

## Article Information

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## Fiscal Watch - Payroll Tax

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**Alan Jessup, Partner**, provides insight into the latest Payroll Tax legislation issues.

One of the issues with grouping is that the provisions of the Payroll Tax legislation are very wide and may catch arrangements where there is in fact no real group. Although the Commissioner may have a discretion to overcome this problem, it seems to be rarely exercised even in the most baffling cases. For example why should one brother's financial advisory business be grouped with another brother's horse training business?

A very common problem arises in relation to businesses operated directly or indirectly through discretionary trusts. This is because 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 the grouping provisions, to be a beneficiary in respect of more than 50% of the value of the interests in the trust. Therefore there may be family trusts where a person who falls within a class of beneficiaries in both trust deeds will come within this provision yet be a person who would never in all likelihood never receive a benefit from one of the trusts e.g. a person who is a nephew for the first trust but a son for the second trust. This provision would result in that person having more than 50% of the value of the interests in both trusts. As a result, although these businesses may be run by completely different families and be completely different types of businesses operating in completely different areas with nothing in common other than the trust deeds happening to include the same beneficiary or beneficiaries may be grouped because one person has a controlling interest in both businesses.

The NSW Court of Appeal recently considered these provisions where there were two different businesses each operated by separate discretionary trusts where there was a beneficiary in common. To get around this problem, the beneficiary disclaimed his entitlement under both trusts expressed to operate retrospectively. Unfortunately for the taxpayers, although they had been successful at first instance, on appeal the retrospective disclaimer did not assist the taxpayer because the disclaimer occurred after the liability for the payroll tax arose. As a result the two trusts were caught by the grouping provisions. The liability for payroll tax that arose under the legislation before the disclaimer could not be expunged by the retrospective disclaimer.

This illustrates that care needs to be taken with business structuring involving discretionary trusts to ensure that as far as possible the grouping provisions are not attracted through inappropriate specification of classes of beneficiaries. For example two brothers who have family trusts operating their own separate businesses should ensure that the classes of beneficiaries of those family trusts do not include beneficiaries in common.