

26 September 2018

BY ELECTRONIC MAIL: [Phoenixing@treasury.gov.au](mailto:Phoenixing@treasury.gov.au)

Nathania Nero  
Senior Advisor  
Corporations Policy Unit  
Consumer and Corporations Division  
The Treasury  
Level 5, 100 Market Street  
Sydney 2000

### COMBATING ILLEGAL PHOENIX ACTIVITY

Dear Sir,

We refer to the reforms to combat illegal phoenix activity draft legislation and submit our response to this consultation.

We note that on 26 October 2017 we provided feedback to your consultation paper - Combating Illegal Phoenixing - September 2017. On 5 September 2018 Nicholas Giasoumi of this office attended a treasury roundtable discussion on the proposed reforms.

We are of the view that the Corporations Act 2001 currently has adequate provisions relating to breaches of directors' duties (Section 180-Section 184, Section 590 and Section 1307) which if enforced, enables liquidators to combat illegal phoenix type transactions.

However, liquidators are often unfunded and accordingly do not have the financial capacity to litigate in many instances. As a result the burden of prosecuting claims can fall to ASIC. In these circumstances the proposed new creditor defeating dispositions proposals, whilst welcomed, do not overcome instances where the liquidator has insufficient funding.

A further shortcoming is that the proposed recovery of voidable creditor defeating dispositions requires the entity to be placed into external administration within 12 months of the transaction. Such a time frame would encourage the effectuation of such transactions, providing for the new entity to commence to trade, whilst refraining from placing the old entity into external administration, thus becoming a "zombie company", avoiding the 12 month rule and potentially any recovery proceedings.

We believe a more effective way to prevent illegal Phoenixing activity, is to introduce similar grouping provisions that are employed by the State Revenue Office in relation to collection of payroll tax. This is on the basis that more often than not, the major creditor left behind is the Australian Taxation Office. The grouping provisions include circumstances of common or related entities which employ people (a labour hire company) to perform work on behalf of a related entity (a trading company). If the labour hire company is wound up and the liquidator has insufficient funds to pursue a claim against the trading entity for an unjust enrichment claim, then the unpaid taxes are not recovered. Grouping provision would enable the Australian Taxation Office, if it follows the State Revenue Office lead, to recover unpaid taxes from the trading entity, or the newly engaged labour hire company. Additionally, these provisions can be extended and applied to any new entity, making it liable for the debt left behind by the old entity in the illegal phoenix transaction.

Such a mechanism is not reliant on a liquidator, creditors or ASIC to pursue unpaid taxes, but would enable the Australian Taxation Office to do so directly by operation of law. Disputed claims would result in the aggrieved party making the claim to set aside the ATO's findings with the burden of proof and the cost of doing so being the responsibility of the aggrieved party.

The provision can be further extended to capture circumstances that attempt to avoid these provisions. For example, if non-related parties are appointed as directors, however the new entity operates from the same premises, employing the same employees and operating a like business, the new entity would still be liable for the ATO debt left behind by the old entity.

Attached is a printout of the State Revenue Office of Victoria website detailing their Grouping provisions for your information.

The Australian Taxation Office could play a more significant role in combating illegal phoenix activity by actively by monitoring and enforcing lodgement of Business Activity Statements.

In this regard, where an entity applies for an ABN, in circumstances where the initial BAS is not lodged by the due date, the entity should receive a notice advising that the non-lodgement will result in the cancellation of the ABN in 28 days if not rectified. This can be extended to the cancellation of ABN's in circumstances where three consecutive BAS's are not lodged.

Education of directors in relation to their obligations and penalties if they transgress or obtain unscrupulous advice should be mandatory. The cost of an online course could be nominal, and the proceeds applied to assist in funding investigations into combating illegal phoenix activities. It is envisaged that with extra awareness, directors will be more reluctant to listen to the advice of pre-insolvency advisors.

We note that the adoption of any education and proactive steps to encourage compliance with lodgement of BAS's are "front end" prevention of loss and protects the public purse, as opposed to other measures, which are "back ended," after the events have occurred.

