

PAYROLL TAX GROUPING ISSUES

Introduction

1. This paper is not intended as an exhaustive discourse on the grouping provisions. Rather it seeks to concentrate upon three aspects of grouping, namely:
 - (a) grouping through common employees (s.71);
 - (b) grouping through discretionary trusts (s.72(5) and (6); and
 - (c) the Commissioner's discretion to degroup (s.79).
2. Thereafter attention is directed at one particular aspect of recovery, namely the joint and several liability of all group members, irrespective of being an employer, viewed against the recent decision in Broadbeach Properties and the capacity for a non employer group member to dispute liability in winding up proceedings.

The modern approach to statutory construction

3. The grouping provisions are contained in Part 5 of the *Payroll Tax Act 2007* (the PTA 2007). As with any statute we are told¹

“... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just

¹ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also *Jeffrey James Prebble Pty Ltd v FCT* (2003) 131 FCR 130 at [25] per Hill and *Hely JJ and IRG Technical Services Pty Ltd v FCT* (2007) 165 FCR 57 at [21].

mentioned, one may discern the statute was intended to remedy.”

4. The context, legislative purpose, mischief and existing state of the law, can be discerned from two relevant decisions in this jurisdiction concerning the grouping provisions, namely *Baxter v Chief Commissioner* (1986) 7 NSWLR 122; 86 ATC 4816 and *Commissioner of Pay-Roll Tax v RS Elsegood (Sales) Pty Ltd* (1983) 1 NSWLR 223.

5. In *Baxter*, Yeldham J said at page 124 of the earlier form of the grouping provisions as follows:

“Part IVA of the Pay-roll Tax Act was introduced in 1975. It is obviously designed to prevent the splitting of businesses, and to avoid other devices for the minimising of any liability for pay-roll tax.”

6. In *Elsegood*, the matter was considered by the Court of Appeal (Hutley, Samuels, and Mahoney JJA). In that case Samuels JA said at page 226 as follows:

*“In the present case the literal or descriptive construction is the one which achieves **the legislature's intention which is plainly to give the grouping provisions an extensive reach**; there are relieving provisions which may be applied if hardship results.”* (Emphasis added)

7. In the same case Mahoney JA at page 229-230 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 statute 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 ... by committing to the Commissioner a discretion which he may exercise so as to remove such anomalies. S.16H was seen as giving such a discretion. (Emphasis added)

Establishing a group

8. In general terms groups are established between:
 - (a) related bodies corporate within Corporations Law (s.70)
 - (b) employers through the use of common employees (s.71);
 - (c) commonly controlled businesses (s.72); and
 - (d) entities with a controlling interest in corporations (s.73).

9. Once a group, as defined is established, if any member of that first group is a member of any other group, that group is in turn subsumed and grouped with that second group (s.74). The Commissioner has a discretion to exclude or "degrou" if the commissioner is satisfied that the business is carried on independently and is not connected with the carrying on of a business by any other member of the group (s.79).

Grouping through discretionary trusts

10. By s.6(d) a business includes "the carrying on a trust (including a dormant trust)". Given that the ordinary meaning of "carrying on" involves activity, repetition and regularity, it is difficult to

conceive of “carrying on a dormant trust”. Presumably a dormant trust is an inactive trust that is settled, though not yet trading, or alternatively a trust in the course of being wound up. Ordinarily, a passive investment activity carried on through a trust would not be described as “dormant”.

11. The thrust of the definition of the “carrying on” of a trust would seem to attach to the performance of fiduciary duties by the trustee. A bare trust, is not necessarily a “dormant trust”. A bare trust is often used to describe a trustee devoid of active duties of management or reposed of significant discretion. In *Christie v Ovington*² Hall VC said that a bare trustee is:

“... a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the request of his [beneficiary] be compellable in equity to convey the estate to them, or by their direction”.

See also the discussion of a bare trust by Gummow J in *Herdegen v FC of T*³.

12. It is an open question whether a bare trustee (in the sense above) holding property with no active duties of management, in receipt of passive investment income can be said to be “the carrying on of a trust”. Such a case may arise where the trustee holds a parcel of public company shares, with not power to trade shares, and merely receives the dividends flowing from those shares. There is no conventional “business” or being busy or undertaking activity. Undoubtedly the revenue authorities will construe “the carrying on of a trust” to mean the performance of fiduciary duties. But what of the situation

² (1875) 1 Ch.D 279 at page 281

³ 88 ATC 4995

where those fiduciary duties are imposed, not by a conventional trust deed, but rather presumed to be the case (as in a resulting trust) or actively imposed by operation of law, for example, a constructive trust.

