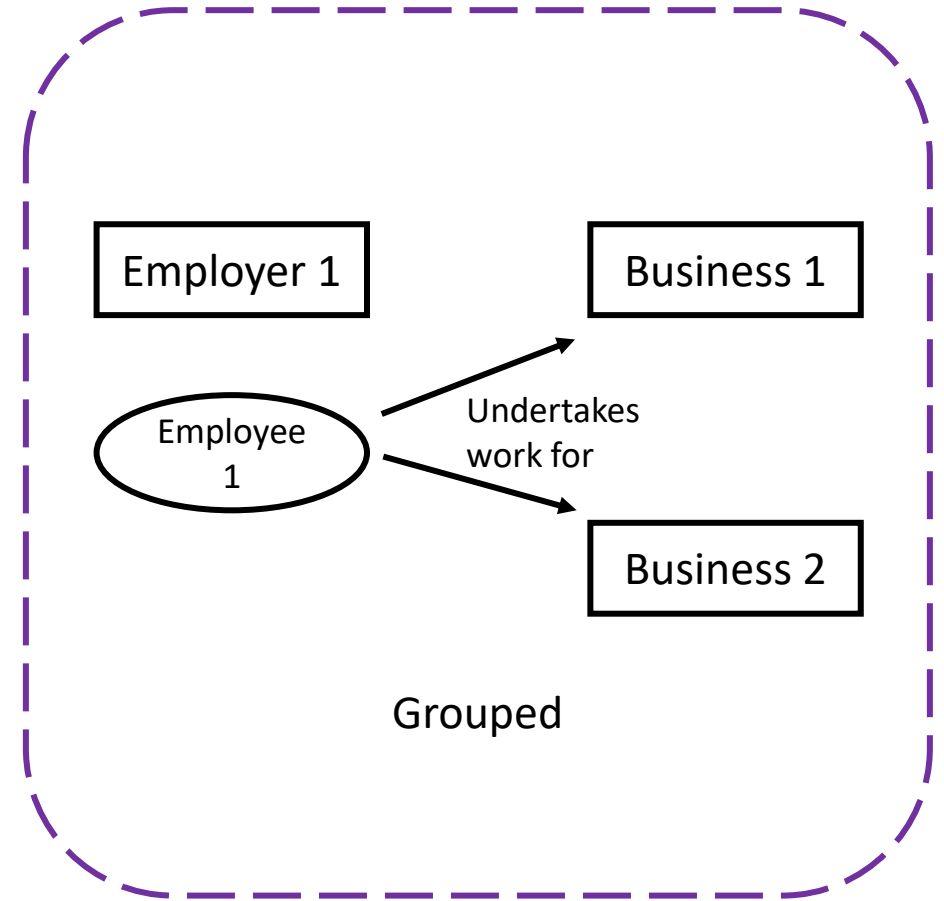
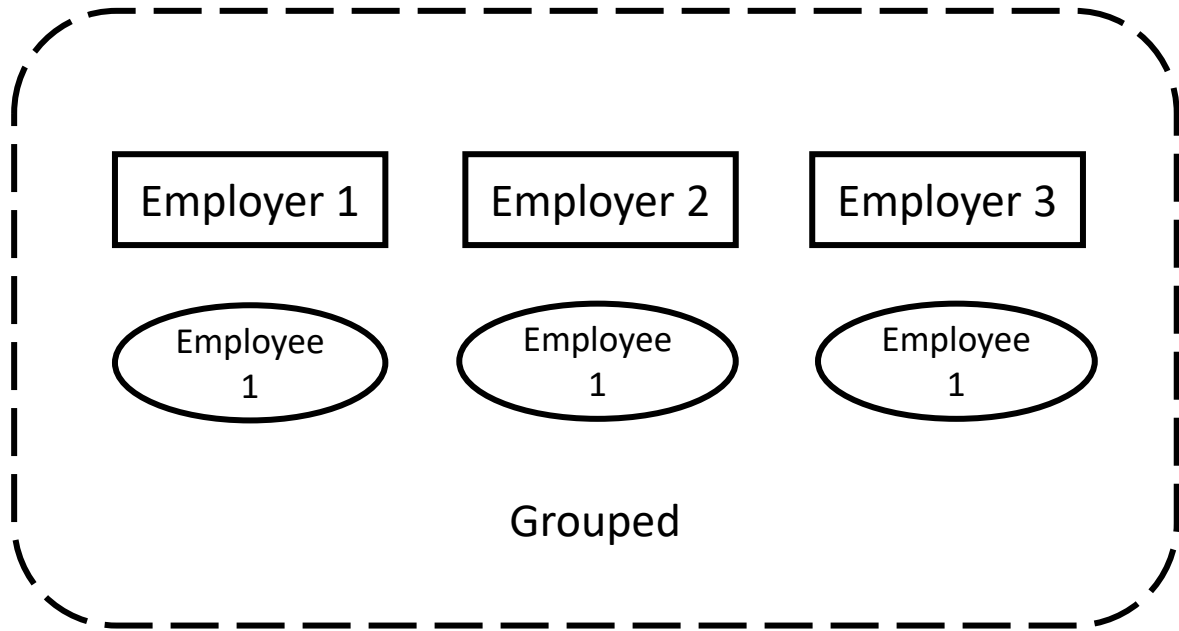
Common Employees

- (1) If 1 or more employees of an employer perform duties in connection with 1 or more businesses carried on by the employer and 1 or more other persons, the employer and each of those other persons constitute a group.*
- (2) If 1 or more employees of an employer are employed solely or mainly to perform duties in connection with 1 or more businesses carried on by 1 or more other persons, the employer and each of those other persons constitute a group.*
- (3) If 1 or more employees of an employer perform duties—
 - a) in connection with 1 or more businesses carried on by 1 or more other persons; and*
 - b) in connection with, or in fulfilment of the employer's obligation under, a relevant agreement;**

the employer and each of those other persons constitute a group.

