The Tax Institute

NSW Tax Forum

Session 2C: What you need to know about grouping

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1. Overview

In the post pandemic world revenue collection has become the focus of revenue authorities at the Commonwealth and State/Territory levels. One of the significant areas in which revenue is recovered – and, often in ways the taxpayer did not know liability can arise – is through grouping. It is therefore incumbent on advisors to both know how to plan for the grouping regimes and how to react and assist a client whose inadvertently fallen into a *group* of one of the regimes without intending to do have done so.

Many revenue regimes include grouping provisions. Most seek to group by entity – which is the focus of this paper – but some also group over time or number of transactions to ensure an economic dealing that ought to be taxed in one way is not taxed more beneficially through compartmentalisation, either through time delay or multiple transactions.

The revenue regimes to be considered herein are:

1. The GST Grouping Regime in Division 48 in the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth);

2. The Land Tax Grouping Regime for companies or for joint owners of the *Land Tax Management Act* 1956 (NSW);

3. The Landholder aggregation regime in Chapter 4 of the *Duties Act* 1997 (NSW); and

4. The Payroll Tax Grouping Regime and the relevant contractor / employment agency provisions of the *Payroll Tax Act* 2007 (NSW).

It will be seen from considering the above there are commonalities across them but also differences based on the particular regime's objective and its subject matter. For instance:

- some regimes are optional (e.g. GST) whilst others are forced upon the clients (e.g. Payroll Tax);

- some elements are obvious (e.g. express grouping provisions) whilst others are subtle but have the same effect (e.g. Payroll Tax harmonisation saving time and costs or non-grouping provisions such as deemed employees effectively grouping third parties with a taxpayer); and

- most regimes extend the integrity of tax collection because the group members become jointly and severally liable for the taxes of the group, not just their liabilities which would otherwise have applied.

In each section the opportunities (e.g. tips) and risks (e.g. traps) will be sought to be addressed.

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2. GST Grouping

Unlike some of the other regimes discussed in this paper, whether to form a GST group or not is a matter for the taxpayer, not a consequence imposed upon the taxpayer. It is therefore something about which more detailed planning can be undertaken.

When considering whether or not to form a GST group it is important to consider both the administrative position of the relevant entities at the moment, who stand to benefit administratively from the grouping, but also the overall GST position they will be placed in should grouping proceed.

2.1 Ability to Form Group

A GST group consists of two or more business entities that operate as a single business for the purposes of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

To form a GST group the entities must satisfied certain requirements (set out below), nominate a group representative and then have that representative notify the Commissioner of Taxation of the Group.

By s 48-10 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) the conditions of forming a group are:

1. Each member in the group has the same tax period and GST reporting cycle, either quarterly or monthly;

2. Each member must have the same basis for GST reporting, e.g. either cash basis or accruals basis;

3. A member cannot be a member of more than on GST group;

4. A member cannot have GST branches;

5. Each member is party to a written agreement to form the GST group – this must be updated every time a new member joins, which can itself become an administrative burden;

6. Each group member must be 90% or more owned by other members in the group, which can be achieved through director ownership or via interposed entities (e.g. indirect ownership);

7. As said above, a group member must become the group representative.

The formation process is by self-assessment of the entity for their own eligibility. The following provisions apply to different entities (see s 48-10 and s 195-1):

Entity Type	Conditions
Companies only	Each company must be directly or indirectly owned as to 90%, being that percentage of voting power or capital/income entitlements
Companies and other entities	As above but the companies must be over 90% owned by the other entity or the companies shareholders satisfy the requirements for the other entities
Partnerships	Only partnerships does not involve any further conditions. The partners or their family members are GST group members already. Partnerships and other entities requires 90% interest in a company (as above), at least two partners are shareholders or beneficiaries of a trust or members of an existing partnership that is a group member.
Trusts	Fixed trusts have 90% requirement as with companies. Trustee can exercise at least 90% of company share votes. Trustee distributes any income or capital to *permitted beneficiaries* (e.g. group members or shareholders of them). Trustee is sole beneficiary of any distribution of income or capital by another trustee that is a group member. Distributions are limited to *family members* of the individual that ties trust into the group.
Individuals	Individual has the 90% requisite interest in a group company. The individual and/or *family members* comprise the partners of a partnership that is a member of the group. The individual and/or *family members* are beneficiaries (direct or indirect) of a trust that is a member of the group and the trustee of that trust distributes income or capital to *permitted beneficiaries* only.

Adding a New Group Member

A GST Group representative member can apply to have a new entity admitted to a GST group at the beginning of a tax period (e.g. a month or quarter depending on the lodgement periods applicable to the group). Any new member must satisfy the technical requirements to become a member and the qualifying requirements vis-à-vis its relationship to each other member of the group.

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Removing a Group Member

The GST Group representative member is required to advice the Commissioner of Taxation if a member:

1. ceases to qualify to be a member of the GST group; or

2. decides to leave the GST group.

By ss 48-51 and 48-52 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), if the removal of a GST group member would otherwise have occurred during a tax period (e.g. a month or quarter depending on the lodgement periods applicable to the group), the removal is backdated to the beginning of that tax period. This is significant as the backdating can impact on transactions that occurred before the member was required to leave, or elected to leave, the GST group and may have been accounted for on the basis that the entity was a group member.

If an adjustment is required due to a group member leaving, the group representative is liable for that amount to the Commissioner of Taxation: s 48-71 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

2.2 Consequences of GST Group Formation

The consequences of forming a GST group is that the entities constituting the group – who would otherwise be separate entities for GST purposes – are effectively treated as a 'single entity' for various GST purposes in accordance with Division 48 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

The effect of forming the GST group is that:

1. The representative member is responsible for lodging a single GST return on the group's behalf: see s 48-5 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth);

2. Internal transactions between group members are generally ignored for GST purposes: see ss 48-40 & 48-45 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth). Though if a supply is made partly when both parties are group members and partly when they are not an apportionment is required: ATO ID 2012/34;

3. All GST transactions made by the group with external parties (e.g. taxable supplies, creditable acquisitions, taxable importations et cetera) are treated as being made through the group representative member for dealings with the Commissioner of Taxation (though for the actual dealings with the third party the group member – not the representative – ought to still send or receive the tax invoice – *GST Ruling* 2013/1); and

4. The group representative is responsible for any GST payments and able to claim any input tax credits, and is liable for any adjustments that are due, but the group members are then jointly and severally liable for the entirety of the group's GST liabilities: see s 48-40 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

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No Anti-Avoidance Issue on Grouping

Despite the benefits set out under the next heading, a taxpayer's availing themselves of an option open under the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) is not considered a choice that would call for the anti-avoidance provisions in Division 165 of that Act to apply: see s 165-5(3) of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) and the principles considered in *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523; 87 ALJR 588; 297 ALR 190; 87 ATR 13; 2013 ATC 20-389; [2013] HCA 16.