We agree with proposals that limit the ability to enable the backdating of the resignation of company directors.

We agree with the extension of the Director Penalty Regime to GST, LCT and WET liabilities.

We agree with the removal of the three-month rule which applies before director penalties with respect to unpaid superannuation guarantee charge liabilities.

We understand that the implementation of Director Identification Numbers is being considered under separate legislation and we support this initiative.

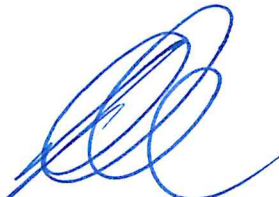
Yours faithfully



**NICHOLAS GIASOUMI**  
**REGISTERED LIQUIDATOR**



**SHANE LESLIE DEANE**  
**REGISTERED LIQUIDATOR**



**ROGER DARREN GRANT**  
**REGISTERED LIQUIDATOR**

Encl



## Grouping

---

This page explains:

- How corporations are related within the meaning of s50 of the *Corporations Act 2001 (Cth)*.
- How businesses can be grouped where an employee of an employer performs duties for another business.
- How a person, or persons together, have a controlling interest in a business.
- How an entity has a controlling interest in a corporation under the tracing provisions.
- When groups are amalgamated.
- The implications for interstate groups.
- Exclusions from the grouping provisions.
- Group registration requirements.

### Related corporations

Corporations are grouped under s70 of the *Payroll Tax Act 2007* (the Act) where they are related bodies corporate within the meaning of s50 of the *Corporations Act 2001 (Cth)*. This is more commonly described as a holding/subsidiary relationship.

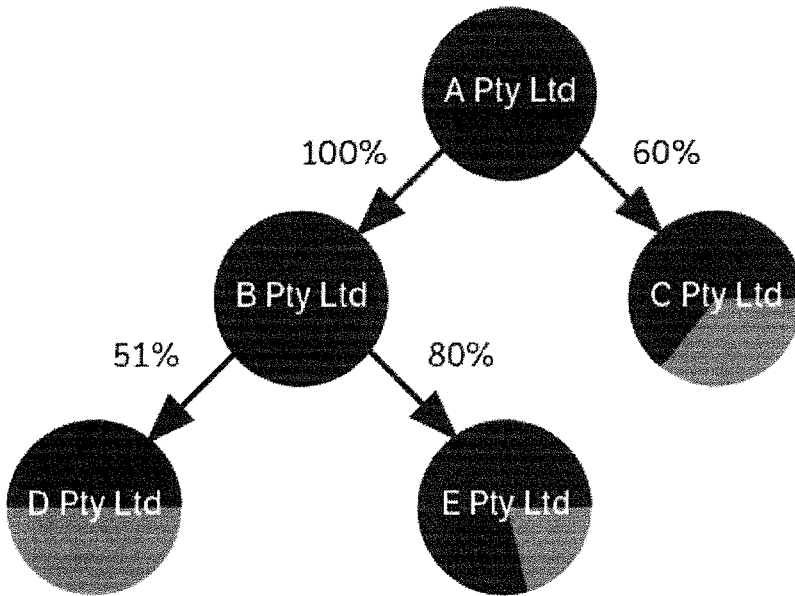
A corporation will be grouped with another corporation for the purposes of s70 if it:

- Holds more than 50 per cent of the issued share capital of that other corporation,
- Controls the composition of the board of directors of that other corporation, or
- Can cast, or control the casting of, more than 50 per cent of the votes which can be cast at a general meeting of that other corporation.

For the purposes of this section, a group includes those corporations in a direct holding/subsidiary relationship as well as corporations with a:

- Common holding company, or
- Common ultimate holding company.

#### Example



- A constitutes a group with both B and C. A is the holding company of both B and C because it holds 50 per cent of the issued shares of each company.
- B, D and E constitute a group because B is the holding company of both D and E.
- All of the companies shown on the diagram constitute a group because A is the common ultimate company.

A group under this section is a mandatory group. Under s79(3) of the Act, the Commissioner must not exclude a corporation from such a group, even if the business carried on by that corporation is independent of, and not connected with, the business of other corporations in the group.