13. The debate may seem sterile. But if the passive investment trust can be grouped, then by s.81 the Commissioner can recover the tax debt of the “group” solely and exclusively against the trust property.
14. Accepting that the carrying on of fiduciary duties is a trust and thereby a “business”, then by s.72(1) if the one person or a set of persons, has a “controlling interest” in each of two business, the persons who carry on that business constitute a group. Section 72(2) then, in effect, defines when a person has a “controlling interest in a business”. Thus, for example, the person who is entitled to exercise more than 50% of the voting power at meetings of directors has a controlling interest in the corporation.
15. For our purposes, s.72(2)(g) PTA 2007 provides that a person has a controlling interest in a business:

(g) in the case of a business carried on under a trust-the person or set of persons (whether or not as a trustee of, or beneficiary under, another trust) is the beneficiary in respect of more than 50% of the value of the interests in the first-mentioned trust.

16. Section 72(6) then defines what is taken to be a greater than 50% of the value of the interests in the trust as follows:

(6) A person who may benefit from a discretionary trust as a result of the trustee or another person, or the trustee and another person, exercising or failing to exercise a power or

discretion, is taken, for the purposes of this Part, to be a beneficiary in respect of more than 50% of the value of the interests in the trust.

17. The first problem with the drafting of s.72(6) is the ascertainment of a person “who may benefit ... as a result of the trustee or another person ... exercising or failing to exercise a power or discretion”. Following the decision in *Re Manisty’s Will Trust*⁴, it is open to have an “Appointor” provision. Thus the beneficiaries of a discretionary trust are “*persons X, Y. and Z, together with any other person who the Appointor by instrument nominates to be a beneficiary*”. There may be a further discretion as to the distribution of income among that class or expanded class as the case may be.
18. That power to add beneficiaries literally falls within s.72(6) as a particular person (and indeed any person) may conceivably benefit from the trust by the exercise of some power or discretion.
19. Almost assuredly, a court would construe s.72(6) so that “a person who may benefit” is limited to persons already within the class of discretionary beneficiaries and not a person who may subsequently be added. Otherwise the section would have an indefinite reach.
20. When I say already within the class of beneficiaries under the deed, s.72(6) extends the class to any takers in default or failsafe beneficiaries. Thus, for income tax purposes⁵ to avoid any application of the penal rate of tax under s.99A of the ITAA 1936 most trust deeds have a provision like “the trustee has an absolute discretion as to the distribution of income among the

⁴ [1974] Ch 17

⁵ See for example *Marbray Nominees v FCT* 85 ATC 4750

class of beneficiaries and in the event of the trustee failing to effectually exercise his discretion for any reason prior to midnight in each financial year, then to A and B equally”.

21. The modern discretionary trust has its genesis in the decision in *McPhail v Doulton*⁶. In substance, all that is required is that there be certainty with the class of discretionary beneficiaries so that it can be ascertained who is “in” and who is “outside” the class. A discretionary trust for “all the residents of greater Sydney” is void for lack of certainty. But a discretionary trust for “*all electors enrolled on the Commonwealth electoral roll for the division of Wentworth as at 26/6/2009*” is valid, notwithstanding there may be 75,000 such persons.
22. Further, the only interest a member of the class of beneficiaries has is a right to come to court and compel due administration of the trust and does not extend to an ownership interest in any underlying asset or property of the trust⁷. But each member of the class is properly a “beneficiary” so called, in the eyes of equity⁸.
23. In my view, s.72(6) involves a logical impossibility. In the Wentworth electoral roll example, each elector is a “beneficiary” as defined (*Kafaratis v FCT*). Each elector/beneficiary, may by the exercise of the trustee’s discretion, by resolution, be distributed a share of the income of the trust estate. By s.72(6) each elector/beneficiary, is deemed to “*be a beneficiary in respect of more than 50% of the value of the interests in the trust*” and by s.72(2)(g) each deemed to have a controlling interest.

⁶ [1971] AC 424

⁷ *Gartside v IRC* [1968] AC 553; *Livingstone v CSD* [1965] AC 694; and *CPT Custodians v CSD (Vic)* (2005) 221 ALR 196.

⁸ *Kafaratis v FCT* (2008) 172 FCR 242

24. But, it is a logical impossibility for each of 75,000 persons to have more than 50%. It is of course, possible to create a statutory fiction that is contrary to actual fact. By the deeming, the Act “*creates a fictitious factual situation*”: see *Loizos v Carlton and United Breweries Ltd* (1994) 94 NTR 31 at 32 per Kearney J with whom Angel J agreed. In *Moonee Valley City Council v Quadry Industries Pty Ltd* (1999) 102 LGERA 367 at [22], Balmford J. said:

“ ... where a statute provides that something is to be deemed to be a fact, it is implicit in such a provision that the assumption shall, if necessary, be made contrary to the fact.”

