SUPREME COURT OF QUEENSLAND

CITATION:	*Scott and Bird & Ors v Commissioner of State Revenue* [2016] QSC 132
PARTIES:	**STEVEN ROY SCOTT AND CHERYL ANNE BIRD AS TRUSTEES OF THE MEWCASTLE SUPERANNUATION FUND** (first applicants) **CAN BARZ PTY LTD AS CUSTODIAN OF THE DECLARATION OF CUSTODY TRUST FOR THE MEWCASTLE SUPERANNUATION FUND** (second applicant) **CAN BARZ PTY LTD AS CUSTODIAN OF THE DECLARATION OF CUSTODY TRUST NO 2 FOR THE MEWCASTLE SUPERANNUATION FUND** (third applicant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	SC No 9889 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	13 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3, 4 and 5 February 2016
JUDGE:	Bond J
ORDER:	**The order of the Court is that:** **1. the Commissioner proceed to decide the application for an exclusion order in respect of the Wilson/Voll Group; and** **2. otherwise, the application is dismissed.**
CATCHWORDS:	TAXES AND DUTIES – PAYROLL TAX – LIABILITY TO TAXATION – GROUPING OF EMPLOYERS – where second and third applicants were custodial trustees for the first applicants who in turn held property on trust for the beneficiaries of a self-managed superannuation fund – whether applicants were "carrying on a trust" and therefore to be regarded as carrying on a "business" as defined by s 66(d) of the *Payroll Tax Act* - where the applicants apply for judicial review of Commissioner's decision to refuse to exclude them

from a group for the purposes of the *Payroll Tax Act* – whether the applicants are entitled to relief

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – whether Commissioner failed to take into account a relevant consideration by determining absence of employees irrelevant – whether Commissioner failed to take into account the first applicants role as trustees of superannuation fund – whether Commissioner erred by taking into account certain agreements, investments and loans between the first applicants and group entities

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Corporations Act 2001 (Cth), s 9
Judicial Review Act 1991 (Qld), s 20, s 24
Payroll Tax Act 1971 (Qld), s 9, s 10, s 11, s 12, s 29, 34, s 42, s 51A, s 66, s 67, s 68, s 69, s 70, s 71, s 72, s 74, s 75
Superannuation Industry (Supervision) Act 1993 (Cth), s 17A
Taxation Administration Act 2001 (Qld), s 77

Ayoub v Minister for Immigration and Border Protection (2015) 231 FCR 513, cited
Can Barz Pty Ltd & Anor v Commissioner of State Revenue & Ors [2016] QSC 59, cited
Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd (2012) ATR 880, cited
Commissioner of Pay-roll Tax (NSW) v R G Elsegood & Co Pty Ltd [1983] 1 NSWLR 223, cited
Commissioner of Stamps v Garrett F Hunter Pty Ltd (1997) 69 SASR 275, considered
Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd (2012) 250 CLR 503, cited
Curragh Queensland Mining Ltd v Daniel (1992) 34 FCR 212, cited
Denham Constructions Pty Ltd v Chief Commissioner of State Revenue (NSW) (1998) 40 ATR 416, cited
East Melbourne Group Inc v Minister for Planning (2008) 23 VR 605, considered
Flegg v Crime and Misconduct Commission [2014] QCA 42, cited
FTZK v Minister for Immigration and Border Protection (2014) 88 ALJR 754, cited
Herald & Weekly Times Limited v Correctional Services Commissioner (2001) 18 VAR 316, cited
John French Pty Ltd v *Commissioner of Pay-roll Tax (Qld)* [1984] 1 Qd R 125, cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531, cited
McCloy v New South Wales (2015) 89 ALJR 857, cited

Mead Packaging (Aust) Pty Ltd v Commissioner of Pay-roll Tax (NSW) (1978) 8 ATR 477, cited
Minister for Immigration v Li (2013) 249 CLR 332, considered
Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525, cited
Pierce v Rockhampton Regional Council [2014] QSC 104, cited
Seovic Engineering Pty Ltd v Chief Commissioner of State Revenue [2015] NSWCA 242, considered
Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW) (2011) 245 CLR 446, cited
Thiess v Collector of Customs (2014) 250 CLR 664, cited

COUNSEL:	P G Bickford for the applicants J M Horton QC, with T Pincus, for the respondent
SOLICITORS:	Bourke Legal for the applicants Crown Law for the respondent

Introduction

[1] By deed made on 31 January 2002 (which was varied by deed on 12 October 2011), the first applicants, Ms Bird and Mr Scott, became trustees of the Mewcastle Superannuation Fund ("the Fund"), which was a self-managed superannuation fund as defined by s 17A of the *Superannuation Industry (Supervision) Act* 1993 (Cth). It was a fund established for the sole purpose of providing retirement benefits for its members or to their dependents if a member died before retirement. Ms Bird and Mr Scott were the original members of the Fund.