However, this provision will not be applied to group a corporation which only acts as a trustee of a trust and is not trading in its own right, even though it forms a holding/subsidiary relationship with another corporation.

The grouping provisions apply to corporations regardless of where they are located. This is particularly relevant to Australian subsidiaries of an overseas parent corporation. The grouping provisions could apply to group these corporations even if the Australian subsidiaries are unaware of each other's existence.

For this reason, a corporation owned by an overseas parent should contact their parent corporation to determine whether there are other subsidiaries operating in Australia.

## Employees performing duties for another business

An employer will be grouped with the person(s) carrying on another business or other businesses where:

- One or more employees of the employer perform duties for one or more businesses carried on by the employer and one or more persons.
- One or more employees of the employer are employed solely or mainly to perform duties for one or more businesses carried on by one or more other persons.
- One or more employees of an employer performs duties for 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 of those persons

The application of these grouping provisions was considered by the Supreme Court in *Commissioner of State Revenue v Liquid Rock Constructions Pty Ltd [2012] VSC 329*. The court held that the other business or businesses to which an employee of an employer is performing duties, must have some practical ability to direct that employee as to the manner of the performance of those duties.

### Example

CDE Manufacturing Pty Ltd is a manufacturer of widgets. XYZ Administration Pty Ltd provides marketing, accounting, clerical and secretarial services to CDE. In providing those services, the employees of XYZ are under the general direction of CDE.

Therefore, CDE and XYZ constitute a group because the employees of XYZ perform duties for or in connection with the business of CDE.

## Commonly controlled businesses

If a person or set of people has a controlling interest in each of two businesses, the people who carry on the businesses make up a group.

### Controlling interest

A group exists where a person or a set of persons has a controlling interest in each of two businesses. In such circumstances, it is the entities conducting the businesses that are grouped and not the persons who have the controlling interest in the businesses.

What constitutes a controlling interest depends on the type of entity operating the business. Under s72 of the Act, a person or a set of persons is considered to have a controlling interest:

1. Where a business is conducted by a corporation, that person or set of persons:
  - is the director of that corporation and can exercise more than 50 per cent of the voting power at a meeting,
  - is able to instruct or influence a director(s) who can exercise more than 50 per cent of the voting directors' meeting, or

- can exercise or influence the exercise of more than 50 per cent of the voting power attached to a issued voting shares of the corporation.
2. Where a business is conducted by either an incorporated or unincorporated body, that person or set of persons:
    - constitutes more than 50 per cent of the board of management of the corporate or unincorporate carrying on that business, or
    - can control the composition of the board.
  3. Where a business is conducted by a partnership, that person or set of persons:
    - owns, whether beneficially or not, more than 50 per cent of the capital of the partnership, or
    - is entitled to more than 50 per cent of the profits of the partnership.
  4. Where the business is conducted by one person, that person is the sole owner of the business.
  5. Where in the case of a set of persons, the persons are together, as trustees, the sole owners of the busi
  6. Where a business is conducted by a trust, that person or set of persons is the beneficiary in respect of than 50 per cent of the value of the interests in the trust.