25. The problem arises where any one of those 75,000 electors and thereby beneficiaries have a controlling interest in any other business. The trust and that other business are grouped. Let us assume a more realistic example. Suppose there are two family trusts in identical form in respect of 2 separate individuals. John Smith conducts a solicitor’s practice in Liverpool through the Smith Trust. Bob Brown conducts a plumbing business in Newcastle through the Brown trust, that is the business are completely separate. The respective deeds provide the class of beneficiaries is:

- (a) John Smith;
- (b) His spouse and her siblings;
- (c) his parents;
- (d) his brothers and sisters (whether full, half or step) and their spouses
- (e) his children (whether natural adopted or step), and
- (f) any company in which any of the above hold a share.

26. Bob Brown's deed is identical save that, clause (a) says "Bob Brown". Thus far, there is no possible grouping whatsoever.
27. However, Bob Brown and John Smith are bachelors, but they marry sisters.
28. The two trusts are now grouped through the "spouse sibling provisions" in the trust deed and the operation of s.72(2)(g) and 72(6). The sibling-spouse clauses have the effect that the sisters become a beneficiary of the cross over between trusts.
29. Jean Smith owns a share in BHP. BHP is now within the class of beneficiaries of the Smith Trust.
30. Betty Brown owns a share in News Corp and thus News Corp is a potential beneficiary of the Brown Trust.
31. BHP is deemed to have more than 50% of Smith Trust (s.72(6) and s.72(2)(g)). BHP is grouped with the Smith Trust (s.72(4)).
32. Correspondingly, News Corp is deemed more than 50% of Brown Trust and grouped with Brown Trust. Smith Trust and Brown Trust are grouped through the sibling spouses.
33. But, in my example, I have succeed in grouping BHP and News Corp together under s.74 because of the deeming of each beneficiary having greater than 50% of the value under the trust. Undoubtedly the Commissioner would exercise the discretion to at least degroup BHP and News Corp. But would he degroup the Smith Trust and Brown Trust post sibling marriage? At law, he probably should. Though his auditors would undoubtedly search for one other connecting fact between the trusts.
34. Suffice to say, the potential groupings through adroit use of the discretionary trust provisions are bewildering. The remedy, as

hinted at in *Elsegood*, is the relieving discretion to de-group in s.79. That discretion to exercise a power to absolve and dispense the tax entirely is “an extraordinary responsibility”⁹ and, in effect confers on the Chief Commissioner “a legislative discretion”¹⁰. As stated by Menzies J in *Giris*¹¹:

The enactment of such a provision can only be regarded as an acknowledgment by the legislature of its inability to make laws laying down prospectively what will give rise to a particular taxation liability. It leaves, as a problem for the Commissioner to decide, retrospectively and in the light of what has happened, whether the particular provision should not apply to a particular trust estate [c.f. “group member”] in respect of a year that has passed.

Common use of employees

35. For the sake of completeness, prior to amendments introduced on 1 July 2003 the proper form of s.16C of the PRT Act 1971 was as follows:

16C Grouping where employees used in another business

For the purposes of this Act, where:

- (a) an employee of an employer, or two or more employees of an employer, performs or perform duties solely or mainly for or in connection with a business carried on by that employer and another person or other persons or by another person or other persons, or*
- (b) an employer has, in respect of the employment of, or the performance of duties by, one or more of his or her employees, an agreement, arrangement or undertaking (whether formal or informal, whether expressed or implied and whether or not the agreement, arrangement or undertaking includes provisions in respect of the supply of goods or services or goods and services) with another person or other persons relating to a business carried on by that other person or those other persons, whether alone or together with another person or other persons,*

⁹ *Giris Pty Ltd v F.C. of T.* supra at page 380.9 per Menzies J.

¹⁰ *Giris Pty Ltd v F.C. of T.* supra at page 372.5 per Barwick CJ.

¹¹ *Giris Pty Ltd v F.C. of T.* supra at page 381.3 per Menzies J.

that employer and:

(c) each such other person, or

(d) both or all of those other persons,

constitute a group.