[2] Can Barz Pty Ltd was incorporated in Queensland pursuant to the *Corporations Act* 2001 (Cth) on 18 June 2009 and Ms Bird was (and is) its sole director and secretary. Relevantly, it acted in two custodian trust capacities, because it held two separate properties pursuant to two separate custody trusts, in each case on trust for Ms Bird and Mr Scott as trustees of the Fund.

[3] On 16 April 2015, the Commissioner of State Revenue (by an appropriate delegate) advised Ms Bird, Mr Scott and Can Barz that they and a number of other natural and corporate persons were regarded as grouped together as part of the "Mewcastle group" under the grouping provisions of the *Payroll Tax Act* 1971 (Qld) ("the Act")[1]. It subsequently became clear that the delegate regarded each person to be carrying on a "business" within the meaning of the Act for which Mr Scott and Ms Bird held a "controlling interest" within the meaning of the Act[2].

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1 *Payroll Tax Act* 1971 (Qld) ss 34(2), 42(2), 51A, 66-71, 75. No challenge to any grouping decision is made in this proceeding. For completeness I note that there is some material before me suggesting that B.E.B. Services Pty Ltd and Bull Recruitment Pty Limited also formed part of the group, but nothing seems to turn on whether that is accurate.

2 See [29](b) below.

[4] At the same time, the Commissioner issued assessment notices to two corporate members of the Mewcastle group, namely Mewcastle Pty Ltd and Mewcastle Internal Linings Queensland Pty Ltd. Excluding penalty and interest, the assessments were to amounts of primary tax totalling in excess of $2.6 million[3].

[5] One consequence of a number of legal persons being grouped together under the Act is that if a group member fails to pay tax to which the member is assessed, all the members of the group are rendered jointly and severally liable for the unpaid amount: s 51A of the Act.

[6] In the present case, the assessed amounts have not been paid and, accordingly, all the members of the group, including Ms Bird, Mr Scott and Can Barz, are jointly and severally liable for the unpaid amounts.

[7] On 16 June 2015, Ms Bird, Mr Scott and Can Barz sought an order under s 74 of the Act that they be excluded from the group. An exclusion order made pursuant to s 74 would have had the consequence that they would not have been liable for the unpaid tax assessments. On 10 September 2015, the Commissioner's delegate communicated his decision refusing to exclude them from the group.

[8] In the meantime the Commissioner had taken steps to obtain some payment in respect of the alleged tax liability by serving garnishee notices in respect of monies which would become payable to Ms Bird, Mr Scott and Can Barz in various ways in the event that a sale transaction in respect of one of the properties held by Can Barz as custodian trustee settled as expected. The applicants had advised the Commissioner that in their view, even if they were not excluded from the group, the garnishee notices could not be valid and effective and flagged an application to Court for an order establishing that contention.

[9] Prior to settlement of the conveyancing transaction, the Commissioner by her solicitors indicated that if it were held that the notices did not require the garnishee to pay an amount to the Commissioner, she would repay the amount to the applicants or as the Court directed. The result was that at settlement on 16 September 2015, a mortgagee was paid out; the usual conveyancing expenses were met; and a balance of about $250,000 was paid to the Commissioner.

[10] On 3, 4 and 5 February 2016, I heard –

(a) an application seeking declaratory relief as to the validity of the garnishee notices; and

(b) an application for judicial review of the decision to refuse to exclude the applicants from the group.

[11] By judgment published on 21 March 2016[4], I dealt with the former application, concluding that the garnishee notices were not valid and were not effective to impose obligations on the garnishees to pay monies as they sought to do. This judgment deals with the latter application.

[12] It is appropriate first to examine in more detail the statutory framework within which the impugned decision occurred.

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[3] Objection to the assessment has been lodged by the group members who were assessed. For present purposes, the assessments must be assumed to be correct.

[4] *Can Barz Pty Ltd & Anor v Commissioner of State Revenue & Ors* [2016] QSC 59.