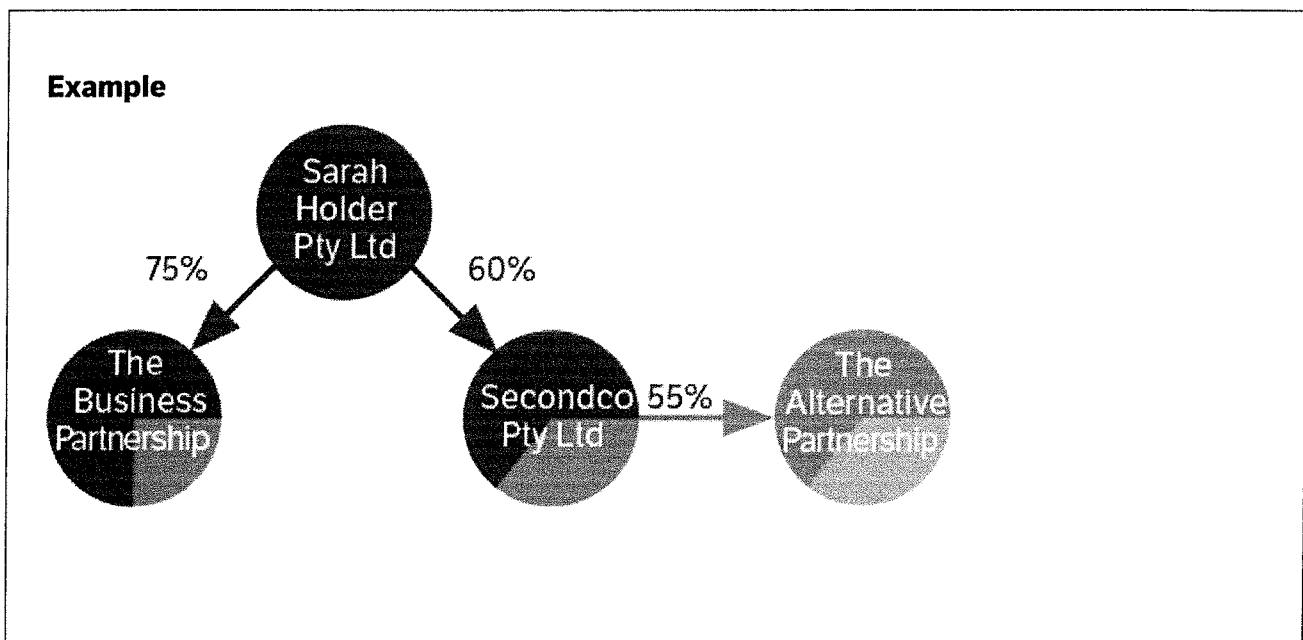
In relation to trusts:

- Interests in a trust include, among other things, entitlements to profits or capital distributions.
- Any person who may benefit from a discretionary trust is deemed to be a beneficiary of more than 50 p of the value of the interests in the trust and therefore has a controlling interest in that trust.

## Indirect relationships

A controlling interest for the purposes of the grouping provisions need not be direct. Control may be held through another entity to which a person is related or in which a person has a controlling interest. This can occur:

1. If corporations are related under s50 of the *Corporations Act 2001* (Cth), a corporation is deemed to ha controlling interest in any business in which a related corporation has a controlling interest.



Sarah Holder Pty Ltd and Secondco Pty Ltd are related under s50 of the *Corporations Act 2001* (Cth) because Secondco Pty Ltd is a subsidiary of Sarah Holder Pty Ltd. These two companies have controlling interests in two businesses, The Business Partnership, and The Alternative Partnership, respectively.

As Sarah Holder Pty Ltd and Secondco Pty Ltd are related, Sarah Holder Pty Ltd is deemed to have a controlling interest in the business in which Secondco Pty Ltd has a controlling interest (that is, The Alternative Partnership). Therefore, The Business Partnership and The Alternative Partnership constitute a group because Sarah Holder Pty Ltd has a controlling interest in The Business Partnership and is deemed to have a controlling interest in The Alternative Partnership.

2. If a person has a controlling interest in one business and the person who carries on that business has a controlling interest in another business, then that first person is also deemed to have a controlling interest in the second business.

#### Example

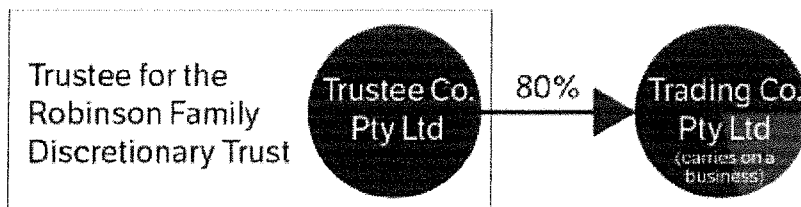


Ian Vestor has a controlling interest in Business A. Company A, which carries on Business A, has a controlling interest in Business B. Ian Vestor is therefore also deemed to have a controlling interest in Business B via his controlling interest in Business A.

