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Let’s chat

Business restructures – additional comments – May 2025

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

The thing about Queensland

- *Duties Act 2001* (Qld)
- Section 10 – what is dutiable property
  - (d) A Queensland business asset
- Section 34 – what is a Queensland business asset
  - 'a business asset of a Queensland business'
- Section 35 – what is a business asset
  - (a) goodwill…
  - (d) the business name used for carrying on a business…
  - (h) intellectual property used for carrying on a business;
  - (i) personal property in Queensland of a business
- Schedule 6 – definition of personal property
  - Means a personal chattel which includes trading stock and plant and equipment

The thing about Queensland

- *Duties Act 2001* (Qld)
- Section 9 – what is a dutiable transaction
  - A transfer of dutiable property…
  - A partnership acquisition
  - The creation or termination of a trust of dutiable property
  - A trust acquisition or trust surrender
- Sections 55 to 58
  - Trust acquisition where a person acquires a trust interest in a trust that holds dutiable property or has an indirect interest in dutiable property
  - Trust surrender is the opposite of a trust acquisition
  - Trust interest is a person's interest as a beneficiary of a trust and for a trust that is a discretionary trust, only a taker in default of an appointment by the trustee can have a trust interest
  - An indirect interest exists through a trust interest or partnership interest interposed

The thing about Queensland

- Caution
  - Restructuring trusts operating a Queensland business without considering stamp duty
    - Special caution where there is a unit trust
  - Restructuring businesses without considering stamp duty
- Get advice
  - Availability of a small business restructures?
  - Limited transactions of particular Queensland business assets may not be considered a dutiable transactions.
- Bust some myths
  - Don't need to lodge unit transfers for a unit trust that owns property/operates a business
  - No stamp duty on the restructure of a business
  - We only need to pay stamp duty on the consideration/net amount
  - Don't need to pay stamp duty when transferring within the family group

Queensland small business restructure

- Available for the following:
  - Sole trader to company with sole trader as sole shareholder
  - Partnership to company with each partner as the shareholders in the company in the same proportion
  - Trust to a company with the default beneficiary of the trust as the shareholders in the company in the same proportion as their default interest
  - Trust to a company with that trust as the sole shareholder
- Also important:
  - Transferor is a small business entity which carries on a Queensland business with an annual turnover of not more than $5 million
  - Value of small business property is less than $10 million
  - Restructured company has not since its registration and before the restructure: held any asset or liabilities, been a party to an agreement, been a beneficiary or trustee of a trust or issued or sold any shares or rights relating to shares

Queensland small business restructure

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- We can help with obtaining the Queensland small business restructure stamp duty exemption
  - Preparation of business sale agreement pursuant to Queensland stamp duty small business restructure exemption
    - Agreement can include additional provisions if relevant to obtain the small business restructure rollover or 122-A/122-B rollovers (we can provide a fixed price to provide any capital gains tax advice)
  - Provision of broad comments to consider when restructuring business into new entity
  - Meeting client to assist with any witnessing and taking of documents for processing
  - Liaising with Queensland Revenue Office to obtain Queensland stamp duty exemption
  - Reasonable queries to assist with the transition
- Instructions during June 2025 - $3,300 (GST inclusive)
- Otherwise - $2,750 (GST inclusive)

The need for documentation

- Documentation should be prepared so it can be lodged when seeking the stamp duty exemption
- What if the transfer relates to 'non-dutiable' assets (e.g. shares)?
  - Level of documentation may depend on the type of CGT rollover/concession relied upon
  - For example, where written notice or elections are required, then appropriate documentation can retain evidence of such notice/election
  - Alternatively, if the CGT rollover/concession requires parties to confirm certain facts, the documentation can include provisions confirming the compliance of such requirements
  - Documentation may be preferred where unrelated parties are involved with the transaction (i.e. employees buying in)
- We can assist with the inclusion of the drafting of share sale agreements, asset sale agreements or business sale agreements

The value of a lawyer

- When you're unsure about the effects of legal rights on persons, the value of a lawyer to discuss and consider flow on effects may be valuable
- Of particular relevance when dealing with trusts holding business assets
- Also of value if you are unsure about true 'asset protection' arguments
- Again, we are happy to assist where required (whether it is limited to the legal documentation, or if it extends to structuring advice)