Section 70 PTA

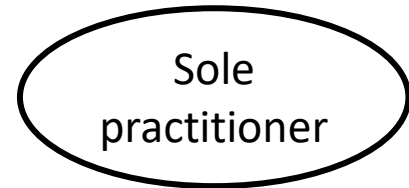
Note definition for 'employee' and Revenue Ruling PTA 017



Common Controllers

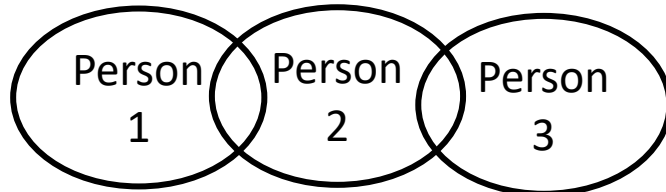
- (1) If a person or set of persons has a controlling interest in each of 2 businesses, the persons who carry on those businesses constitute a group.
- Section 71 PTA
 - Data somewhat easily able to be matched (other than controllers of discretionary trusts)

Controlling interest



Conducts business

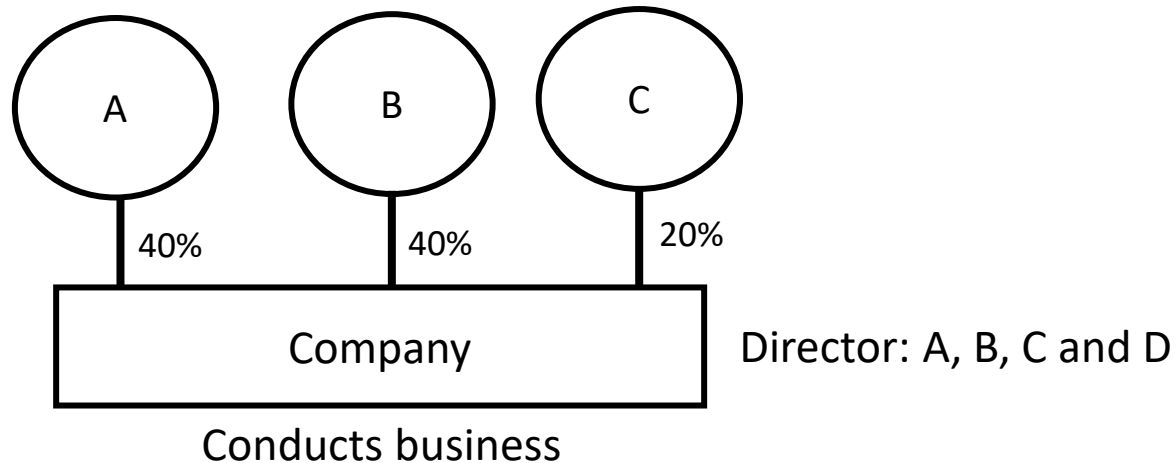
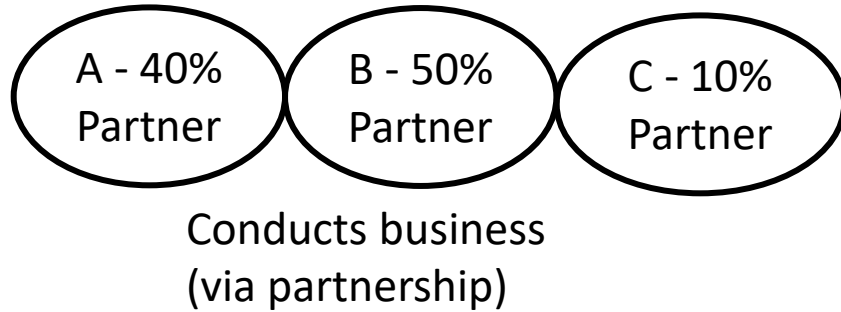
'Controller' – sole practitioner



Conducts business

'Controller' – persons 1, 2 and 3

Controlling interest

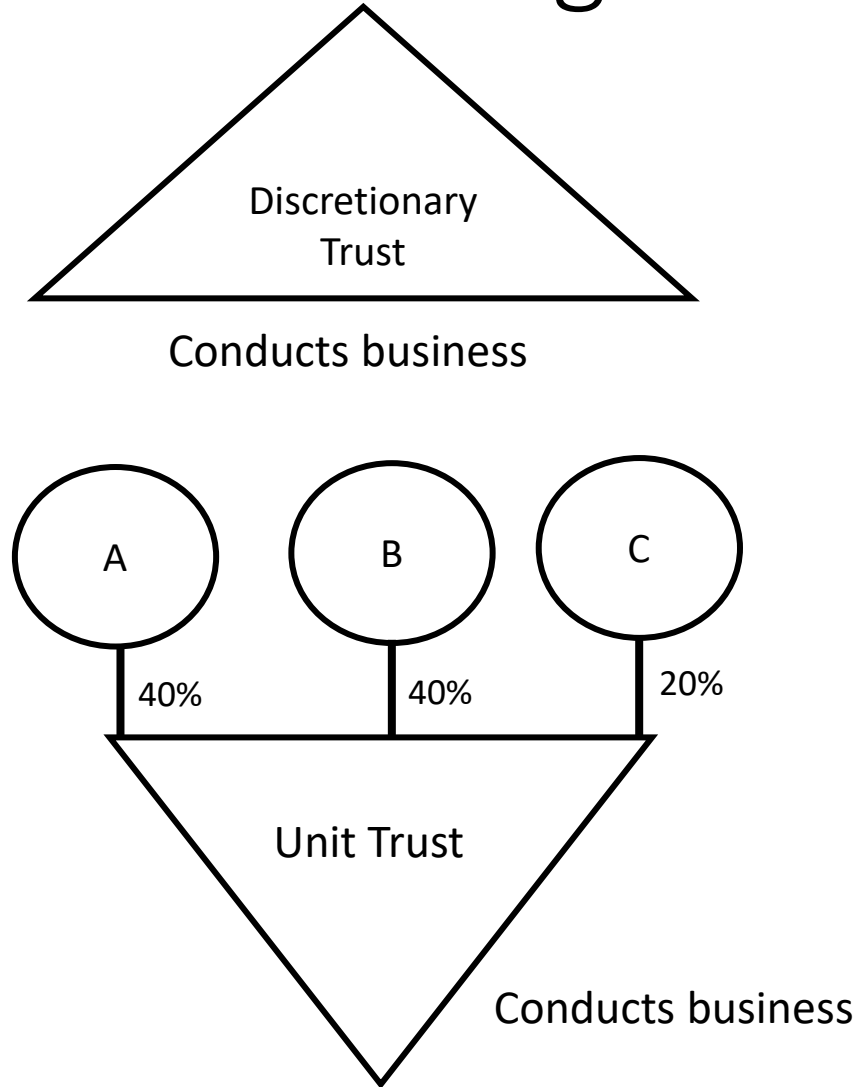


'Controller' – any combination of the partners who hold more than 50% of the capital or are entitled to more than 50% of the profits

'Controller':