The statutory framework

[13] Generally speaking, payroll tax is a tax on wages paid by an employer to employees for services in Queensland during each financial year: ss 9 to 11. Payroll tax is paid by the employer by whom taxable wages are paid or payable: s 12. If total wages paid by an employer during a financial year are below the payroll tax threshold of $1.1 million for that year, then no payroll tax is payable by that employer: s 29.

[14] The concept is straightforward if there is one employer (whether a natural person or a corporation) carrying on a business which employs a number of employees.

[15] However the operation of the Act carries the complication that in particular circumstances a number of legal persons are grouped together for payroll tax purposes. In those circumstances –

(a) a group's payroll tax amount is calculated on the members' total combined taxable wages: s 33;

(b) a single payroll tax threshold deduction applies to the whole group rather than each member of the group being able to benefit from a separate threshold deduction: s 33;

(c) one employer from the group, known as the designated group employer (the "DGE"), claims the deduction and is liable for payroll tax: ss 34(1) and 42(1); and

(d) all group members are jointly and severally liable for any unpaid amounts of payroll tax and that is so whether or not the group member was an employer during the relevant period: ss 34(2), 42(2) and 51A.

[16] There are several alternative statutory tests, any of which may determine that a person is a member of a group: see, generally, Divisions 1 to 3 of Part 4 the Act. Amongst other things:

(a) companies constitute a group if they are "related bodies corporate" within the meaning of s 9 of the *Corporations Act* 2001: s 69;

(b) groups may arise from the use of common employees in connection with one or more businesses: s 70;

(c) groups may arise where a person or set of persons has a "controlling interest" in each of two businesses: s 71; and

(d) groups may arise from the tracing of interests in corporations, such that a person or set of associated persons and a corporation constitute a group if they have a controlling interest in the corporation: ss 72 and 74A to 74G.

[17] The grouping provisions operate of their own force and, accordingly, do not require a decision by the Commissioner before they operate. Nevertheless the practice of the Commissioner is to notify group members if the view is taken that they form part of a group for the purposes of the Act. In this case, that occurred by the letter of 16 April 2015 referred to at [3] above. Such a notice then gives the group members the opportunity to make an application for an exclusion order pursuant to s 74 of the Act. In this case, the application was made on 16 June 2015 and refused on 10 September 2015 as referred to at [7] above.

[18] Section 74 provides:

74 Exclusion of persons from groups

(1) The commissioner may, by order in writing (an ***exclusion order***), exclude a person from a group.

(2) The commissioner may make an exclusion order only if the commissioner is satisfied 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 the group.

(3) For deciding whether to make an exclusion order, the commissioner must have regard to—

(a) the nature and degree of ownership and control of the businesses carried on by the person and the other members of the group; and

(b) the nature of the businesses; and

(c) any other matters the commissioner considers relevant.

(4) Despite subsection (1), the commissioner cannot make an exclusion order if the person and another body corporate that is a member of the group are related bodies corporate.

[19] The discretion to make an exclusion order is only enlivened if the Commissioner is satisfied of the matters referred to in s 74(2). Unless that precondition is satisfied, the discretion is not enlivened: see *Seovic Engineering Pty Ltd v Chief Commissioner of State Revenue* [2015] NSWCA 242 at [20] to [22], where Meagher JA (with whom Beazley P and Macfarlan JA agreed) observed[5]:

> [20] The applicants' submission that the power conferred by [s 74(1)] is enlivened whenever it is just and reasonable to exclude members from a group to alleviate any harsh consequences of the grouping provisions finds no support in the statutory language. The precondition for the exercise of that power is described in [s 74(2)]. That subsection provides that the Chief Commissioner may only make a determination to exclude members if satisfied "that a business carried on by the person [being the person sought to be excluded from a group], 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".
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> [21] The applicants refer to three decisions containing general observations as to the purpose or object of de-grouping powers such as that in [Part 4 of the Act]. One of those decisions is *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales* [2011] HCA 41; 245 CLR 446 at [8]. There the "de-grouping" provisions were described as "available for application by the Chief Commissioner upon determination, in broad terms, that it would be unreasonable to apply the 'grouping' provisions". The Court was not directing its attention to the meaning or application of a provision in the same or similar terms to [s 74(2)]. The other decisions referred to, which also do not address that question, are *Baxter v Chief Commissioner of Pay-Roll Tax* (1986) 7 NSWLR 122 (Yeldham J) and *R G Elsegood (Sales) Pty Ltd v Commissioner of Pay-Roll Tax (NSW)* (1982) 12 ATR 750 (Hunt J) and, on appeal to this Court, [1983] 1 NSWLR 223.
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> [22] It may readily be accepted that the broad purpose of the power to exclude is to enable the Chief Commissioner to relieve against the unreasonable operation of the grouping provisions. However the circumstances in which the power to do so is engaged are described in [s 74(2)]. Whilst that description should be construed having regard to that purpose, it nevertheless remains the position that the Commissioner must in terms be satisfied that the business sought to be excluded is not connected with the carrying on of a relevant business.