2.3 Benefits of GST Group Formation

Once formed a range of benefits flow from being part of a GST group:

1. The GST representative member lodges as single BAS with the Commissioner of Taxation for the group each period, thereby saving time and effort in processing further lodgements;

2. GST grouping eliminates the need to apply GST to inter-entity but intra-group transfers (see the benefits discussed further below);

3. A single GST payment / refund is required each period from the representative member, reducing the number of transactions and reconciliation work required;

4. Joining the group is a choice for each member, and specific entities can be exclude from the group if desirable to do so, even if they are wholly owned by other members of the group (this can be contrasted to the income tax consolidations regime, where the choice to join a consolidated group is mandatory in certain circumstances); and

5. Improved cashflow as there is an ability to offset liabilities for taxable supplies with receipts from input tax credits relevant across the group.

Having said that, it is good practice for each member to still prepare its own Business Activity Statements – even if they are not lodged – to substantiate the GST claims it makes that is part of the aggregated claims of the Group.

An example of the benefits that has arisen in the author's practice is a trading company with profits but asset protection risks that has used trading funds to build up property asset holdings developed tangentially with the trading business. The decision was made to move the real estate within the five year period that renders it no longer *new residential property*. By forming a group with a head entity the real estate was able to be moved (albeit with duty consequences, but saving the asset protection problem) without duty being imposed that otherwise would have been imposed.

A more bespoke, or particular, list of benefits potential available are:

1. If you provide GST-free services (such as education) through multiple companies GST on intra-group supplies can be removed;

2. As stated above, intra-group asset transfers are easier (though the duty and income tax consequences remain); and

3. The transfer of tax losses to a company that is not a member of the group is a taxable supply if it is made for consideration to an associate but, the Commissioner of Taxation accepts that GST is not payable on a transfer of such losses within a GST group.

2.4 Detriments of GST Group Formation

In contrast to the above benefits, there are some detriments to forming a GST group.

Joint and Several Liability

Under s 444-90 of Schedule 1 to the *Taxation Administration Act* 1953 (Cth) all members of a GST group are jointly and severally liable for the GST payable by the group or any member of it.

Further, if a group member has tax debts the Commissioner of Taxation can offset a GST refund payable to the group against the other tax debts of the member: see ss 8AAZLa and 8AAZLB of the *Taxation Administration Act* 1953 (Cth).

Further guidance on the Commissioner of Taxation's collecting group debts are in *Practice Statement* PS LA 2013/6.

Should the members of the group consider the joint and several liability ought be tempered they can enter into an indirect tax sharing agreement (**ITSA**) to limit the particular member's exposure: see s 444-90 of Schedule 1 to the *Taxation Administration Act* 1953 (Cth). This option is available on and from 1 July 2020. Under such an ITSA the representative member remains liable for all of the group's GST debt – making the choice of the representative entity an important one – but other members of the group. The requirements of an ITSA are:

1. It must be entered into between the representative member and one or more members of the group;

2. It must be entered into before the date on which the representative member is required to lodge the Business Activity Statement for the relevant tax period;

3. Each participating member's *contribution amount* for the relevant period must be ascertainable from the agreement;

4. The contribution amount must represent a *reasonable allocation* of each participating member's liability for the group's indirect tax payable for that period.

Further, the ITSA is ineffective if:

1. The representative member fails to comply with the written notice from the Commissioner of Taxation requiring it to provide a copy of the agreement in the approved form within 21 days;

2. The agreement was entered into as part of an arrangement which had a purpose of prejudicing the Commissioner of Taxation's recovery of the group's Business Activity Statement liability;

3. The representative member enters into one or more agreement for the same period.

In light of the purpose of an ITSA being to remove a group member's liability it might be asked how can any ITSA ever satisfy #2.

The requirements for the ITSA are set out by the Commissioner of Taxation at *Indirect Tax Sharing Agreement* on the ATO website. See also *Practice Statement* PS LA 2013/6.

Loss of Thresholds

Importantly, GST thresholds are applied for the group as a single entity and not ot each member of the group. For example:

1. the financial acquisitions threshold in Division 189 of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) only applies to the GST group as a whole and cannot be allocated to each member of the GST group.

2. The turnover limits (i.e. cash accounting, monthly tax periods et cetera) also only apply to the group as a whole and all members must be on the same reporting basis and GST period (i.e. cash or accruals and monthly reporting or quarterly reporting).

BAS For Other Reasons

Although one Business Activity Statement is needed for the group, and despite the above comment that it is appropriate to have the group members prepare (but not lodge) their Business Activity Statements for substantiation purposes, those other group members will have to prepared and lodge a Business Activity Statement if it is otherwise needed to deal with other reporting obligations such as PAYG Withholding, PAYG Instalments or FBT Instalments.

3. Land Tax Grouping

It is convenient to note why grouping is financially disadvantaged in a land tax context.

3.1 Land Tax Thresholds Generally

Land tax is payable by the owner of land upon the taxable value of all the land which, at midnight on the 31 December each year, is owned by them within New South Wales and which is not exempt: ss 7, 8 & 9(1) of the *Land Tax Management Act* 1956 (NSW).

The taxable value of all land owned by a person is the total sum of the average value of each 'parcel' of that land, less any deduction allowed by the Act for the use of certain land for primary production and similar purposes: ss 9(2) & (3) of the *Land Tax Management Act* 1956 (NSW). Section 9AA sets out how to assess the average value of a parcel of land.

The rate of land tax is 1.6% of the unimproved land value of the property holdings but, for certain taxpayers, a land tax free threshold applies (this assumes the foreign person surcharge does not apply).

In 2023, that threshold is $969,000. Once the taxpayer (otherwise entitled to the threshold) holds land over that amount $100 plus 1.6% of every dollar over it is levied. If the relevant holding (and the related company discussions below may make this relevant to the clients) is valued at $5,925,000 the land tax on every dollar thereafter is levied at 2%.

A company is assessed in the same way as an individual owner, unless it is related to another company or other companies (which I discuss below). Therefore, companies and individuals can access the threshold discussed above.

A real issue, therefore, is whether they will be grouped and therefore lose the benefit of one of those thresholds and be jointly and severally liable for the total land tax payable. The loss of a single threshold is worth $15,504 per annum.

3.2 Grouping Companies

A company is considered to be a related company if two or more companies are commonly owned or controlled. A related company can be assessed separately or assessed jointly with another company or companies to which it is related under the related companies (grouping) provisions in s 29 of the *Land Tax Management Act* 1956 (NSW).

Section 29 of the *Land Tax Management Act* 1956 (NSW) provides:

29 Related companies

(1) For the purposes of this section, 2 companies are related to each other:

(a) if one of those companies holds a controlling interest in the other company, or

(b) if the same person holds, or the same persons together hold, a controlling interest in both companies, or

(c) if:

(i) more than one-half of the issued share capital of one of those companies (in this paragraph referred to as ***the first company***) is held by the other company (in this paragraph referred to as ***the second company***) together with the shareholders of the second company, and

(ii) the proportion of the issued share capital of the second company held by shareholders of the first company is more than the difference between one-half and the proportion of the issued share capital of the first company held by the second company, or

(d) if one of those companies is related to a company to which the other of those companies is related (including a company which is related to the other of those companies by reason of another application or other applications of this paragraph).