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Degrouping for payroll tax

- Wife operates a business from Trust A
- Husband and Wife were Primary Beneficiaries
- A typical discretionary trust beneficiary class including trusts and companies where other beneficiaries had an interest
- Husband has his own business in Business Group B
- Concern Husband would result in Business Group B and Trust A being grouped for payroll tax purposes
- Deed of amendment entered into that:
  - Removed Husband as a Principal and Primary Beneficiary
  - Amended the trust deed to remove the Husband as a Primary Beneficiary in the Schedule, removing 'spouse of a Primary Beneficiary' as a Secondary Beneficiary in the Schedule; **and inserting Husband as an Excluded Beneficiary**

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Degrouping for payroll tax

- 9 years later
- Wife wants to include the Husband as a beneficiary of Trust A
- Issues:
  - By having the Husband included as an Excluded Beneficiary, amendments could not be made to allow an Excluded Beneficiary to be a Beneficiary of Trust A
    - There was no need to make the Husband as an Excluded Beneficiary
    - Difference between being named beneficiary, part of a beneficiary class, not included in a beneficiary class and specifically excluded as a beneficiary
  - Deed of amendment didn't even work to prevent payroll tax grouping
    - If there were other mutual persons that could control Trust A and Business Group B , they would have still been grouped
    - E.g. if the Wife could be seen as controlling Business Group B
    - E.g. if there were a mutual discretionary trust (i.e. Trust A could be seen as controlling Business Group B)

Buying the trust for its' licence

- Trust holds a licence that enables the trust to obtain certain contracts
- Engineer retiring and a younger engineer wishes to 'acquire the licence'
- Unfortunately, due to regulations, the licence can't be transferred
- Young Engineer wishes to 'purchase' the trust
- Need to:
  - Change Trustee
  - Change Appointor
  - Change Beneficiary (?)

Buying the trust for its' licence

- Due to the change of trustee exemption, a change of beneficiary cannot occur (stamp duty would be payable if there is a change of trustee as part of a transaction affecting the rights of beneficiaries)
- Trust law advice on having beneficiaries from a different family group
- How does consideration get paid
- What happens to fees paid in relation to the licence:
  - Wages paid from discretionary trust?
  - Fees paid to a related company instead?

Broadening the beneficiary class

- Beneficiaries of a Trust:
  - Named Person
  - Parents, siblings and children of Named Person
  - Other persons/entities nominated by the trustee
- Not included:
  - Spouses (including de facto spouses)
  - Spouses of other beneficiaries
- Trust is a service trust (holds business assets)
- The Default Beneficiaries are 'all of the beneficiaries of the Trust' and if more than one, in equal shares
- Risk by nominating other persons/entities, the default beneficiaries change

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Broadening the beneficiary class

- Need to ensure default beneficiaries remain the same, but allowing distributions to a broader beneficiary class
- Inserting a new beneficiary class and updating the income powers to enable distributions to that other beneficiary class
- 'Against trust law'?
  - Destroying the 'substratum of the trust'?
- The beneficiary class clearly allows for additional beneficiaries to be included
- Further, the variation power allows for the variation to be made so long existing beneficial rights are not adversely affected

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Trust amendments

- They can be hard
- Often requires asking the 'why' and whether it is worth it
- We can assist with discussing what is exactly required and whether the amendments can result in adverse trust law or tax consequences
- Fixed price will depend on the nature of the amendment required, and if exemptions are required to be sought:
  - Change of Trustee
  - Family Trust Exemption
  - Corporate Trustee Family Trust Exemptions

Other type of documents

- Business restructures can be broader than moving business assets
- Thinking of restructuring loans, care should be taken to ensure appropriate documentation are in place (where required)
  - Division 7A
  - Related party loans
  - Investment agreements (?)
- Got clients with a family connection overseas?
  - Overseas trust lending to Australian person/entity – section 99B *Income Tax Assessment Act 1936*
  - Overseas company lending to Australian person/entity – 109BC *Income Tax Assessment Act 1936*
  - CFC resident in an unlisted country provides a beneficiary to an Australian associated entity – section 47A *Income Tax Assessment Act 1936*

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Trust distributions

- Some restructures will require consideration of trust distributions
- Think twice before finalising and ensure any requirements can be met
  - Connected entity
  - Small business concession stakeholder
- Appreciate care must be taken when making separate income and capital distributions
- Ensure resolutions are signed by 30 June
  - Ensure they are not just signed without thinking to reduce any potential claims that the trustee failed to exercise their discretion in good faith
- Backdating is not okay, and there are methods to identify such

Contact details

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