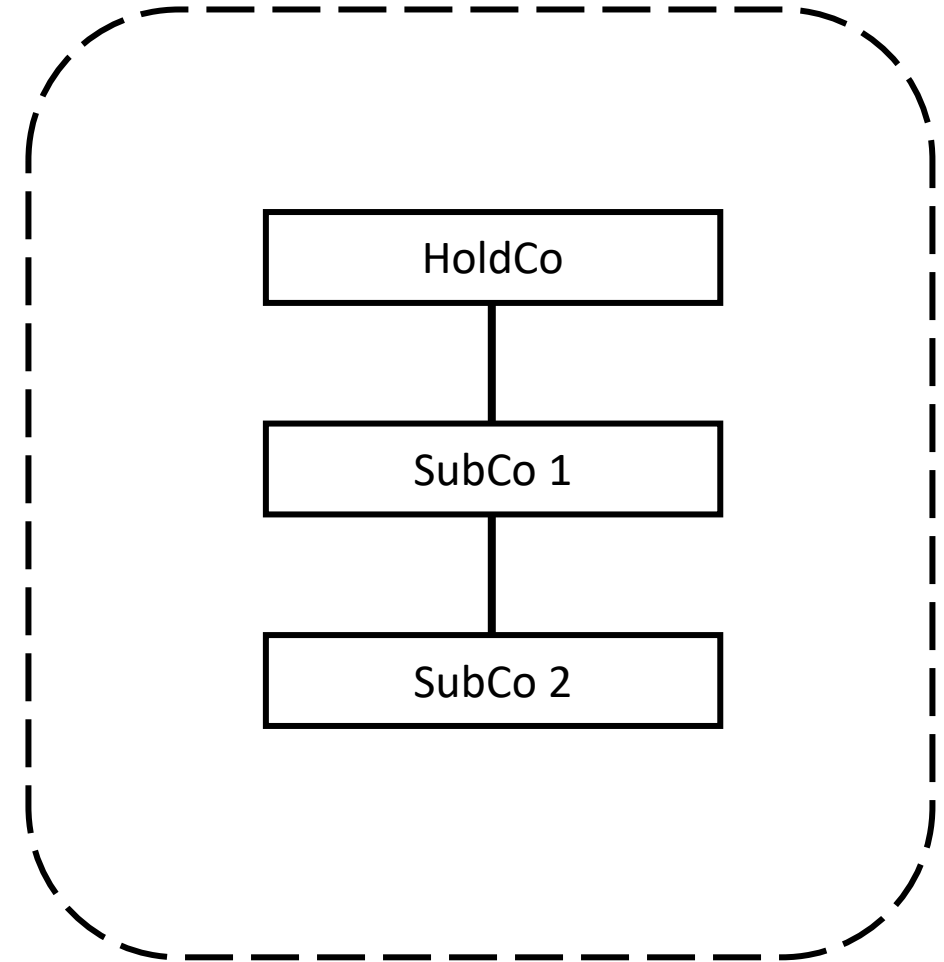
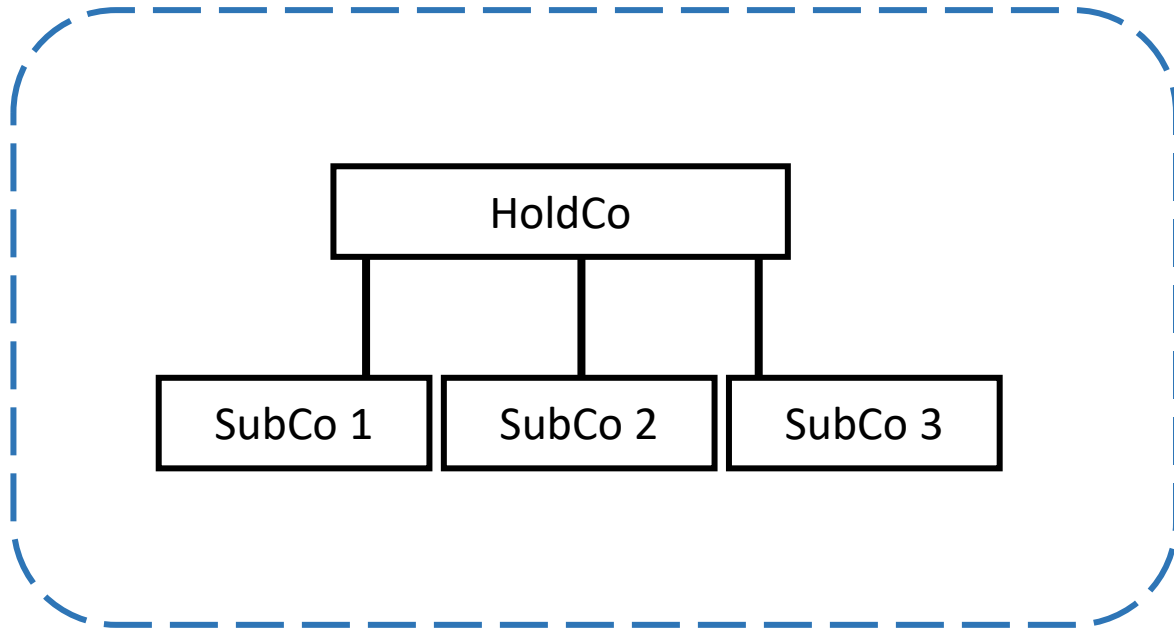
1. Any combination of shareholders holding more than 50% of the voting power in the shares
2. Any combination of the directors who are entitled to exercise more than 50% of the voting power at the meeting of directors