(1A) A person holds, or persons together hold, a ***controlling interest*** in a company if:

(a) the person, or the persons acting together, can control the composition of the board of directors of the company, or

(b) the person is, or the persons acting together are, in a position to cast or control the casting of more than half of the maximum number of votes that might be cast at a general meeting of the company, or

(c) the person holds, or the persons acting together hold, more than half of the issued share capital of the company.

(2) For the purposes of determining whether companies are related, the following provisions apply:

(a) companies may be related to each other notwithstanding that those companies do not own land in New South Wales,

(a1) in subsections (1) (b) and (1A), ***person*** includes company,

(b) a reference to the issued share capital of a company does not include a reference to any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital,

(c) any shares held or power exercisable by a person or company as a trustee or a nominee for another person or company:

(i) are to be treated as held or exercisable by that other person or company, if the trust is a fixed trust, and

(ii) are to be treated as not held or exercisable by the trustee or nominee (whether or not the trust is a fixed trust),

(d) any shares held or power exercisable by a person or company by virtue of the provisions of any debentures of another company, or of a trust deed for securing any issue of any such debentures, shall be disregarded,

(e) any shares held or power exercisable by, or by a nominee for, any person or company (not being held or exercisable as mentioned in paragraph (d)) shall be treated as not held or exercisable by that person or company if the ordinary business of that person or company includes the lending of money and the shares are held or the power is exercisable only by way of security given for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money, not being a transaction entered into with a person associated with that person or company within the meaning of Division 2 of Part 1.2 of the *Corporations Act 2001* of the Commonwealth,

(f) without limiting by implication the circumstances in which the composition of a company's board of directors is to be taken to be controlled by a person or another company, the composition of a company's board of directors shall be taken to be controlled by a person or another company if that person or other company, by the exercise of some power exercisable whether with or without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors.

(3) The Chief Commissioner, in assessing the land tax payable by companies that are related to each other and that own land in New South Wales:

(a) may assess:

(i) all those companies separately,

(ii) all those companies jointly, or

(iii) any 2 or more of those companies jointly and the remainder separately, and

(b) shall classify:

(i) 1 of those companies, or, where a joint assessment is made, the companies jointly assessed, as a concessional company, and

(ii) the remainder (if any) as non-concessional companies,

and the companies shall be liable accordingly.

(4) Where 2 or more companies are jointly assessed under subsection (3), those companies shall, for the purposes of that assessment, be deemed to be a single company.

(5) Where 2 or more companies related to each other are liable for land tax (whether assessed separately or jointly), each company is liable jointly and severally to pay that tax.

(6) Section 45 of the *Taxation Administration Act 1996* applies to an amount payable under subsection (5).

(7) If a company is classified as a non-concessional company, the company, and each of the companies that are related to it, are members of the same group.

The Group's land tax liability is a joint and several one: s 29(6) of the Act which states s 45 of the *Taxation Administration Act* 1996 (NSW) applies. That section provides:

45 Joint and several liability

(1) If two or more persons are jointly or severally liable to pay an amount under a taxation law, the Chief Commissioner may recover the whole of the amount from them, or any of them, or any one of them.

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(2) If under a taxation law two or more persons are jointly and severally liable to pay an amount of tax that is payable by any one of them, each person is also jointly and severally liable to pay any related charges, being:

(a) any amount payable to the Chief Commissioner under a taxation law in relation to that amount, including any interest and penalty tax under Part 5, and

(b) any costs and expenses incurred in relation to the recovery of that amount that the Chief Commissioner is entitled to recover from any such person.

(2A) The Chief Commissioner may issue a notice of assessment of the liability of a person to pay any tax and related charges for which the person is jointly and severally liable with another person under a taxation law, even if a notice of assessment has already been issued to the other person.

(3) A person who pays an amount of tax in accordance with the liability imposed by this section has such rights of contribution or indemnity from the other person or persons as are just.

The Chief Commissioner has set out his views on s 20 of the *Land Tax Management Act* 1956 (NSW) in Revenue Ruling LT 003v2 (Dated 23 October 2012).

3.3 Joint Owners

Joint owners of land are jointly assessable and liable in respect of land as if a single person owned the land and there was no entitlement to any deductions. The term 'joint owners' is defined in s 3(1) as:

> ***Joint owners*** means persons who own land jointly or in common, whether as partners or otherwise, and includes persons who have a life or greater interest in shares of the income from the land and persons who by virtue of this Act are deemed to be joint owners.

Section 27 of the *Land Tax Management Act* 1956 (NSW) then prescribes the manner in which joint owners of land shall be assessed for land tax. Particular note should be taken of ss 27(3) & (4).

The Act makes a distinction between ‘primary taxpayers’ and ‘secondary taxpayers’ in respect of land. There are numerous provisions throughout the Act referred to these terms (for instance, s 23 has been referenced above).

The joint owners in respect of their joint assessment are deemed to be the primary taxpayer and each joint owner in respect of his or her separate assessment is deemed to be a secondary taxpayer. Fundamentally, the *Land Tax Management Act* 1956 (NSW) provides that joint owners of property in respect of their jointly owned property shall be deemed to be the primary taxpayer and that the joint owners are jointly assessable and liable in respect of the land. Property may be owned as joint tenants or as tenants in common. And the ratios (whether 50/50 or 999/1) do not alter the fact of there being joint ownership.

Where two or more persons are jointly liable for land tax, they are each liable for the whole tax. It is joint and several. However, any of the owners who have paid the tax may recover contributions from the other owners: s 45 of the *Taxation Administration Act* 1996 (NSW).

In addition to the primary assessment, each joint owner is also separately assessable and liable as a secondary taxpayer in respect of his or her individual interest in the jointly held land, together with other land they own: s 27(4) of the *Land Tax Management Act* 1956 (NSW). An example illustrates the point:

> Assume Olive and Nina jointly own Greeacre as tenants-in-common in equal shares. Greenacre’s current land value is $600,000 and it is not exempt from land tax. Olive does not own any other land, but Nina owns an investment property whose current land value is $450,000.
>
> Olive and Nina are deemed to be the primary taxpayer in respect of their joint assessment and each is deemed to be a secondary taxpayer for the purposes of their respective assessments: s 27.
>
> Land tax is assessed as follows:
>
> *Assessments of primary taxpayer*
>
> Land value of Greenacre = $600,000
>
> Land tax payable = $100 plus 1.6% of $51,000 ($600,000 less threshold of $549,000[1]) = $916
>
> *Assessments of secondary taxpayers*
>
> Olive’s Assessment:
>
> Since Olive doesn’t own any other land she is not liable to pay any further land tax.
>
> Nina’s Assessment:
>
> Share of interest in Greenacre $300,000
>
> Land value of investment property $450,000
>
> Land Tax Payable: $100 plus 1.6% of $201,000 ($750,000 less threshold of $549,000) = $3,316

less deduction of $458[2] ($916 divided by two) to prevent double taxation

Land Tax Payable = $2,857

The secondary taxpayer is assessed and liable in respect of the land or interest, notwithstanding that the primary taxpayer is exempt from taxation in respect of the land or interest, or that there is no primary taxpayer in respect of the land or interest: s 33 of the *Land Tax Management Act* 1956 (NSW).