3. Where a trustee of a trust has a controlling interest in a business, a beneficiary of that trust will be deemed to have a controlling interest in that business if that beneficiary is a beneficiary in respect of more than 50 per cent of the value of the interests in that trust.

#### Example





Ben Robinson stands to benefit from the Robinson Family Discretionary Trust. He is therefore deemed to be a beneficiary of more than 50 per cent of the value of the interests in that trust and as such is deemed to also have a controlling interest in the business carried on by Trading Co. Pty Ltd.

### Same person owning two or more businesses

Where two businesses are conducted by the same entity or person, there is no need to consider the application of the grouping provisions.

In such cases, there is only one employer and the wages paid for each business must be combined in returns lodged by that employer. The same applies to a trustee owning two businesses, except where the trustee owns the businesses on behalf of two different trusts, in which case the grouping provisions would need to be considered.

### Tracing of interests

Under the tracing provisions, an entity will be grouped with a corporation in which the entity has a controlling interest.

A controlling interest exists if the entity has a direct interest, an indirect interest or an aggregate interest in the corporation – and the value of that interest exceeds 50 per cent.

### Entities

An entity is a person or set of associated persons which, under s73(4) of the Act, includes:

- A person and his/her spouse or domestic partner.
- Natural persons where the relationship between them is that of parent and child or siblings.
- Related corporations within the meaning of the *Corporations Act 2001* (Cth).
- A natural person and a private company where the natural person is a majority shareholder or director company or of another private company that is a related body corporate of the company within the meaning of the *Corporations Act 2001* (Cth).
- A natural person and a trustee where the natural person is a beneficiary of the trust (not being a public trust scheme) of which the trustee is a trustee.
- A private company and trustee where a company or a majority shareholder or director of the company is a beneficiary of the trust (not including a public unit trust scheme) of which the trustee is a trustee.
- Natural persons if they are partners in a partnership.

- Private companies if common shareholders hold a majority interest in each private company.
- Trustees if beneficiaries are common to the trusts (not including a public unit trust scheme) of which the trustees.
- A private company and a trustee where a related body corporate of the company, within the meaning of the *Corporations Act 2001* (Cth), is a beneficiary of the trust (not including a public unit trust scheme) of which the trustee is a trustee.

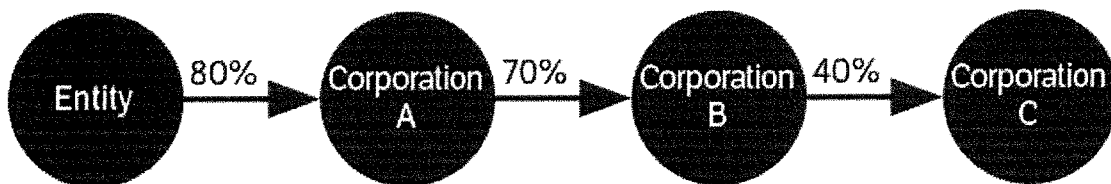
## Tracing interests in corporations

A direct interest in a corporation exists where an entity can directly or indirectly exercise, control or influence the voting power attached to voting shares in the corporation. The value of the direct interest is the proportion of the corporation's voting shares, expressed as a percentage, that the entity can exercise, control or influence.

An indirect interest exists where an entity has a direct interest in a corporation, that is the directly controlled corporation, which is linked to another corporation.

A corporation is linked to the directly controlled corporation if it is part of a chain of corporations where each link in the chain has a direct interest in the next corporation in the chain. The value of the indirect interest is calculated by multiplying the value of the entity's direct interest in the directly controlled corporation, with the value of each direct interest forming the link.

### Example



- Entity has a direct interest in Corporation A.
- Corporation A has a direct interest in Corporation B.
- Corporation B has a direct interest in Corporation C.
- Corporations B and C are linked to Corporation A.

Therefore, Entity has an indirect interest in both Corporations B and C.

The value of Entity's indirect interest in Corporation B is 80 per cent x 70 per cent = 56 per cent.