Controlling interest

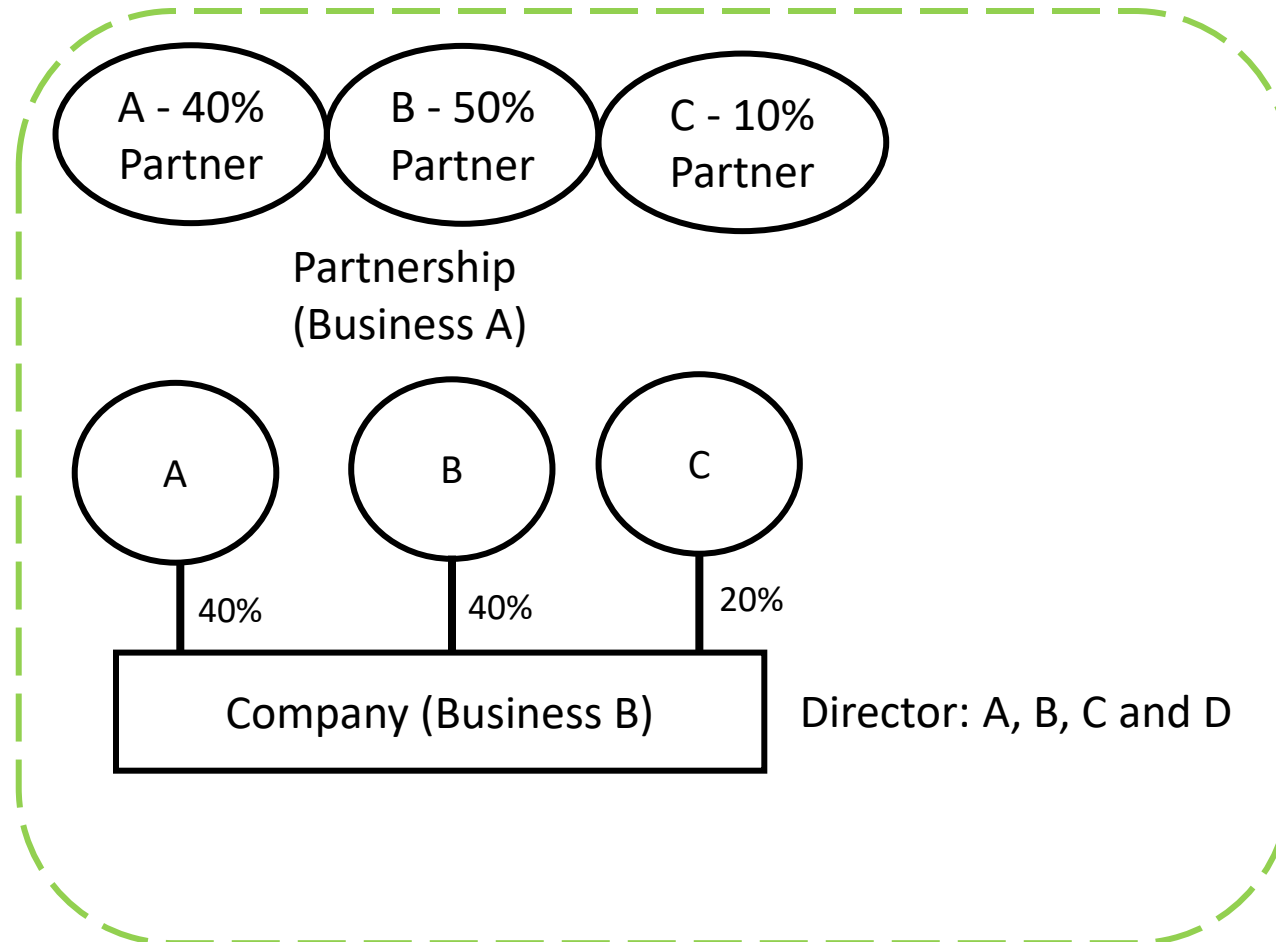


'Controller' – any combination of persons (whether or not as the trustee or beneficiary of another trust), who is a beneficiary in respect of more than 50% of the value of the interests in the trust