The operation of s 27 of the Act, in its form at that time, was described as follows by Barwick CJ, Kitto & Menzies JJ in *Hollingworth v Commissioner of Land Tax* (1968) 118 CLR 45 at 51-52:

> As to joint owners the plan adopted (in s 27) is to make the joint owners jointly liable for land tax in respect of the land as if it were owned by a single person, and to make each of them separately liable in respect of his individual interest together with any other land owned by him in severalty and his individual interests in any other land. The joint owners in respect of their joint assessment are deemed to be the primary taxpayer, and each joint owner in respect of his separate assessment to be a secondary taxpayer — presumably meaning so far as the jointly owned land is concerned; and then follows a provision to prevent double taxation of the secondary taxpayer, namely that the necessary deduction shall be made "from the land tax payable in respect of his interest in the land by each joint owner".

The '*provision to prevent double taxation of the secondary taxpayer*' that Barwick CJ, Kitto & Mezies JJ referred to is s 33 of the *Land Tax Management Act* 1956 (NSW).

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[1] This is an outdated threshold, but it is used to allow the numbers to work.

[2] The deduction is calculated in accordance with s 33 of the Act, as the lesser of:

- the amount of land tax payable in respect of Greenacre: $300,000/$750,000 x $3,316 = $1,326/40
- the amount of land tax payable in the primary assessment in respect of Nina's half interest (e.g. half of $916) = $458

4. Duties Grouping

Although not strictly a "grouping" of entities, a relevant regime to this paper is the aggregation provisions in the Chapter 4 of the *Duties Act* 1997 (NSW). This is because the purchase of shares in a private company, or units in a unit trust, will not be subject to stamp duty: s 34(1) (and the note to s 11) of the *Duties Act* 1997 (NSW). However, if the acquisition is 'relevant acquisition' for the Landholder Provisions in Chapter 4 of the *Duties Act* 1997 (NSW), *ad valorem* duty will still apply.

4.1 Landholder Duty

Chapter 4 of the *Duties Act* 1997 (NSW) charges duty on certain transactions that are otherwise not *dutiable transactions* under Chapter 2 of that Act: s 145. The rate of duty is higher under Chapter 4 than under Chapter 2 in relation to private company shares or units because it assess as if the land was being transferred.

Landholder duty is levied when a *relevant acquisition* arises: s 148 of the *Duties Act* 1997 (NSW). A relevant acquisition includes the acquisition of a significant interest in a *landholder*: s 149.

A *landholder* includes a company or a unit trust scheme that has land holdings in NSW with a threshold value of $2m or more: s 146 of the *Duties Act* 1997 (NSW).

A *significant interest* is an entitlement to the distribution of 50% or more of the property of the landholder if such a distribution occurred: s 150 of the *Duties Act* 1997 (NSW).

Relevantly, a party can be a landholder before settlement, but after contract, as special rules deem both parties to an uncompleted contract to be separately entitled to the whole of the property: s 160 of the *Duties Act* 1997 (NSW).

Returning to the definition of a 'relevant acquisition', it also includes the acquisition of an interest in a landholder that, when aggregated with other interests in the landholder acquired by the person or other persons under acquisitions that form, evidence, give effect to or arise from what is *substantially one arrangement between the acquirers*, results in an aggregation that amounts to a significant interest in the landholder: s 149(1)(A)(iii) of the *Duties Act* 1997 (NSW).

In terms of the relevant matters in Ruling DUT 028, the Chief Commissioner states as follows:

> In determining whether the acquisitions are substantially one arrangement, any relevant matters will be taken into account, including the following:
>
> - any interdependency between the acquisitions, including whether any of the acquisitions are conditional on any of the other acquisitions;
> - whether the persons from whom the interests are acquired are the same or associated persons;
> - the period of time over which the acquisitions take place;
> - whether the acquirers' interests will be used together; and
> - whether the interests were used together before the acquisitions.

And further:

> Unlike the similar provision in section 25 of the Duties Act, section 114 refers to substantially one arrangement "between the acquirers". Consequently, the disposal of a 100% interest in a land

> rich landholder to unassociated parties (none of whom acquires a significant interest) who do not have knowledge of the identity or purposes of the other acquirers would not constitute one arrangement between the acquirers.

Note that although this refers to the relevant legislation under equivalent provisions in the former 'land-rich' regime and DUT 028 is obsolete, the current legislation adopts the same limitations (the words, 'between the acquirers') and should be given the same interpretation.

4.2 Grouping for Landholder Duty

The Landholder regime contains grouping mechanisms to ensure that a *relevant acquisition* is not defeated by moving it to relevantly related entities.

Where two entities are linked entities the acquisitions will be aggregated for the purposes of Chapter 4 of the Act. Whether entities are "linked" is governed by s 158 of the Act, which provides:

158 Meaning of "linked entity"

(1) A ***linked entity*** of a private unit trust scheme or private company (a ***principal entity***) means an entity (other than a public unit trust scheme or a listed company) that is part of a chain of entities:

(a) that starts with the principal entity and is comprised of one or more links, and

(b) in which one or both of the following apply:

(i) at each link between 2 entities in the chain—one of the entities would be entitled, in the event of a distribution of all the property of the other entity (and without regard to any liabilities of any entity in the chain), to receive not less than 50% of the value of the property of the other entity,

(ii) in the event of the distribution of all of the property of entities in the chain (except for the principal entity)—the principal entity would be entitled (without regard to any liabilities of any entity in the chain) to receive not less than 50% of the value of that property.

(2) A ***linked entity*** of a public unit trust scheme or listed company (a ***principal entity***) means an entity that is part of a chain of entities:

(a) that starts with the principal entity and is comprised of one or more links, and

(b) in which, at each link between 2 entities in the chain—one of the entities would be entitled, in the event of a distribution of all the property of the other entity (and without regard to any liabilities of any entity in the chain), to receive not less than 50% of the value of the property of the other entity.

(3) For the purposes of this section:

(a) a trust is to be regarded as entitled to receive property (whether as a principal entity or as a linked entity of a principal entity) if a trustee of the trust is entitled to receive the property in its capacity as a trustee, and

(b) a partnership or other unincorporated body is to be regarded as entitled to receive property, as a linked entity of a principal entity, if a member of the partnership or other unincorporated body is entitled to receive the property as a member of the partnership or the other unincorporated body.

(4) In this section and in section 158A:

entity means any of the following:

(a) a corporation,

(b) a unit trust scheme,

(c) a trust,

(d) a partnership or other unincorporated body.

(5) In this section and in section 158A:

(a) a reference to a ***trust*** includes a reference to a unit trust scheme, and

(b) a reference to a ***trustee*** of a trust includes a reference to a custodian of the trustee of the trust in its capacity as custodian or a sub-custodian of the custodian of the trustee of the trust in its capacity as sub-custodian.