[20] It is to be noted immediately that in *Seovic*, the Court of Appeal referred to construing the New South Wales equivalent of s 74(2) having regard to the fact that the broad purpose of the power conferred by s 74(1) is to enable the Commissioner to relieve against the unreasonable operation of the grouping provisions, but that nevertheless it remains the position that the Commissioner must be satisfied in the terms identified in s 74(2).

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5 The statutory references in the quotation are to the Queensland equivalents of the New South Wales statute.

[21] It is appropriate to examine a little more closely the significance of what may be said about legislative purpose.

[22] Because the *Acts Interpretation Act* instructs that "the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation"[6] and if a provision is ambiguous or obscure "consideration may be given to extrinsic evidence capable of assisting in the interpretation"[7], it is legitimate to seek to obtain guidance from statements which exist as to the purpose of the grouping provisions and the discretion to make an exclusion order.

[23] In this regard, it will suffice to refer to the *Payroll Tax Amendment (Harmonisation) Bill* 2008 Explanatory Note.

(a) Under the heading "Grouping", the following appears (emphasis added):

> Employers related or connected to each other are treated as a group for pay-roll tax purposes. The tax liability of a group depends on the level of combined Australian wages of all group members and there is only one deduction per group, claimed by the designated group employer. **Grouping prevents employers avoiding pay-roll tax by splitting pay-roll over several entities, with each entity claiming the $1 million threshold/deduction.**
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> …
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> **Because the provisions are drafted broadly, the Commissioner of State Revenue has a discretion to exclude members from a Group where satisfied as to certain matters**.

(b) Under the heading "Consistency with Fundamental Legislative Principles", the following appears (emphasis added):

> 3. The following proposed amendments may raise the [fundamental legislative principle] of impacting on the rights and liberties of individuals on the basis that those rights and liberties are dependent on the exercise of administrative power which is not sufficiently defined.
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> …
>
> d) The re-enactment of the Commissioner of State Revenue's discretion to exclude a person from being a member of a group.
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> **The grouping provisions ensure that payroll tax is not avoided by employers by splitting the payroll over several entities, each claiming the $1,000,000 deduction/threshold**.
>
> **Businesses are only grouped under the *Payroll Tax Act* 1971 where they are carried on by related corporations or otherwise closely controlled by common entities or persons all connected through the use of common employees**.
>
> **However, despite this, there may be instances where it is considered that grouping of businesses under the relevant tests may not be appropriate**. Accordingly, the Commissioner of State Revenue is provided with a discretion, other than for entities grouped as related corporations, to exclude entities from the group where they are not substantially connected with, or dependent on, each other. **The discretion therefore ensures that inappropriate grouping does not occur under the provisions.**
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> Further, the matters which the Commissioner of State Revenue must have regard to in the exercise of the discretion are clearly set out in the provision. Finally, the inclusion of the proposed discretion is essentially a re-enactment of the exclusion from grouping discretions that currently exist in Queensland's grouping provisions. Similar

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6 *Acts Interpretation Act* 1954 (Qld), s 14A.

7 *Acts Interpretation Act* 1954 (Qld), s 14B.

> discretions also exist in all other state and territory pay-roll tax legislation. Accordingly, it is considered that the discretion is sufficiently defined and appropriate in the circumstances.
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> …
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> **5. The proposed amendment providing generally for joint and several liability of group members may raise the [fundamental legislative principle] of impacting on the rights and liberties of individuals on the basis that it would make a person liable for the debts of another person**.
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> As stated, businesses are only grouped where they are closely related or otherwise connected with each other. Further, periodic, annual and final liability amounts for the designated group employer and ultimately each group member is determined by reference to the wages paid or payable by the entire group. Therefore, while each group member is liable for pay-roll tax individually, this liability is connected to other group members.
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> In Queensland the current joint and several liability provision is similar, though narrower, than that applying in NSW and VIC. In Queensland, where a designated group employer fails to pay any annual or final liability amount, each group member is jointly and severally liable for those amounts. However, in NSW and VIC, their provisions also extend to periodic liability amounts, interest and penalty tax.
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> **Given the above, the extension of joint and several liability for group members to periodic liability amounts, interest and penalty tax is considered appropriate and necessary to protect the revenue.** Similar provisions also exist in other state and territory pay-roll tax legislation.