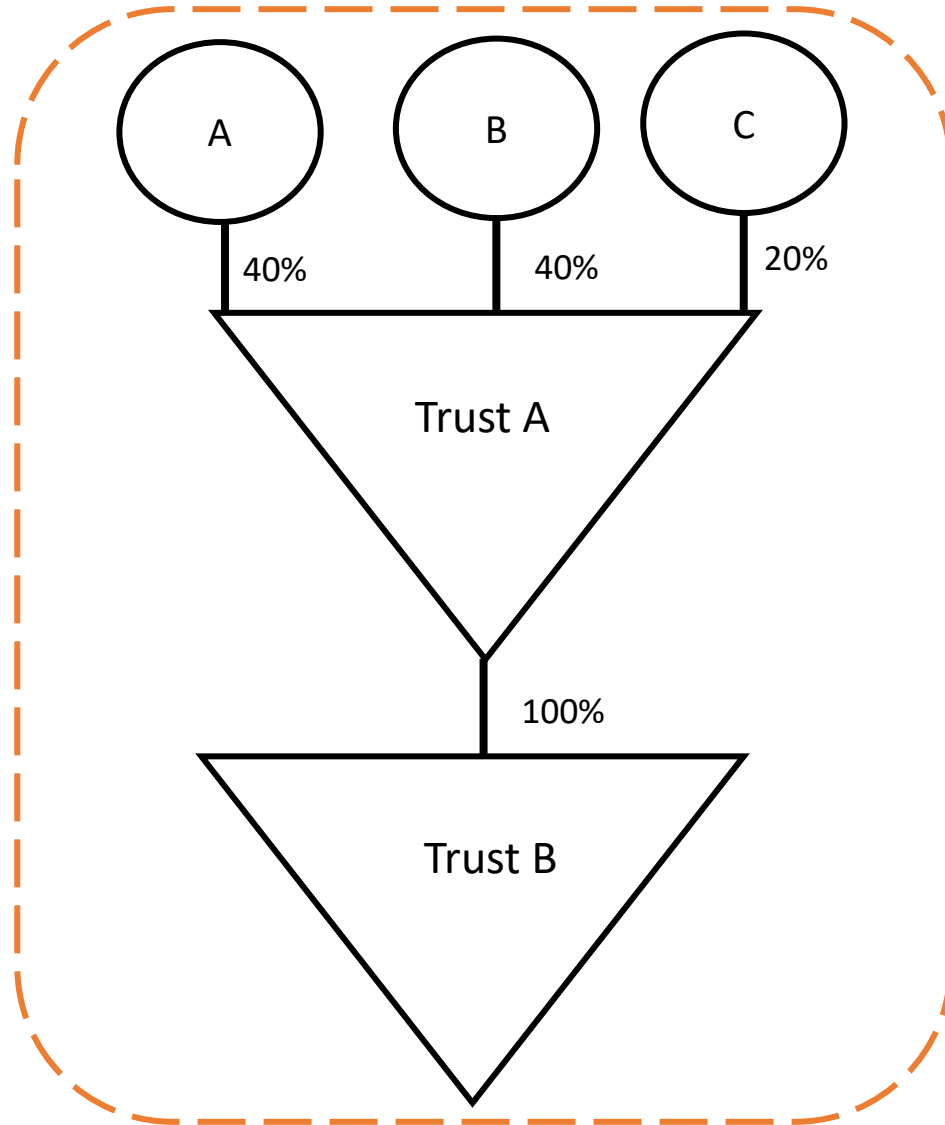
Common Controller – s71(3) PTA



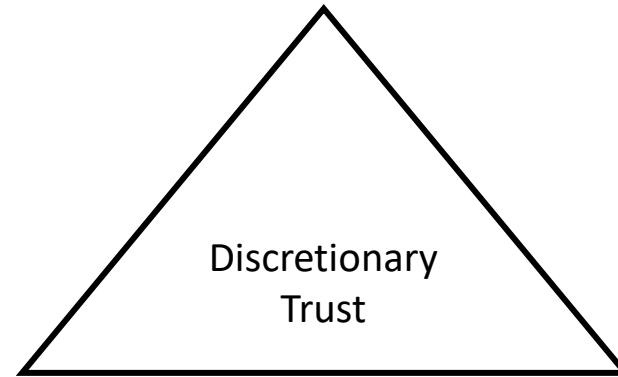
Common Controller – s71(4) PTA



Common Controller – s71(5) PTA



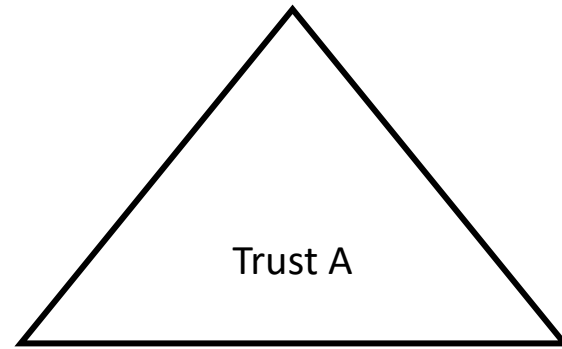
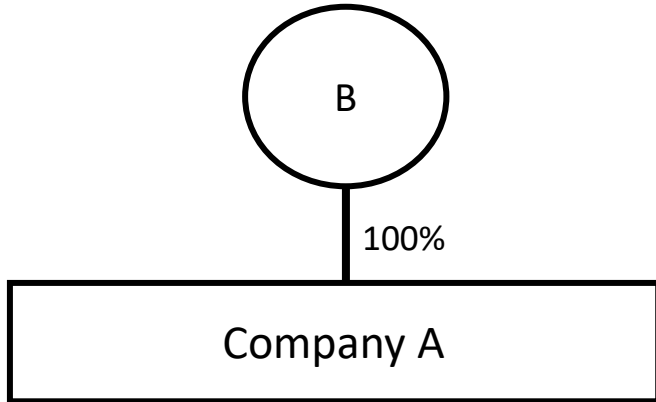
Common Controller – s71(6) PTA



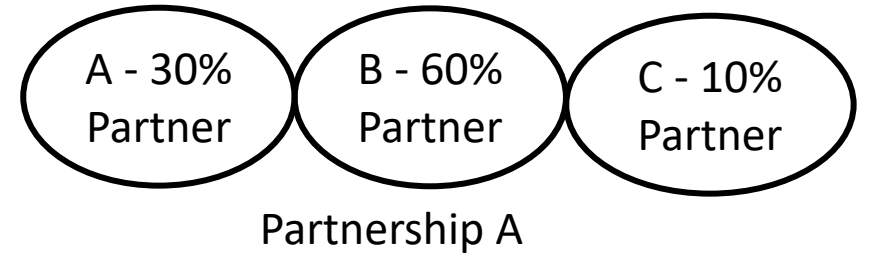
Primary Beneficiary: A
General Beneficiaries:

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

Common Controller – s71(7) and (8) PTA



Primary Beneficiary: A
General Beneficiaries: Same as previous slide (B is the brother of A)



Tracing of Interests

- (1) *A **relevant entity** and a corporation constitute a group if the entity has a **controlling interest** in the corporation.*
- (2) *For this section, a relevant entity has a "**controlling interest**" in a corporation if—*
 - (a) *the corporation has share capital;*
 - (b) *the **relevant entity** has an **interest** in the corporation; and*
 - (c) *the value of that interest is more than 50%.*

Section 72 PTA

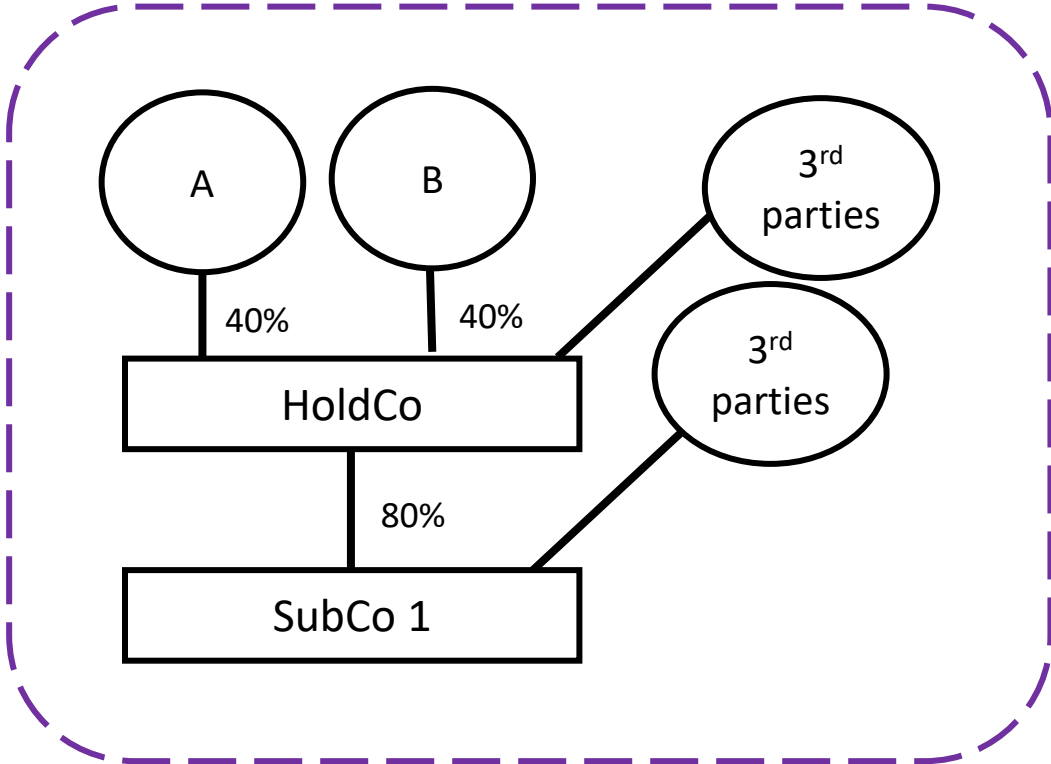
Relevant entity means a person or two or more **associated persons** – section 74B PTA

Associated persons includes **related persons** and ‘entities with Common Controllers’* - section 74C PTA

Related persons includes spouses (including de factos), parents, children and siblings – section 74D PTA