Of further relevance is s 149(1)(a)(ii) of the *Duties Act* 1997 (NSW), which aggregates the interests in the landholder held by associated persons. Clause 2 of the Dictionary to the *Duties Act* 1997 (NSW) states "associated persons" includes "related persons". So far as is relevant it provides:

2 Meaning of "associated person"

(1) For the purposes of this Act, an ***associated person*** means a person who is associated with another person in accordance with the following provisions:

(a) persons are associated persons if they are related persons,

(b) natural persons are associated persons if they are partners in a partnership to which the *Partnership Act 1892* applies,

(c) companies are associated persons if the same person has a majority shareholding in each company,

(d) trustees are associated persons if any person is a beneficiary common to the trusts of which they are trustees,

(e) a company and a trustee are associated persons if a related body corporate of the company is a beneficiary of the trust (not including a public unit trust scheme) of which the trustee is a trustee,

(f) a company and the trustee of a unit trust scheme are associated persons if the shares in the company and the units in the unit trust scheme are "stapled", so that they cannot be traded except as a single security,

(g) trustees of unit trust schemes are associated persons if the units in the unit trust schemes are "stapled", so that they cannot be traded except as a single security.

When acquiring interests in private landholders (there is a public threshold at 90% but that less likely to be breached), consideration ought always be given to the issues above.

5. Payroll Tax Grouping

Due to the harmonisation project, in which the various State and Territory payroll tax regimes are harmonised as much as possible, considering the *Payroll Tax Act* 2007 (NSW) has some cross-over to other jurisdictions. This paper will only consider that NSW Act.

5.1 Payroll Tax Generally

Payroll tax is a State and Territory based tax that is determined by reference to an employer's taxable wages and is payable by the employer to the relevant State or Territory Revenue Office. Generally, employers are required to self-assess their payroll tax liability on a monthly basis by calculating the tax payable for each return period. Employers must also undertake an annua reconciliation at the end of each financial year to ensure that the correct payroll tax liability is paid.

This annual reconciliation differs from the Land Tax regime discussed above, where it is more likely that some years pass before the taxpayer concerned becomes aware of the issue, because there are less touch points as to the liability before the Chief Commissioner gets involved.

Payroll tax is therefore a tax on an employer that starts at a level of taxable wages and increases as that level of wages increases. Up to 30 June 2020 the threshold was $900,000, and it has been $1.2 million since 1 July 2020. Since 1 July 2022 payroll tax of 5.45% paid on wages over the threshold.

There are three broad areas of relevance for this paper within the Payroll tax regime:

1. Broad Outlines of the Harmonisation Project: this has relevance as a client may have a group of entities operating in, or a business conducting operations in, multiple jurisdictions;

2. Grouping provisions generally: which is the obvious regime to consider in this paper; and

3. Taxing provisions that extend the basis of assessment beyond immediate employees of an organisation: this is not as obvious a topic for this paper one that is every bit as important as it is commonly litigated and creates an increased tax liability.

They will be considered separately.

5.2 Payroll Tax Harmonisation

Modern businesses travers national boundaries let alone domestic State boundaries so the administrative burden of various payroll tax regimes was, thankfully, addressed.

In March 2007, the State and Territory Treasurers agreed to harmonise their respective State and Territories' payroll tax rules. New South Wales and Victoria were the first to introduce harmonised legislation with effect from 1 July 2007; Tasmania, the Australian Capital Territory and Queensland gave effect on 1 July 2008; the Northern Territory and South Australia introduced it in two stages with effect from 1 July 2008 and 1 July 2009; and Western Australia phased it in over numerous stages after all other jurisdictions had done so.

The main objectives of the project were to:

1. make it easier for businesses to comply with their payroll tax obligations;

2. reduce payroll tax compliance costs for businesses; and

3. provide red tape reductions for business that operate in more than one jurisdiction.

In that way it can be seen that this has a grouping benefit as, although there is no actual reduction in taxes, there is a time and cost benefit that is material.

The project focused on a number of key areas:[3]

1. Grouping provisions: which are discussed in more detail below;

2. Timing of lodgement: monthly returns must be lodged with the relevant revenue authority within seven days of the end of the moth and an annual reconciliation must be lodge by 21 July;

3. Motor vehicle allowances: the exempt component of a motor vehicle allowance was linked to the large car rate as published annually by the Commissioner of Taxation;

4. Accommodation allowances: the accommodation allowance exemption was linked to the lowest salary band/lowest capital city rate under the *Income Tax Assessment Act* 1997 (Cth);

5. Fringe benefits: the taxable amount of fringe benefits for payroll tax purposes will be determined by grossing up the fringe benefits using the lower fringe benefit gross-up rate. Employers will also be allowed to apply the otherwise deductible rule which reduces the taxable value of a fringe benefit by the amount of the income tax deduction that would have been claimable by the employee;

6. Work performed outside Australia: wages are exempt from payroll tax if they are paid or payable for services performed by an employee wholly in one or more other countries for a continuous period of more than six months;

7. Employee share acquisition schemes: the value of the share or options issued under employee share acquisition schemes will be treated as taxable wages and accordingly, are liable for payroll tax. However, there is flexibility for employers to elect to remit payroll tax either: (a) when the employee share scheme interest is granted to the employee; or (b) when the employee share scheme interest vests in the employee; and

8. Superannuation contributions for non-working directors: all superannuation contributions (including non-monetary contributions) to non-employee directors will be considered taxable wages for payroll tax purposes.

The States and Territories did not, however, harmonise the thresholds or rates of payroll tax.

[3] This is taken from Romaldi, Allan and Simeoni, Kelly & Co Lawyers, *Payroll Tax – Harmonisation and Grouping,* 44(7) Taxation In Australia at 411-412.

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5.3 Payroll Tax Grouping

Prior to the introduction of the grouping regime the simple use of multiple entities operated in a common interest would render payroll tax avoided by ensuring each entity itself had wages below the threshold. It was described by Mahoney JA in *Commissioner of Pay-roll Tax (NSW) v RG Elsegood & Co Pty Ltd* [1984] 1 NSWLR 231; 83 ATC 4150 at 4155 as follows:

> Tax relief was given by the Act to businesses employing less than a specified number of employees. Attempts have been, or could be, made by larger businesses to obtain that relief by splitting their businesses, into a number of smaller or separate businesses, employing no more than the specified number of employees. The remedy adopted by the statutes to avoid that mischief was: to deny such relief to members of a 'group'; to provide for the employees of 'commonly controlled' businesses to be deemed to constitute a 'group'; to define 'group' for this purpose in wide terms so as hopefully to include all who might be involved in the avoidance of the purpose of the legislation; and to deal with such anomalies as might arise because of the wide terms of the definition of 'group' partly by specific provisions … and partly by committing to the Commissioner a discretion which he may exercise so as to remove such anomalies…

I will return below to whether later courts have properly applied the regime as Mahoney JA describes it.

5.3.1 Grouping: Casting a Wide Net

Part 5 of the *Payroll Tax Act* 2007 (NSW), which comprises ss 67 to 87 of the Act, provides for the grouping of companies and trusts if they meet the relevant connections. As will be seen, the provisions are very broad, which it will be argued was intentional because the legislature had provided a degrouping mechanism in s 79 that, were it to be applied properly, would balance the rigidity and breadth of the grouping mechanisms. It will also be argued that the Courts have failed to give s 79 its intended effect which renders the Payroll tax grouping regime more draconian that it ought to be.

Payroll tax grouping laws seek to aggregate multiple entities for the purpose of determining their payroll tax liability. Entities that are grouped for payroll tax can only claim one tax free threshold between them and are jointly and severally liable for any outstanding payroll tax.