The value of Entity's indirect interest in Corporation C is 80 per cent x 70 per cent x 40 per cent = 22.4 per cent.

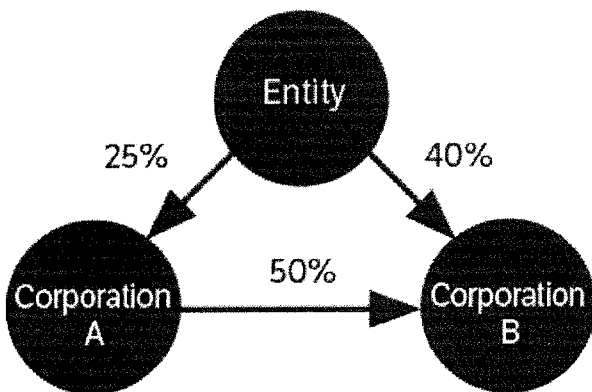
Therefore, under the tracing of interests provisions, the entity forms a group with corporations A and B because its direct interest in Corporation A and its indirect interest in Corporation B both exceed 50 per cent.

An aggregate interest is the sum of an entity's direct and indirect interests in a corporation and occurs when an entity has:

- A direct and indirect interest in a corporation,
- More than one indirect interest in a corporation.

The value of the aggregate interest is the sum of the value of the entity's direct interest in the corporation and the value of each indirect interest.

### Example



1. Entity has a direct interest in A (25 per cent) and B (40 per cent).
2. Entity has an indirect interest in B (25 per cent x 50 per cent = 12.5 per cent).
3. Entity's aggregate interest in B is 40 per cent + 12.5 per cent = 52.5 per cent.

Entity therefore has a controlling interest in Corporation B. Entity and Corporation B form a group under the tracing of interests provisions.

## Amalgamations

Where two or more groups exist and at least one member is common to each, those groups will, subject to the Commissioner's discretion, be amalgamated and treated as one.

### Example

**Group 1**

Comprises Company A and Company B

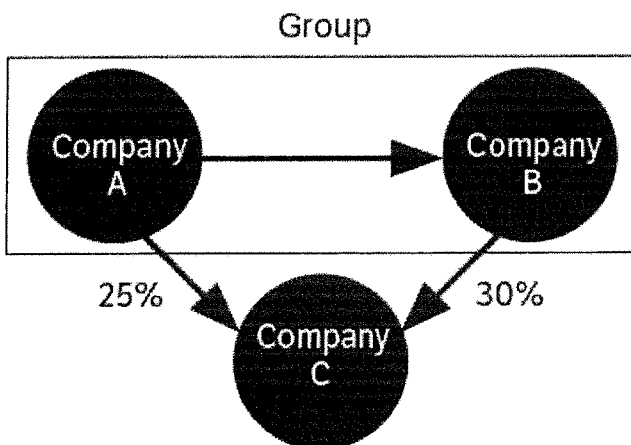
**Group 2**

Comprises Company A and Partnership C

Company A is common to each group.

Therefore, Group 1 and Group 2 will be amalgamated and companies A and B, and Partnership C, will form one group.

Where two or more members of a group, when considered together, have a controlling interest in a business, within the meaning of s72, all the members of the group and the person or persons who carry on the business together form a group.

**Example**

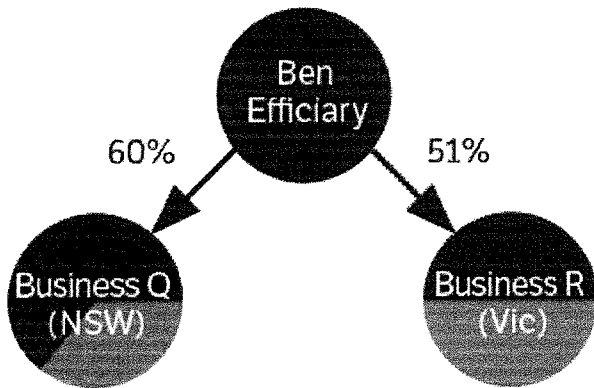
- Company A and Company B form a group for payroll tax purposes.
- Company A has a 25 per cent interest in Company C.
- Company B has a 30 per cent interest in Company C.
- Company A and Company B together have a controlling interest, 55 per cent, in Company C. The companies form a group for payroll tax purposes.