***Interest** is the common multiplier to calculate

Tracing of Interests

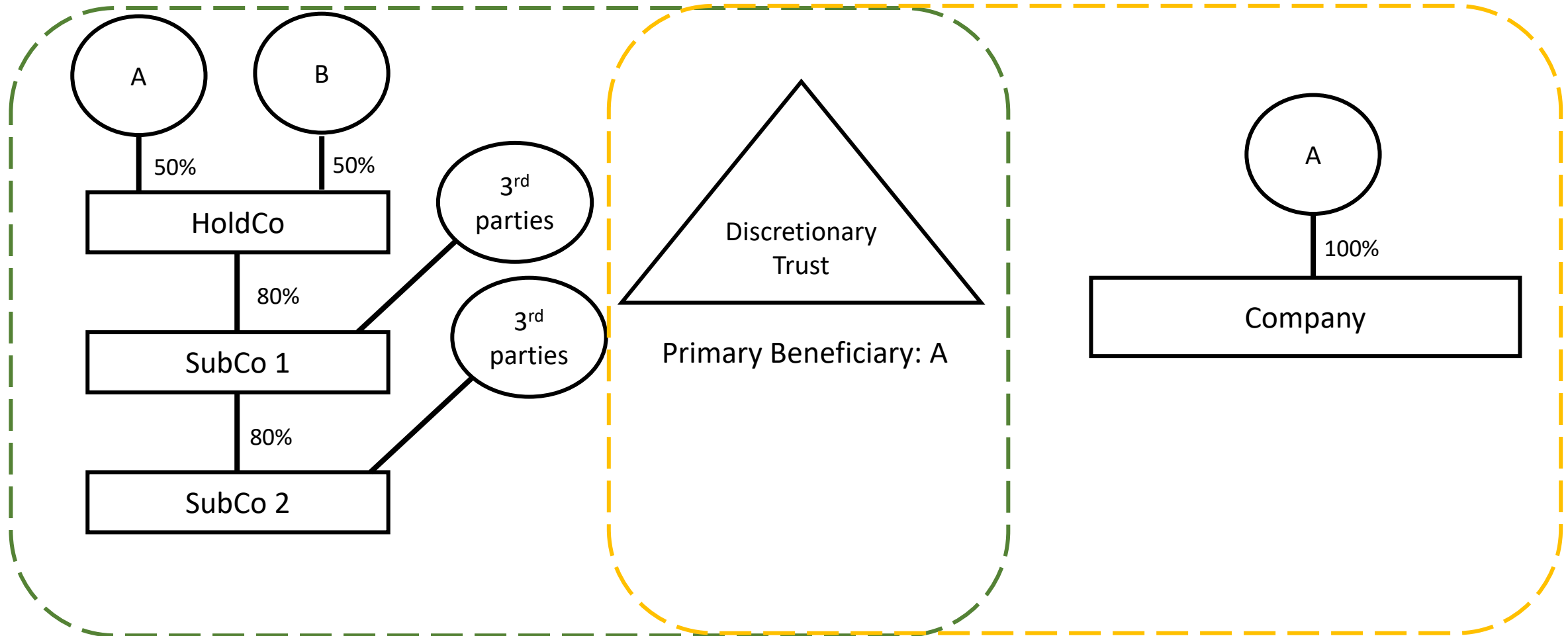


Common Group Member

- (1) If a person is a member of 2 or more groups, the members of all the groups together constitute a group.*
- (2) If 2 or more members of a group have together a controlling interest in a business...all the members of the group and the person or persons who carry on the business together constitute a group*

Section 73 PTA

Common Group Member



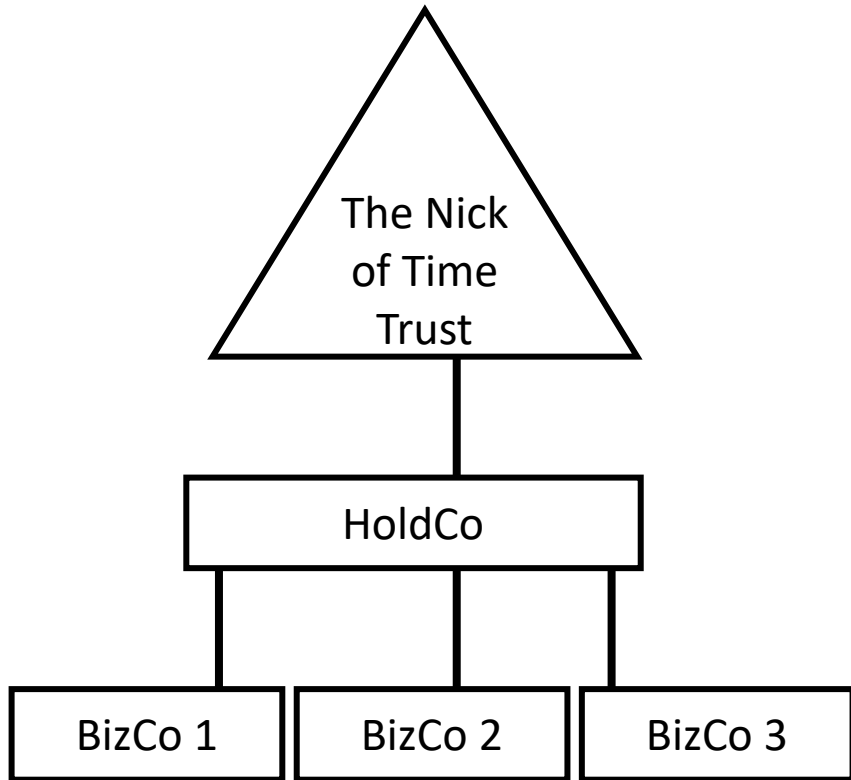
Consequence of being grouped

- One payroll tax tax-free threshold
- One set of deductions available to reduce payroll tax
- All group members jointly and **severally** liable to the debt
 - Asset protection
 - Risk issues

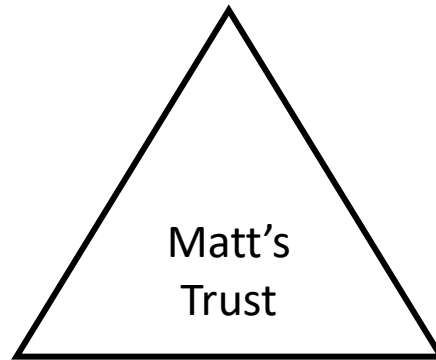
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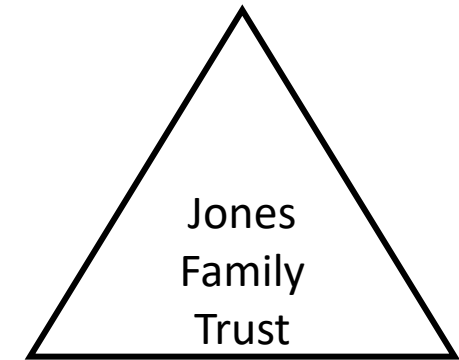
The effect of a discretionary trust



Notes:
BizCo 1, 2 and 3 have aggregated taxable wages equal to \$800,000
Nick is the primary beneficiary of The Nick of Time Trust