36. Stripped of verbiage, section 16C(a) reads “*where ... employees of an employer, ... perform duties solely or mainly for or in connection with a business carried on by the employer and another person or ... by another person ... that employer and each such other person ... constitute a group*”.
37. Thus under s.16C(a) the focus was on, as one limb of the section, services “solely or mainly performed”.
38. Stripped of verbiage s.16C(b) provided where “*an employer has, in respect of ... the performance of duties by, ... his or her employees, an agreement, arrangement or undertaking ... with another person ... relating to a business carried on by that other person ... that employer and each such other person ... constitute a group*”.
39. Thus s.16C(b) focuses on an agreement for the services on an employee to be effectively farmed out.
40. Agreement was, of course, widely defined Thus in *Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 143 CLR 434, their Honours Gibbs and Mason JJ at page 444, approved of the observations of the Privy Council in *Newton v Commissioner of Taxation* (1958) 98 CLR 1 at page 8, to the effect that:
- “an arrangement is something less than a binding contract or agreement, something in the nature of an understanding which may not be enforceable at law.”*
41. For the 2004 to 2006 years the common employee provisions appeared in sec 106H of the TAA NSW and were as follows:

(1) If 2 persons have an agreement under which an employee of 1 of them works solely or mainly in connection with a business carried on by:

(a) the other, or

(b) both of them,

then the 2 persons constitute a primary group.

(2) In this section:

agreement means an agreement, arrangement or undertaking, whether formal or informal, whether express or implied, and whether or not the agreement, arrangement or undertaking includes provisions in respect of the supply of goods or services.

person includes a set of persons.

42. Compared to s.16C(a) and (b) the provision in 106H is apt to confuse. Section 106H has telescoped the two separate limbs of s.16C into the one provision.
43. Did s.106H fundamentally rewrite the law so that one had to say the employee “solely or mainly” performed services for one business. That is the employee’s time sheet had to be analyzed to see for whom “services” were mainly performed. Of course, if the employee performed services equally for three employers (the butcher, baker and candle stick maker) then there could be no employer for whom he “mainly” let alone solely worked. That construction renders the section nugatory in the case where there is an equal division of the employee’s time between three or more employers.
44. Alternatively, the section could mean that the “agreement” had to be characterized “solely or mainly” for the provision of services. Thus only if the labour component were ancillary and incidental to the provision of other goods or services would the arrangement be outside the section. That interpretation links “solely or mainly” to the nature or character of the agreement. Having regard to the “context and purpose” ala the decisions in CIC Insurance and Prebble above, the context would suggest

that such a fundamental change was not intended and the literal reading, linking “solely or mainly” to a percentage time of the services is incorrect. Alternatively the literal reading produces an arbitrary or fanciful result.

45. Fortunately the current s.71 has reverted back to splitting the separate limbs up, ala s.16C of the 1971 Act.
46. The usual case for the operation of the common employee provision is the captive Phillips¹² type service company. Of course, Phillips is all about income splitting.
47. The point was accepted as given; by Yeldham J in *Baxter v Chief Commissioner of Payroll Tax* 86 ATC 4816 at 4821-2. That case concerned, amongst other issues, a solicitor’s practice and its Phillips type service trust and also an accountant’s practice and its Phillips type service trust. At page 4820 his Honour set out the provisions of, amongst others, section 16C and noted the Commissioner’s contention that groups were constituted by “*Valga Pty Ltd (employer) carrying on service trust business and Solicitor’s partnership carrying on legal practice (Section 16C)*” as well as by “*Gemmi Pass Pty Ltd (service trust business) and accountancy partnership: certainly by reason of s 16C*”. At page 4821-2 his Honour concluded:

“There is no doubt that by the operation of one or more of the sections which I have earlier set out, the firm W A Baxter & Co [solicitor’s practice] and Valga Pty Ltd constituted one group; Paul Paroz [accountancy practice] and Gemmi Pass Pty Ltd constituted a second group ...” (Emphasis added).
48. The other obvious application of the common employee case is an artificial attempt by businesses to de-aggregate their activities. Thus stand alone companies are incorporated to

¹²

78 ATC 4361

undertake functions previously performed by the conglomerate enterprise.

49. Invariably, services of one particular employee (the group finance director) are provided across the board to the stand alone companies and thus s.71(3) applies. Again, inevitably, ala Baxter above, if there is an artificial contrivance to “split” what is truly one business the grouping should apply.
50. The truly difficult case for s.71 is where there is no contrivance to split or de-aggregate a conglomerate business. Rather two business, arguably, fall foul of the grouping provisions by accident. The difficult case, in my experience involves the shared common employee (e.g. a receptionist) between two business that share premises, but not an enterprise. Thus a solicitor and an accountant may share premises and have a pooled receptionist. Prima facie there is a grouping. But as with the discretionary trust example, the real question is the exercise of the discretion to degroup.