**Interstate groups**

The grouping provisions apply to businesses regardless of where they operate. Accordingly, two businesses may be grouped even though one is located in Victoria and the other in another state.

This is relevant for the purposes of determining a group's total Australian wages because it will have an impact on the amount of the approved deduction that the group is entitled to claim in Victoria.

### Example



Despite the fact that the two businesses are located in different states, Business Q and Business R will be grouped because Ben Efficiary has a controlling interest in each.

## Exclusions from the grouping provisions

By necessity, the grouping provisions are very broad in their application. In recognition of this, the Act gives the Commissioner discretion to exclude a member from a group in certain circumstances.

The discretion is not available for members that are related corporations within the meaning of s50 of the *Corporations Act 2001 (Cth)*.

This discretion is available only in relation to groups which arise as a consequence of:

1. Use of common employees,
2. Commonly controlled businesses,
3. Tracing, or
4. Amalgamation of groups with common membership.

The Commissioner may exclude a member from a group formed as a result of these grouping provisions if he is satisfied the business conducted by that member is independent of, and not connected with, the business conducted by any other member of the group. In considering the application of this discretion, the Commissioner considers:

- The nature and degree of ownership and control of the businesses,
- The nature of the businesses, and
- Any other relevant matters.

## **Commissioner's discretion**

The following, which are not in order of importance, are some of the practical considerations and questions the Commissioner considers when determining whether or not to exercise discretion to exclude a member from a group.

### **Trade between the businesses**

- Are transactions occurring between the businesses?
- If yes, what is the purpose of those transactions?
- What is the level of trade between the businesses?
- Do the purchases of one of the businesses constitute a large proportion of the sales of the other business?
- Are these transactions conducted on normal commercial terms, or are discounts provided?

### **Sharing of resources between businesses**

- Do the businesses share resources, including premises, staff, management and accounting services?
- If there is sharing of resources, is there any charge made?
- If there is a charge, is the charge reasonable given the type of resource shared and the level of sharing?

### **Common management of the businesses**

- Is the same person or persons responsible for the day-to-day operation of the businesses?
- If so, are the operating decisions of one of the businesses made with the impact of such decisions on the other businesses in mind?
- Are the managers of the businesses controlled or obliged to follow the directions of another person(s)?

### **Common financial arrangements between the businesses**

- Do the businesses have common financial arrangements?
- Have the businesses sought finance as a group from a financial institution?
- If yes, are there cross-securities for arrangements between the businesses?
- Are there loans between the businesses?
- If there are loans between the businesses, do written loan agreements exist?
- Is a reasonable rate of interest charged on the loans?
- Are regular repayments required?

### **Common customers of the businesses**

- Is there a relationship between the customers of the businesses?
- Do the customers of one of the businesses automatically become customers of the other business(es)?
- Do the businesses provide complementary services to their customers?
- Is there a connection between the nature of the businesses?
- Does one of the businesses add value to goods or services provided by the other business?

### **The extent of the connection between the business owners**

- Are the same people the owners of the businesses?
- Are the owners of the businesses closely related?

These factors are just some of the more common issues that the Commissioner considers when deciding whether to exercise discretion to exclude a member from a group. It is not an exhaustive list. Each case is considered on all its relevant facts.

Generally, the Commissioner exercises the discretion if he is satisfied that the:

- Relationship between the businesses is not continuous, active and significant,
- Connections between the businesses are merely casual or irregular.

If there is any uncertainty about the application of the grouping provisions please apply in writing for a private ruling.

## **Registration requirements for groups**

Grouping provisions apply to all entities irrespective of whether or not they are employers. Each member of the group must be registered individually and as part of the group.

Once registered, each group is allocated a unique registration number. Group changes, such as when entities begin and stop being part of a group, must be updated promptly in PTX Express.