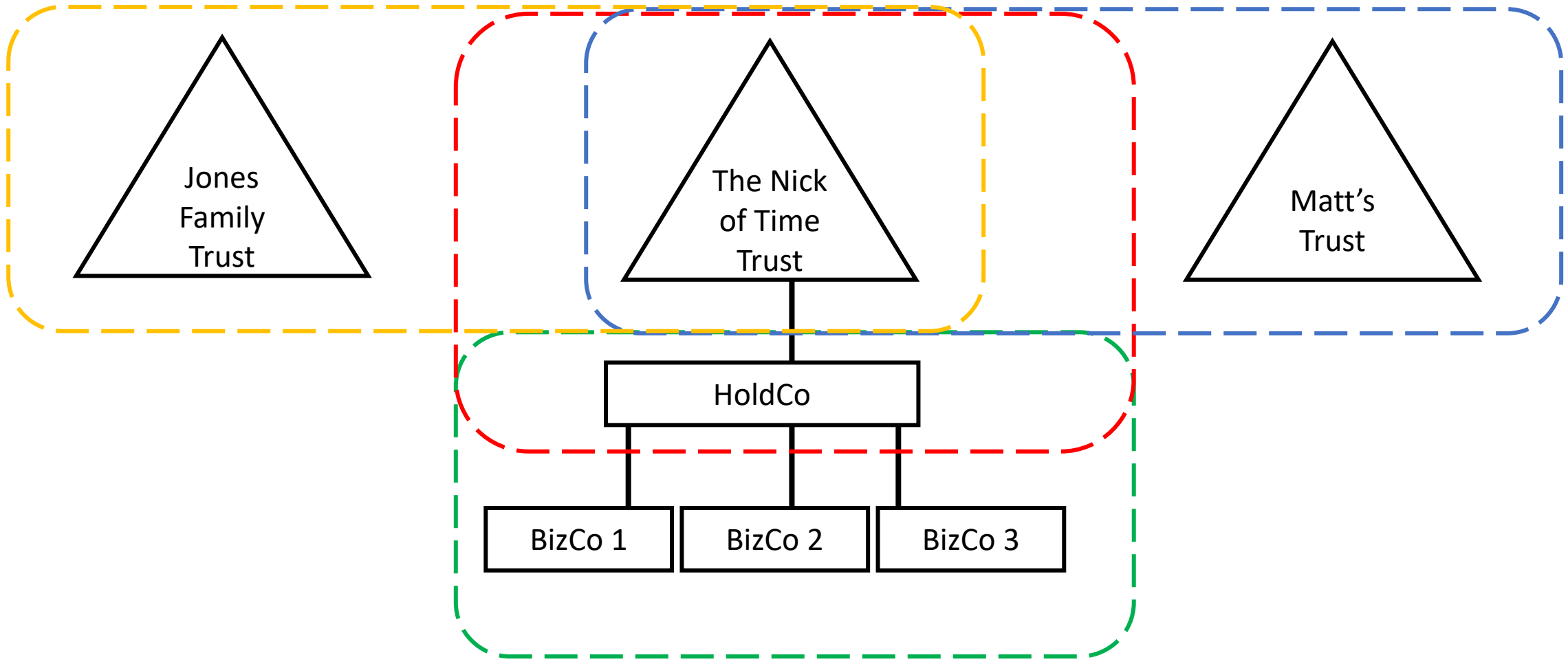


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Matt's Trust has taxable wages equal to \$900,000
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Notes:
Holds property and share investments
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The effect of a discretionary trust



Solutions to the problem

- Application to 'de-group'
- Structure discretionary trusts correctly

'De-grouping' application

- Asking the Commissioner to exercise a **discretion*** to exclude an entity from being a member of the group – section 74 PTA
- Cannot exclude related bodies corporate
- Test is if the Commissioner is satisfied the business carried on by the entity asking to be excluded from the group, is carried on independently and not connected with the business carried on by any other member of the group

*Not easy where businesses can be seen as working together

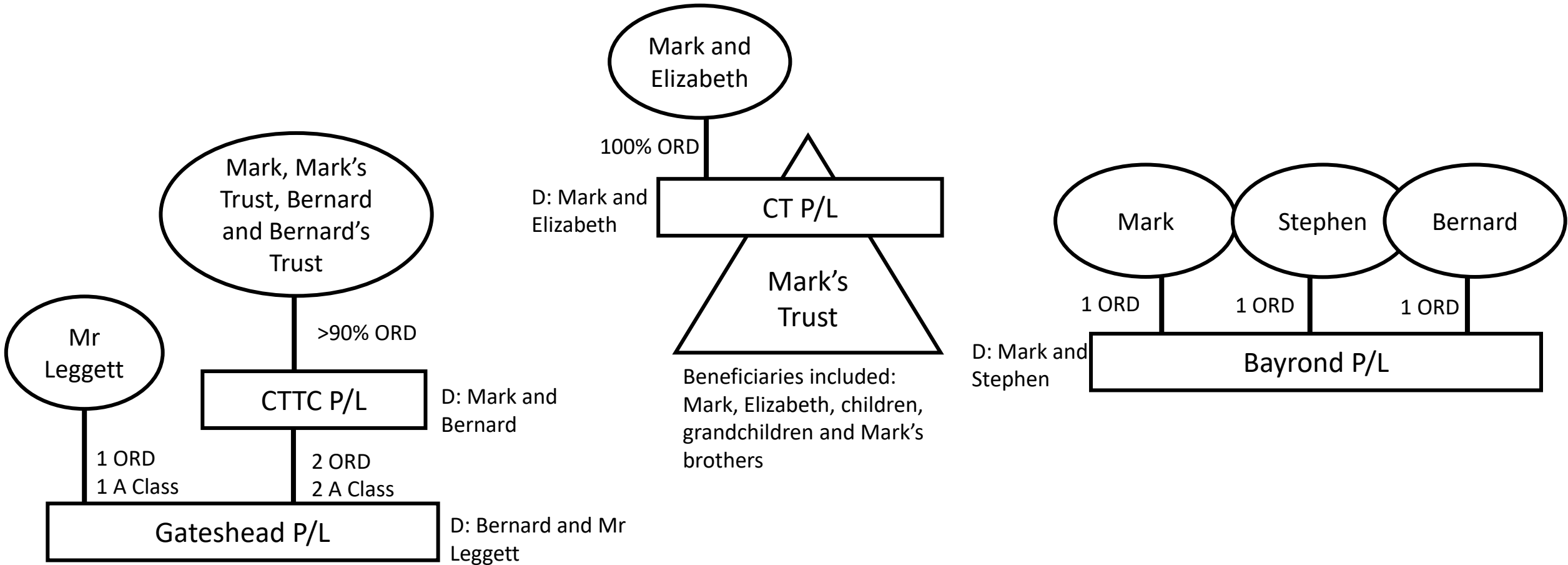
Factors considered to 'de-group'

- Nature and degree of ownership and control of the businesses carried on by the entity and the other members of the group
- The nature of the businesses
- Any other matters the Commissioner considers relevant