A group can be formed under NSW payroll tax laws in any one of five ways:

1. Related companies (as defined under the *Corporations Act* 2001 (Cth)): see s 70 of the *Payroll Tax Act* 2007 (NSW);

2. Common control (generally a greater than 50% interest in different entities): see s 72 of the *Payroll Tax Act* 2007 (NSW);

3. Tracing of interests in corporations: see s 73 of the *Payroll Tax Act* 2007 (NSW);

4. Subsuming rules (larger groups formed out of smaller groups): see ss 69 & 74 of the *Payroll Tax Act* 2007 (NSW); or

5. Use of common employees see s 71 of the *Payroll Tax Act* 2007 (NSW).

These rules are rigid in their application and will considered separately below.

Related Parties (s 70)

In the context of related parties, often the related companies or common control provisions are most relevant. However, the broadness of the payroll tax grouping provisions has been highlighted in a number of cases where the Chief Commissioner has been successful in grouping entities via the common employee provision (discussed below).

A related body corporate for the purposes of the *Corporations Act* 2001 (Cth) is, via s 50, two companies that are in a holding/subsidiary relationship or being two subsidiaries of the same holding company.

It is therefore a vertical test of whether a chain of entities, or an entity sitting above two or more other entities, renders the companies *related bodies corporate*.

Common Control (s 72)

Where a person, or a set of persons, has a controlling interest in two or more entities they are grouped for the purposes of the *Payroll Tax Act* 2007 (NSW).

So far as:

1. a sole owner or set of persons owning a business, the control it (s 72(2)(a) & (b));

2. private companies are concerned a controlling interest is one that is more than 50% of director votes (s 72(2)(c)) or member votes (s 72(2)(e)) or the company otherwise acts in accordance with the controller's directions (s 72(2)(c)(ii));

3. a partnership is concerned, a person or set of persons who have more than 50% of the partnership capital (s 72(2)(f)(i)) or more than 50% of the profits (s 72(2)(f)(ii)), they control the business; and

4. trust is concerned, a person or set of persons who have more than 50% of the value of interests in the trust (either directly or via other trusts), control the business (s 72(2)(g)) and all default beneficiaries of a discretionary trust are deemed to control that trust (s 72(6).

The provisions then cascade any two versions of the control in specified ways to form one subsumed group: for two companies see s 72(3), for persons see s 72(4), for trusts see s 72(5), for beneficiaries and trusts see s 72(7) and for trusts and partnerships see s 72(8).

These provisions are mechanical and easily considered but they are also easily triggered. For instance, should a client have two completely unrelated businesses, but they are the controlling director of both, there is an automatic grouping (subject to degrouping discussed below).

Tracing of Interests (s 73)

Tracing of interests in corporations is used when a person has a combination of corporate and shareholder control in two or more corporations. In such cases, a person will own shares in the first corporation and both the same person, and the first corporation will own shares in the second corporation. The provision uses direct interests in corporations, indirect interests in corporations and aggregate interests in corporations.

By s 73(1) of the *Payroll Tax Act* 2007 (NSW) a person and an entity are grouped if the person has a *controlling interest* in the entity, which arises under s 73(2) when an entity has either:

1. a direct interest of more than 50 per cent; or

2. an indirect interest of more than 50 per cent; or

3. an aggregate interest of more than 50 per cent in a corporation where the entity and the corporation form a group.

the requisite control is there for a *controlling interest* down the chain of entities.

If the same entity has such a level of control in a second corporation then the two corporations are grouped.

By s 73(3) the tracing provision in Division 3 of Part 5 (comprising ss 75 to 78) are brought in. They include:

1. direct interests in a corporation: s 76 of the *Payroll Tax Act* 2007 (NSW);

2. indirect interests in a corporation: s 77 of the *Payroll Tax Act* 2007 (NSW);

3. aggregating direct and indirect interests: s 78 of the *Payroll Tax Act* 2007 (NSW).

Common Employees (s 71)

One alarming aspect of the common employee provisions is s 71 of the *Payroll Tax Act* 2007 (NSW), which bears repeating in full:

> **71 Groups arising from the use of common employees**
>
> (1) If one or more employees of an employer perform duties for or in connection with one or more businesses carried on by the employer and one or more other persons, the employer and each of those other persons constitute a group.
>
> (2) If one or more employees of an employer are employed solely or mainly to perform duties for or in connection with one or more businesses carried on by one or more other persons, the employer and each of those other persons constitute a group.
>
> (3) If one or more employees of an employer perform duties for or in connection with one or more businesses carried on by one or more other persons, being duties performed in connection with, or in fulfilment of the employer's obligation under, an agreement, arrangement or undertaking for the provision of services to any one or more of those other persons in connection with that business or those businesses, the employer and each of those other persons constitute a group.
>
> (4) Subsection (3) applies to an agreement, arrangement or undertaking—
>
> (a) whether the agreement, arrangement or undertaking is formal or informal, express or implied, and
>
> (b) whether or not the agreement, arrangement or undertaking provides for duties to be performed by the employees or specifies the duties to be performed by them.

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While the specific wording can vary across different states, grouping of two entities under the common employee rules can broadly apply in the following circumstances:

1. If an employee performs duties for (or in connection with) a business carried on by their employer and another party, the employer and the other party will constitute a group; or

2. If an employee of one entity is employed solely or mainly to perform duties for (or in connection with) a business carried on by another party, the employer and the other party will be grouped; or

3. If an employee of one business performs duties for (or in connection with) a different entity under an arrangement for the provision of services, the employer and the other entity will be grouped.

The last of the situations outlined above is extremely broad and can catch not only formal, written arrangements but also unwritten, informal or implied arrangements. This is especially so where certain entities – such as a service entity – provide services to all other entities in a 'group'.

The aspect that is often misunderstood is the significance of the third situation outlined above. Because the provision is to be interpreted so broadly, the default position will often be that two or more unrelated entities end up being grouped for payroll tax purposes.

Subsuming Rules (ss 69 & 74)

By ss 69 and 74 of the *Payroll Tax Act* 2007 (NSW) two smaller groups with a common member become one larger group.

Section 69 states:

> **Constitution of Groups**
>
> A ***group*** is constituted by all the persons or bodies forming a group that is not part of any larger group.

Section 74 states:

> **Smaller groups subsumed by larger groups**
>
> (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 (within the meaning of section 72), all the members of the group and the person or persons who carry on the business together constitute a group.

The cascading operation can be seen in an algebraic example:

1. A and B are grouped (say, for instance, by common directorship) – this is Group 1;

2. B and C are grouped (say, for instance, by common employees) – this is Group 2; and

3. C and D are grouped (say, for instance, by common ownership) – this is Group 3,

then, Group 1 and Group 2 become a joint Group 4, and then Group 4 and Group 3 become a joint Group 5. If can also work other ways (e.g. Group 2 and 3 become Group 4 that then joins with Group 1 to become Group 5), but all ways lead to the signle largest group possible with no smaller groups within that composite whole.