Exclusion under S.79 and earlier provisions

51. In order to exercise the discretion the Commissioner is required to be satisfied having regard to:

- (a) the nature and degree of ownership or control;
- (b) the nature of the businesses; and
- (c) any other matters considered to be relevant;

that the business carried on by a person

- (d) is carried on independently of; and
- (e) is not connected with;

the carrying on of that other business.

52. In *Mead Packaging (Aust.) Pty. Ltd. v Commissioner of Payroll Tax (NSW)* 78 ATC 4164, Rath J. said at page 4172 as follows:

“S.16H(1) requires two findings to be made, namely (1) that a business carried on by the plaintiff (as a member of a group)

is carried on substantially independently of a business carried on by any other member of that group; and (2) that the business is not substantially connected with the carrying on of the business carried on by the other member of that group. The first limb appears to relate to the independence of the businesses, and requires an examination of the connection between the business activities. The second limb appears to relate to connection in management. At all events the composite expression used in the subsection requires a consideration of the businesses and their control, and a finding of substantial independence and substantial absence of connection." (Emphasis added)

53. Section 79, unlike the version in Meads now does not use the word "substantial" but rather only *independence* exists between members of the group. The term "*independence*" is defined by the Shorter Oxford English Dictionary as "*the fact of not depending on another*" and "*exemption from external control or support*".

54. Further s.79 requires that the individual business show it is not *connected* with the carrying on of the other business. In *Plummers Border Valley Orchards Pty. Ltd. v Commissioner of Taxes* 2002 ATC 4530 BC 200202713 Riley J. said that (at paragraph [18]):

"The word "substantially" does not have a fixed meaning. What is required to demonstrate that a business is "not substantially connected" with another business is a matter of fact and degree to be considered in all of the circumstances. It must not be minimal yet need not be total." (Emphasis added)

The Commissioner's policy

55. The Commissioner has issued Revenue ruling No. PT 002 (now replaced with PTA 031) which provides:

Substantial Independence and "No Substantial Connection">

- *In considering whether or not there is substantial independence or no substantial connection, it is necessary for a member of a group to prove to the satisfaction of the*

Chief Commissioner that there does not exist a continuous course of active and substantial relationship, in a business or commercial sense, with any other member of the group, and that the connections which exist are no more than casual, irregular or occasional occurrences.

• In arriving at a decision the Chief Commissioner will consider the nature and extent of all relevant contracts and dealings taken as a whole, between the member and all other members of the group, including:

- the nature and extent of any commercial transactions or dealings, 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;
- the extent to which there is a relationship between customers of the member and customers of other members of the group, including such matters as sharing of customers' total business, and receiving or providing complementary goods or services in respect of particular customers;
- 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 natures of the businesses of the member and other members of the group;
- the extent to which there is a connection between the ultimate owners of the member and other members of the group; and
- any other relevant information.

56. The question is whether the connection between the businesses is not casual, irregular or occasional occurrences.

57. This conclusion is exemplified by observations and examples derived from the decided cases. A "dramatic" example (see

Crusher Holdings Pty Ltd v Commissioner of Taxes (NT) 94 ATC 4646 at 4654), of independent businesses was given in *Commissioner of Payroll Tax (Qld) v John French Pty Ltd* 83 ATC 4283 at page 4291 per McPherson J as follows:

The purpose of the provision [s.16H] is sufficiently evident and may be illustrated by reference to an example, mentioned by counsel in the course of argument, of an ice cream parlour in Brisbane, and a prawn processing plant in Karumba. If there is a number of owners, one of whom has a controlling interest in both businesses, those persons will together constitute a group, but the conduct of the two businesses may be quite separate; and the Commissioner, if satisfied of this, may make an order excluding one of the members from that group.

58. In my shared receptionist example between a solicitor and an accountant, in all likelihood, absent some other connection, the Court would exercise the discretion to de-group. The difficult de-grouping example is vertical integration, that is, where one enterprise has a controlling interest in either its supplier of goods or services, or alternatively of its customer: for example a primary producer acquiring an interest in a transport company that in turn has an interest in a wholesale outlet and ultimately a retail shop.
59. Reference can be made to the decision in *Plummers Border* (supra). In that case three companies (amongst others) were grouped namely:
- (a) Plummers Border Valley Orchards Pty Ltd, which conducted an apple orchard business in South Australia in its capacity as trustee of a unit trust in which the unitholders were entities representing the extended Plummer family;
 - (b) Tully Distributors Pty Ltd, which conducted a produce distribution business in Alice Springs, in its capacity as trustee of a unit trust in which the Plummer family held 50% of the units; and

(c) TD Produce Pty Ltd which conducted a business of buying produce in South Australia, transporting it to Alice Springs and selling it to Tully Distributors. TD Produce was trustee of another unit trust in which the Plummer family held 49.6% of the units.