Any other matters the Commissioner considers relevant – Revenue ruling PTA 031

- Commercial transactions between members (and whether significant)
- Shared resources, facilities or services (including employees)
- Managerial and day to day administration
- Financial interdependencies such as loans, guarantees and common banking facilities
- Connection between members when purchasing or selling goods and services
- Nature of the business
- Connection between the ultimate owners

Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue [2017] NSWCATAD 368



Structuring

- Structuring from the get go
- Varying to get the structure right
- Rejecting interests to get the structure right
- Structuring contracts with 'workers'

The problem with discretionary trusts

- Hallmark feature
- Discretionary beneficiaries
- Default beneficiaries
- Anti-avoidance

'a person who may benefit from a discretionary trust...is taken for this part to be a beneficiary of the trust in respect of more than 50% of the value of the interests in the trust'

- Getting the beneficiaries right

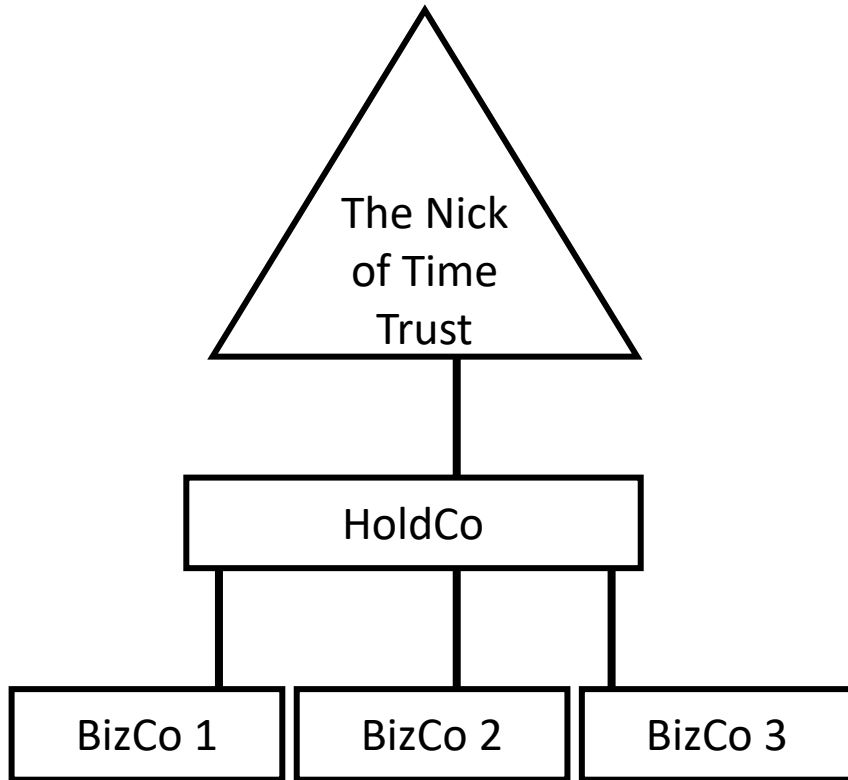
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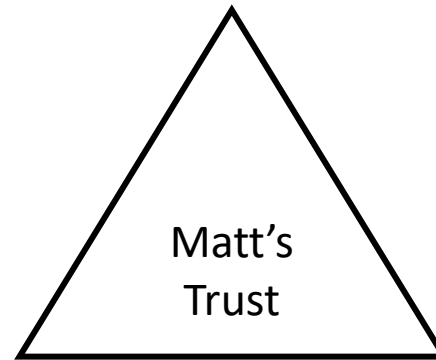
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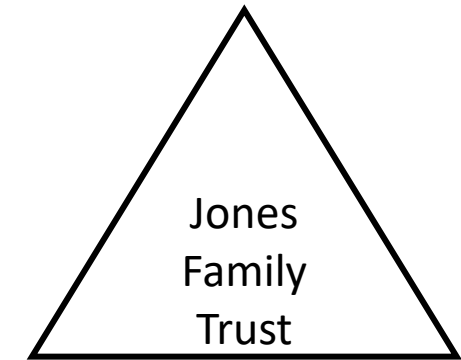
Reminder of the case study



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Common general beneficiary range

- *a Primary Beneficiary;*
- *a Spouse of the Primary Beneficiary;*
- *any **parent or grandparent** of the persons named in paragraphs (a) and (b) above;*
- *any **Children, lineal descendant or remoter issue** of the persons named in paragraphs (a) to (b) above;*
- *any **sister, brother, niece, nephew** of the persons named in paragraphs (a) and (b) above;*
- *any Children, lineal descendants or remoter issue of the persons named in paragraph (e) above;*
- *any **Spouse of the persons** named in paragraphs (a) to (f) above;*
- *the **trustee of any trust** which **any Beneficiary is a member of a class of beneficiaries named in that trust, or holds units in that trust;***
- *any **company** that **a Beneficiary, or this Trust holds any type of share or is a director** in that company;*
- *the personal representatives of the deceased estate of any Beneficiary;*
- *any person who is employed or engaged by the Trustee of this Trust in the course of any business or activity carried on by the Trustee of this Trust;*
- *any charity or religious entity.*

Limiting the beneficiary range

- Specifically exclude rows?
- Reduce beneficiary to just the primary beneficiary, spouse and (maybe) children?
- Complex distribution affairs moving forward
- Vigilant
- Consider entire group (including other trusts in the family where the relevant client could inadvertently 'control')

Structuring from the get go or varying later?

- Timing
- CGT and stamp duty
- Trust law
- Rectifying

Variations

- Traps
- 'Mere power' v 'trust power'
- 'Hereinbefore declared'
- 'Add to, replace'
- Retrospective?
- *Older deeds

Disclaimers and renunciations

The law certainly is not so absurd as to force a man to take an estate against his will...and...the law will certainly, by some mode or other, allow him to renounce or refuse the gift.

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

- Disclaimers – rejection of a gift, and able to apply retrospectively*
- Renunciation – rejection of right to receive distributions, and applies prospectively

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

Why disclaim or renounce?

- CGT could be managed – different CGT event applicable (C2)
- Trust deed is old?
- Can't get people to vary the deed?

Proper drafting

- Cessnock's Case and Rectification Deed
- Amending 'General Beneficiaries' in the 'Schedule of the Trust Deed' to remove brothers
- Rectification ≠
 - Variation
 - Disclaiming
 - Renunciation
 - Ratification

Reviewing of existing employment/contractor contracts

- Exempt wages?
- Contactor exemptions?
- Changes in the business structure?

Conclusion

- Your clients are probably grouped
- Two solutions are:
 - 'De-grouping' application
 - Structuring (whether the actual structure or the worker contracts)

Question?

Thank you

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