Extreme Example to Highlight the Point

The strict nature of the regime can be seem by hypothesizing on how two listed companies – say, Woolworths and CBA – which are clearly independent businesses, a common employee of them both could cause grouping under s 71(1) of the *Payroll Tax Act* 2007 (NSW). Then, should a number of directors of one of them also hold sway in an unrelated venture they conduct separately, that large group would grow to include the new venture via s 72 of the *Payroll Tax Act* 2007 (NSW).

The ability of these provisions to spread and capture is the reason for s 79 of the *Payroll Tax Act* 2007 (NSW), the degrouping provision, as Mahoney JA described above. It will be seen, however, that s 79 has not been given teeth in its interpretation.

5.3.2 Degrouping: What might have been

Section 79 of the Payroll Tax Act provides the Chief Commissioner of State Revenue with discretion to exclude an entity from a group. To do so the requirements of s 79(2) must be met. It provides:

> The Chief Commissioner may only make such a determination if satisfied, having regard to the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the Chief Commissioner considers relevant, that a business carried on by the person, is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group.

How is s 79 Applied?

Guidance as to the exercise of this discretion can be found in the Chief Commissioner of State Revenue's *Revenue Ruling PTA031, Commissioner's Discretion to Exclude from a Group.* How that test should be applied was also considered in *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* 80 ATR 205; [2010] NSWCA 326, especially at [111] per Handley JA[4] and in *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* 87 ATR 880; [2012] NSWCA 181 at [52] and [58] per Meagher JA.

In order for the discretion to be exercised the relevant businesses must be independent and not connected. The relationship between the entities running them '*must not affect the business[es] in*

[4] This case was overturned on appeal in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* (2011) 245 CLR 446; 85 ALJR 1183; 281 ALR 687; 125 ALD 1; 80 ATR 251; [2011] HCA 41 but did not affect the principle referred to.

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some real or practical sense' and any such '*connection [must not] be meaningful in a commercial sense'*: *Lombard Farms Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWADTAP 42 at [50] and [51].

If the relevant businesses were operated together or in a complementary way to each other the discretion is unlikely to be used. In this regard you should compare the facts of the relevant businesses here to the facts of *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* 87 ATR 880; [2012] NSWCA 181 at [36] and [59] per Meagher JA and of *Commissioner of Stamps v Garrett F Hunter Pty Ltd* (1997) 69 SASR 275 at 285 per Doyle CJ, where it was held the interdependency existed.

Author's Concern with this Approach

The concern, from the writer's point of view, is that the test has become minutia focused rather than consider the independence, or otherwise, of the businesses themselves.

This concern is supported by earlier authorities. Justice Yeldham statement in *Baxter v Chief Commissioner of Pay-Roll Tax* (1986) 18 ATR 627 concerning the predecessor provision to s 79(2) (at 635):

> In construing s 16H it is necessary to keep firmly in mind that the grouping provisions to be found in Part IVA cast an exceptionally wide net and potentially give rise to a great many unintended grouping situations. The provisions of s 16H(1) were intended to provide a balance against this to prevent injustice from being done in particular cases and hence, in my view, should not be given a narrow construction.

Note that s 79(2) of the *Payroll Tax Act* 2007 (NSW) differs from its predecessor provisions in that the test applied is no longer that of "substantial independence". In *Lombard Farms Pty Ltd v The Chief Commissioner of State Revenue* [2013] NSWADT 17 Verick JM found that the textual framing of s 79(2) means that insubstantial (although perhaps not *de minimus*) independence would be covered by the provision whereas it would not have been covered by its predecessor (at [28] and [30]).

But the Chief Commissioner's approach – seemingly endorsed by the Tribunal and Courts – is to focus on peripheral matters as well as whether the businesses themselves are complementary or not. The Chief Commissioner's Revenue Ruling No PTA031, *Commissioner's discretion to exclude from a group,* succinctly states the issue. It provides (emphasis added):

> In order to be granted an exclusion from a group, the applicant employer must satisfy the Chief Commissioner that:
>
> 1. The business is carried on independently of businesses carried on by every other member of the group, and
> 2. The business is not connected with the carrying on of businesses carried on by any other member of the group.
>
> The matters that the Chief Commissioner must have regard to are:
>
> - The nature and degree of the ownership and control of the business,
> - The **nature of the businesses**, and
> - Any other matters the Chief Commissioner considers relevant.
>
> The Chief Commissioner must be satisfied that:
>
> - **There is not a continuous course of active and significant relationship, in a business or commercial sense, between the carrying on of the applicant's business and the carrying on of businesses conducted by every other member of the group, and**

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- **The connections which do exist are no more than casual, irregular or occasional.**

The onus is on the employer who applies for an exclusion order to prove these matters.

Matters taken into account

In making a decision, the Chief Commissioner will consider the nature and the extent of all relevant agreements and dealings between the member and the other members of the group, including:

- The nature and extent of any commercial transactions between the members, including the value and percentage of the member's total business which is conducted with other members of the group
- **The extent to which members share resources, facilities or services, including premises, staff, management and accounting services**
- **The extent to which the member controls or is involved in managerial decisions and day to day administration of the other members and the extent to which other members control or are involved in managerial decisions and day to day administration of the member**
- The extent to which there are financial interdependencies, including intra-group loans or guarantees and common banking facilities, and the terms and conditions attached to such agreements
- The degree to which there is a connection between a member and other members of the group in the purchase or sales of goods and services
- **The extent to which there is a connection between the nature of the businesses of the members of the group**, and
- The extent to which there is a connection between the ultimate owners of the members and other members of the group.

The writer's experience in cases run confirms that the emboldened passages above can lead to two businesses that are clearly independent, which have been grouped by mechanical provisions already considered, remain grouped (or not degrouped) because they use common professionals (e.g. accountants or legal reluctant), the same director making managerial decisions or their operations being in geographically similar locations.

With respect that must be wrong because:

1. First, the words in s 79(2) "*if satisfied, having regard to the nature and degree of ownership and control of the businesses"* then proceeding to require further consideration show the enquiry is no longer concerned with the ownership or directorships. The Chief Commissioner's criteria revert to the matters that led to grouping in the first place.

2. Second, any other approach would leave s 79 with no work to do as the reason for the enquiry would also determine the enquiry. Such an interpretation is to be avoided. See, for instance, *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1391,[41] where French CJ said:

   > ... the task of the court construing a statutory provision is to give meaning to every word in the provision. It is a long-established rule of interpretation that "such a sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent."

   That an interpretation of s 79(2) giving it no work to do was incorrect seems to have been accepted by the Tribunal: *Lombard Farms Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWADTAP 42 at [43] to [48].

3. Third, where a discretion is unfettered,[5] as to an extent is s 79 by the words "*and any other matters the Chief Commissioner considers relevant",* does not render the exercise of the discretion arbitrary and unlimited: *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 per Dixon J. It must be exercised appropriately.

Especially is this so where the orthodox approach to exemptions and exceptions to taxing statutes is to apply an interpretation (where 2 or more are available) in favour of the taxpayer: *Burt v FCT* (1912) 15 CLR 469 at 482 per Barton J.[6]

In effect the write submits that the Chief Commissioner's guidance via the ruling falls into the error Handley JA described[7] as "*The ownership and control of the business is not the test. They must be considered but the test is whether the relevant business has been carried on substantially independently of the group."* See also *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* 87 ATR 880; [2012] NSWCA 181 at [52] and [58] per Meagher JA.