60. It was not disputed that the three companies constituted a group. At issue was whether Plummers Border should be excluded on discretionary grounds. S.17H of the Northern Territory Act was relevantly identical to s.16H of the 191 act, that is, “substantially connected”.

61. At paragraph 13 Riley J identified the issue as whether or not the business of Plummers Border was “*substantially connected with the carrying on of a business carried on by the other corporate entities comprising the Group*”.

62. The facts disclosed that from 1990 onwards TD Produce did not buy from Plummers Border at all. However, Tully Distributors sourced approximately 8% only of its stock purchases from Plummers Border. The rest came from independent third parties. Additionally, Tully Distributors freighted goods other than fruit and vegetables. At paragraph 5 Riley J noted that:

During the period Plummers Border provided administrative services to TD Produce. It carried out bookkeeping, invoicing, accounts payable and pay-roll services. It did so at commercial rates and in circumstances that allowed it to use spare staff capacity. Plummers Border also shared space in a market stall at Pooraka with TD Produce. Again this was at commercial rates and allowed Plummers Border to make productive use of space excess to its requirements. (Emphasis added)

63. The decision of the Commissioner refusing to de-group Plummers Border was upheld by Riley J. His Honour emphasised the closeness of the relationship between the three group companies and the integration of the business as steps in

the production and distribution chain. At paragraph 30 his Honour stated:

It is clear that the members of the Group worked together to maximise profits. An example of this is to be found in the decision of TD Produce to utilise and pay for the spare capacity of Plummers Border's staff for its essential administrative services instead of obtaining assistance in the market place. The closeness of the relationship between the three companies was obviously important. Whilst the appellant pointed to the fact that there was no direct trade between Plummers Border and Tully Distributors the Commissioner was entitled to take into account that there were sales of produce from Plummers Border to TD Produce in circumstances where TD Produce was established to act as the purchasing agent for Tully. The closeness of the relationship between Tully Distributors and TD Produce was a legitimate factor to bear in mind when considering the whole of the relationship between the businesses of the three corporate entities and, further, whether Plummers Border should be excluded from the Group." (Emphasis added)

64. His Honour continued at paragraphs 31 and 32 as follows:

The Commissioner correctly concluded that there was a "commonality in the nature of the businesses of the disputed Group". The "trading" businesses operated within the same industry and were each part of a chain of distribution of foodstuffs, especially fruit and vegetables. ... The businesses were each links in the chain of growth and distribution of food stuffs, especially fruit and vegetables. (Emphasis added)

65. Each case must be considered on its merits and own facts. What is decisive is the communality and integration of the businesses.

RECOVERY JOINT AND SEVERAL LIABILITY AND BROADBEACH PROPERTIES

66. Last year in the income tax context, the High Court handed down its decision in Broadbeach Properties, and in conjunction with the decision in Futuris, the shock waves are still being felt. In Broadbeach the High Court has held that the existence of a genuine objection and or appeal against the assessment under

the *Taxation Administration Act 1953* (Cth) (even an actual appeal in the Federal Court) does not afford grounds, either as a “genuine dispute” or alternatively as a matter of discretion, to set aside a statutory demand or resist a winding up application.

67. At the State level, we can ponder the application and implications of Braodbeach read in conjunction with the joint and several liability imposed on all group members by s.81.
68. The precursor to s.81 was s.16LA of the *Payroll Tax Act 1971*, first introduced in 2000. The Explanatory Note said in relation to s.16LA as follows.

“Schedule 4(3) inserts proposed S.16LA into the Act. The section will enable the recovery of pay-roll tax, in the case of a group, from any member of the group and not just from a member that pays wages. The section also applies S.45 of the *Taxation Administration Act 1996* to an amount of payroll tax payable by a group member. S.45 of the *Taxation Administration Act 1996* is to be amended by Schedule 6 [1] to the proposed Act. S.45, as amended, will provide that the liability of a group member to pay an amount of tax also includes a liability to pay any interest, penalty tax and costs and expenses associated with the recovery of the tax. S.45, as amended, will also give a group member who pays an amount in accordance with the section such rights of contribution or indemnity from other group members as are just.” *(Emphasis added)*

69. The legislative policy, as discerned from the Explanatory Note, is clear. Within the 1971 Act the irrelevant consideration of company A not being an employer at all, only appeared in the Explanatory Note and did not find its way into either s.45 or 16LA itself as then enacted. In that respect s.81 now expressly

embodies the non requirement of the payee to be an actual employer. S.81 now provides:

81 Joint and several liability

(1) *If a member of a group fails to pay an amount that the member is required to pay under this Act in respect of any period, **every member of the group is liable jointly and severally to pay that amount to the Chief Commissioner.***

(2) *If 2 or more persons are jointly or severally liable to pay an amount under this section, the Chief Commissioner **may recover the whole of the amount from them, or any of them, or any one of them.***

(3) *If, under this section, 2 or more persons are jointly and severally liable to pay an amount that is payable by any one of them, each person is also jointly and severally liable to pay:*

(a) *any amount payable to the Chief Commissioner under this or any other Act in relation to that amount, including any interest and penalty tax, 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.*

(4) *A person who pays an amount 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.*

(5) ***This section applies whether or not the person was an employer during the relevant period.***
(Emphasis added)

70. S.81(5) now expressly provides that it is immaterial that the group company was not the employer. The Explanatory Note in respect of s.81 provides as follows:

Clause 81 *provides for the joint and several liability of every member of a group where any one of them fails to pay an amount required under the Bill. The Chief Commissioner is entitled to recover the whole amount payable from any member of the group.*

71. Each and every group member, irrespective of whether they have any employees, is jointly and severally liable for the payroll tax liability of each and every other member of the group. Thus,

entity A is made responsible for the payroll tax liability of entity B, provided, of course, that A and B are members of the same group.

72. Thus the existence of an asset rich, non-employer group member, assumes pivotal importance to the Commissioner's recovery prospects.
73. S.81 is, with respect, an extraordinary provision. If it were enacted by the Commonwealth, it would, most likely, since at least 1915¹³, be held to be unconstitutional and beyond Commonwealth power. This is because, inter alia, a Commonwealth law "*which does no more than require moneys owing to the Crown by A to be paid out of property to which B is beneficially entitled is not a law with respect to taxation*": See *MacCormick v FC of T*¹⁴ and also *FC of T v Barnes*¹⁵.
74. In *MacCormick*, for example, it was beyond power to simply legislate that vendor shareholders were liable to pay their company's unpaid tax in a "bottom of the harbour" company strip. An entirely new tax¹⁶ on the vendor shareholder had to be constructed ab initio. Similarly with director penalty notices¹⁷: at Commonwealth level the director cannot simply be made liable for the PAYG/group tax (or income tax itself) not remitted or paid by the company. Hence, the director is made liable for a "new penalty" calculated by reference to the unremitted PAYG/group tax.
75. Of course, the mere fact of such a law possibly not being a "tax" and beyond Commonwealth power is not relevant, as a question

¹³ *Waterhouse v FC of Land Tax* (1914) 17 CLR 665

¹⁴ 84 ATC 4230 at 4235 per Gibbs CJ, Wilson, Deane and Dawson JJ

¹⁵ 75 ATC 4262 at 4267

¹⁶ Taxation Unpaid Company Tax Assessment Act 1982

¹⁷ See s.222AOB and following ITAA. See s. 47A and following TAA (NSW)

of constitutional power, to a State legislature. It is competent for a State legislature¹⁸ “to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability”.

76. From a policy perspective sheeting home the liability of taxpayer A to taxpayer B is defensible given the existence of a “group” as defined involving common ownership, common control or common employees. I only raise the position at Commonwealth level in order to emphasize the extraordinary nature of the power and the likelihood that its exercise (as opposed to its validity) will, most likely, be scrutinized closely by a Court.
77. S.81 is triggered whenever there is a failure by one member to pay as and when required.
78. Relevantly, s.81 is self executing and does not require the Commissioner to serve any notice on the other group members: c.f. s.9(2) of the PTA 2007 where a formal written notice is required for abridgment of time. As a matter of good administrative practice the Commissioner invariably does serve a notice under s.81.
79. Thus as soon as there is a failure to pay as required, then without more and certainly without the requirement of any notice from the Commissioner, each and every group member is jointly and severally liable to pay the tax, even though they are not the employer, and even though they have not been assessed as such by a notice of assessment.
80. It is an interesting question as to what is the position where the entity has subsequently left the group, though there is at that

¹⁸

Broken Hill South Ltd v Commissioner of Taxation (NSW) 56 CLR 337 at 363

time an inchoate payroll tax liability over what is now the former group.