The Court of Appeal has recently considered s 79 in *Chief Commissioner of State Revenue v Elanor Operations Pty Ltd* [2022] NSWCA 222 (Griffiths AJA, with whom Macfarlan and Gleeson JJA agreed) who upheld Ward CJ in Eq's decision in *Elanor Operations Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWSC 104. It provides some comfort to taxpayers as Griffiths AJA dismissed the Chief Commissioner's appeal and confirmed Ward's CJ in Eq's conclusions at [149]-[161], including the following:

> 149 The test, by comparison between the respective businesses of the companies in the Payroll Tax Group that are seeking exclusion (the plaintiffs) and each of the other companies in the Payroll Tax Group, is as to whether (and to what extent), the business carried on by each plaintiff is carried on independently of, and not in a way that is connected with the carrying on of, of a business carried on by another plaintiff. As noted earlier, this is a question of fact and degree and has to be determined having regard (among other relevant matters) to the nature of the ownership and control of the respective businesses and the nature of those businesses. The fact that there are connections between the businesses is not determinative; the connections must be material connections; and the assessment must be made against the background that the grouping provisions were designed to counter tax avoidance through the splitting of business activities by the use of additional entities each attracting a threshold.
>
> 150 As noted, the plaintiffs emphasise the context in which the various businesses operate – namely, that of separate managed investment funds.

Whilst her Honour was still considering connections of directorship (to which I spoke above) there is at least Court of Appeal authority to which taxpayers can now point when meeting the Chief Commissioner on degrouping contests that goes some way to allow s 79 room to operate.

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[5] Which Meagher JA seems to suggest in relation to s 79 predecessor provisions: *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* 87 ATR 880; [2012] NSWCA 181 at [55].

[6] See also Higgins J at 487 and *FCT v Reynolds Australia Alumina Ltd* (1987) 77 ALR 543, *Universal Press Pty Ltd v FCT* (1989) 90 ALR 332 at 337 and *Shell's Self Service Pty Ltd v DCT* (1989) 98 ALR 165 at 178.

[7] *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* [2010] NSWCA 326 at [111], again overturned by the High Court in *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* [2011] HCA 41, which overturning did not affect Handley's JA statement of principle.

5.3.3 Economic Consequences of Grouping

There are two main concerns for employers who are grouped.

Increased Taxes

There will be an increased tax burden as the number of thresholds reduce. For every threshold not available a further $654,000 (being $1.2 million at 5.45% payroll tax) being paid each year.

Joint & Several Liability for Payroll Tax

By s 81 of the *Payroll Tax Act* 2007 (NSW) any member of a group is jointly and severally liable for the payroll tax liabilities of the group and every member of the group. This is a material inroad to the asset protection benefits that may arise from a properly implemented structure.

5.4 Contractors Provisions and Deemed Employees

Another well litigated area of the *Payroll Tax Act* 2007 (NSW) is the:

1. the Contractor provisions in Division 7 of Part 3 of the Act; and
2. the Employment Agency provisions in Division 8 of Part 3 of the Act.

They will be considered in turn.

5.4.1 Contractor Provisions

Division 7 of Part 3 of the *Payroll Tax Act* 2007 (NSW) comprises ss 31 to 36 and operate to deem as wages taxable under the Act any payments made under a *relevant contract.* That is defined in s 32 as (broadly) a contract by which a person provides services to another that are of a kind usually used in the business contracting for those services.

The provisions were recently considered by the Court of Appeal in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40 in which Leeming JA (Meagher JA and Griffiths AJA agreeing) dismissed the appeal by medical practitioners asserting that, *inter alia*, the NCAT Appeal Panel failed to consider matters raised. The effect of the decision is that payments by a medical centre to practicing doctors will be wages and the engagement of the practitioners *relevant contracts.* But, at [67], his Honour notes that the provisions work ‘in quite artificial ways’ and it is open to taxpayers to structure their affairs around those artificial ways.

In short, the terms of any contractor agreements need to be carefully considered to ensure that they are no *relevant contracts* as otherwise there is an effective “grouping” of the contractor payments with legitimate wages of the contractor via the artificial deeming of Division 7 of Part 3.

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5.4.2 Employment Agents

Division 8 of Part 3 of the *Payroll Tax Act* 2007 (NSW) comprises ss 36A to 42 and operate to

The critical question in these cases is that posed by White J in *Freelance Global Ltd v Chief Commissioner of State Revenue* [2014] NSWSC 127. His honour said at [99]:

> whether there is a contract (which includes an agreement, arrangement and undertaking) which may be formal or informal, express or implied, under which Freelance (the employment agent) procures the services of another (its contractor) for a client of Freelance (the company to which Freelance provides the services of its contractor).

See also *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 per White J propounded the 'in and for' test for assessing the work done by the contractor.

The test White J propounded (although called into question by Basten AJ in *Bonner v Chief Commissioner of State Revenue* [2022] NSWSC 441) has been affirmed by the Court of Appeal in *Chief Commissioner of State Revenue v E Group Security Pty Ltd (No 3)* [2022] NSWCA 259 in which Griffiths AJA (Brereton JA and Simpson AJA agreeing) allowed the Chief Commissioner's appeal from Ward's CJ in Eq decision below. The relevant tests were said to be:

1. Per Brereton JA: The question is not whether there was an "employment agency contract" between E Group Security and its related entities, but whether those payments were made under a contract under which the related entities (as employment agent) procured the services of security guards (service providers) for E Group Security (client): [7]. The evidence (described at [9]–[19]) comprising various invoices and statements; a Group organisational chart; master licences belonging to each related entity; financial statements and income tax returns of the related entities and those of E Group Security; and affidavits filed by E Group Security indicated that the related entities did so procure the services of security guards: [20], [22].

2. Per Griffiths AJA (Simpson AJA agreeing at [24]): The principal issue was whether the arrangements between E Group Security and its clients (or, alternatively, the arrangements between E Group Security and its related entities) were "employment agency contracts": [26]. Various documents (described at [78]–[94]) indicated that the related entities did more than simply perform a payroll function during the Relevant Years. Rather, there was an arrangement that operated during the Relevant Years whereby the related entities procured security guards for their client, E Group Security: [96].

In short, if it can be shown that the work being done by the contract was *in and for* the contracting party's business, it will be an *employment contract* and thereby catch those payments as wages. As with the *relevant contractor* provisions discussed above, this has a "grouping" effect of including the contractor payments with legitimate wages of the contractor via the artificial deeming of Division 8 of Part 3.

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6. Conclusion

There is Commonwealth flexibility in the GST grouping regime but it allows for administrative ease rather than tax reduction benefit.

There is State based rigidity in the Payroll Tax and Land Tax regimes, which chase tax liabilities such that there is no optional aspect of the regimes applying.

All regimes render the group members jointly and severally liable.

It is therefore incumbent to know the State rules and structure dealings and agreement appropriately, and know the Commonwealth rules to elect (or not) to use them advantageously, lest joint and several liability and other detriments apply without intending that they do so.

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