81. As the liability is “joint and several” on all group members, the liability attaches to all surviving group members, even though the actual employer may have gone into liquidation¹⁹ or entered into a deed of company arrangement²⁰ (“DOCA”), which DOCA is binding on the Commissioner as a creditor, but only as against that employer company.
82. It is also, in my view, a continuing independent obligation on each group member. S.45 of the TAA then allows for contribution and indemnity, intra group, as is just.
83. Now combine that learning on s.81 with the decision of the High Court in *DFCT v Broadbeach Properties Pty Ltd*²¹.
84. It may be open to each “non-employer” group member, under sec 86(1)(b) of the TAA 1996 to object to the “decision” of the Chief Commissioner to include them within the group. It may also be open to each “non-employer” group member to apply for exclusion from the group under s.79 and object/appeal any adverse decision not to de-group. It may still be open to the “non-employer” group member to request an extension of time to lodge an objection²².
85. But in the Broadbeach Properties scenario, the “non-employer” group member has not applied for exclusion and not objected to any decision to group them.

¹⁹ McDonald v Denny Lascelles Ltd (1933) 48 CLR 457, at 467 (Rich J) and 480 (Dixon J)

²⁰ Re Gardener [1937] Ch 594, 598 and Handberg v Smarter Way (Aust) 190 ALR 130 at [41]

²¹ (2008) 248 ALR 693

²² S.90 TAA 1996

86. The Commissioner, then serves the statutory demand on the “non-employer” group member.
87. According to the decision in *Broadbeach Properties*, the basis of the assessment cannot be agitated in proceedings to set aside the statutory demand or resist winding up. Further the tax is due and owing notwithstanding any objection or review²³; and the production of the assessment is conclusive evidence of both the due making of the assessment and that except in review proceedings “*the amount and all particulars of the assessment are correct*”.
88. The joint judgment of Gummow ACJ, Heydon, Crennan and Kiefel JJ in the *Broadbeach Properties* case concluded at para [57] and [58] on the comparable income tax provisions as follows:

[57] ... S.459G applications by taxpayers are not Pt IVC proceedings and production by the Commissioner of the notices of assessment and of the GST declarations conclusively demonstrates that the amounts and particulars in the assessments and declarations are correct. That being so, the operation of the provisions in the taxation laws creating the debts and providing for their recovery by the Commissioner cannot be sidestepped in an application by a taxpayer under s 459G of the Corporations Act to set aside a statutory demand by the Commissioner.

[58] ... The phrase “may be recovered” in ss 14ZZM and 14ZZR of the Administration Act applies to the statutory demand procedure. That state of affairs places the existence and amounts of the “tax debts” outside the area for a “genuine dispute” for the purposes of s 459H(1) of the Corporations Act. (Emphasis added)

89. It is the “conclusive evidence” provision of s.177 of the ITAA which lies at the heart of the decision in *Broadbeach*. That finds its equivalent in s.119 of the TAA NSW. Sections 177 and 119 are the true privative clauses which oust judicial review of

²³

S.103 TAA 1996

the assessment other than in traditional objection/appeal proceedings. But with statutory demand and winding up proceedings against the “non-employer” group member there is no “assessment” and a “notice of assessment”. Their liability is a vicarious and derivative liability as a joint and several statutory obligation. It arises by the operation of s.81 and not by assessment and a notice of assessment.

90. The privative clause protects and operates once a notice of assessment is produced. But rhetorically, where is the notice of assessment to a “non-employer” group member that s.119 can operate on in statutory demand and winding up proceedings. All the other machinery provisions may apply to the “non-employer” group member; that is, collection in a court notwithstanding the tax is disputed by objection (s.103 TAA NSW).
91. But absent the capacity to produce a notice of assessment issued to a “non-employer” group member the consequence would appear to be that the “non-employer” group member can:
- (a) in recovery proceedings,
 - (b) by way of declaratory relief;
 - (c) by injunction;
 - (d) by way of setting aside the statutory demand; and
 - (e) in resisting winding up,

dispute the very basis of the liability said to arise from the grouping itself, notwithstanding the clear import that such grouping issues should be disputed under s.79 (exclusion from the group) and objection to a decision of the Commissioner (s.86(1)(b) TAA NSW).

92. Again, from a policy perspective, the Commissioner would not wish to have these sort of disputes agitated in recovery proceedings (conducted by the Commissioner's recovery lawyers) outside of traditional Taxation Administration Act 1996 objection/appeal proceedings (conducted by his specialist revenue lawyers)
93. Food for thought and fertile endeavour for thoughtful lawyers of all descriptions (including counsel).

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