[24] That material suggests that:

(a) the grouping provisions were aimed at a particular mischief namely the tax avoidance which might occur if employers split their payroll over several entities each claiming the (now $1.1 million) deduction/threshold;

(b) in order to ensure that purpose was achieved, the grouping provisions were expressed in broad language; and

(c) the purpose of conferring on the Commissioner a discretion to make an exclusion order was to enable the Commissioner to grant relief against the inappropriate operation of the broadly expressed grouping provisions.

[25] These points have been recognised in the case law, as follows:

(a) In *Commissioner of Pay-roll Tax (NSW) v R G Elsegood & Co Pty Ltd* [1983] 1 NSWLR 223 at 229, Mahoney JA accepted the following submission:

> 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 because of the wide terms of the definition of "group" partly by specific provisions: s 16E is perhaps directed to this, at least in part; and partly by committing to the Commissioner a discretion which he may exercise so as to remove such anomalies. Section 16H was seen as giving such a discretion.

(b) In *Baxter v Chief Commissioner of Pay-Roll Tax* (1986) 7 NSWLR 122 at 131 to 132, Yeldham J observed:

> In construing [s 74] it is necessary to keep firmly in mind that the grouping provisions … cast an exceptionally wide net and potentially give rise to a great many unintended grouping situations. The provisions of [s 74] were intended to provide a balance against this to prevent injustice from being done in particular cases and hence, in my view, it should not be given a narrow construction.
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> …
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> … I have already expressed the view that the result is to enlarge the ameliorating provisions directed at absurd or unjust operation of the various grouping provisions.

(c) In *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446 at 451 [8], French CJ, Gummow, Crennan, Kiefel and Bell JJ observed:

> … Prima facie each taxpayer had the benefit of a pay-roll tax threshold … which applied in each of the relevant years. 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. The "de-grouping" provisions were available for application by the Chief Commissioner upon determination, in broad terms, that it would be unreasonable to apply the "grouping" provisions.

(d) In *Seovic*, quoted at [19] above, the Court of Appeal acknowledged, having been referred to the previous three cases, that "[i]t may readily be accepted that the broad purpose of the power to exclude is to enable the Chief Commissioner to relieve against the unreasonable operation of the grouping provisions."

[26] However too much should not be made of the extrinsic evidence. In *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39], French CJ, Hayne, Crennan, Bell and Gageler JJ observed (footnotes omitted)[8]:

> "This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text". So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

[27] Accordingly, acceptance of the proposition that the legislative purpose of the grouping provisions was that to which I have referred at [24] above does not give rise to the conclusion that the discretion to exclude would necessarily be exercised if the evidence in any particular case revealed that the parties had not engaged in the avoidance behavior to which the provisions were directed. That must be so as a matter of principle. It also seems to me that the text supports that conclusion. It cannot have been the overriding intention of the legislature that group members should be excluded if there is no suggestion of the avoidance behavior at which the grouping provisions were aimed. If that were so the legislature would not have made the blanket determination that the discretion could not be exercised at all where the group members were related corporations.

[28] The decision of Doyle CJ in *Commissioner of Stamps v Garrett F Hunter Pty Ltd* (1997) 69 SASR 275 is consistent with the view just expressed concerning the limited implications of acceptance of the legislative purpose to which I have referred. Doyle CJ considered the exercise of the discretion to exclude in relation to a grouping of two medical practice companies in competition with each other and a corporate trustee of a unit trust which

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[8] The passage has also been cited with approval by a differently constituted Court in *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22].

employed a number of staff to provide secretarial, administrative and other services to the medical practice companies. The corporate trustee was not formed to enable the splitting of one business into different entities with a payroll below the taxable threshold. Doyle CJ accepted that the case was not the sort of case at which the grouping provisions were aimed. Nevertheless, His Honour concluded (at 286 to 287) that that fact had little if any relevance. Rather, it was necessary to consider the other matters rendered relevant by the language of the statute, which on the facts before his Honour were matters concerning ownership and control of group members and the lack of substantial independence between the corporate trustee and the two medical practice companies.

The decision to refuse to exclude the applicants

[29] The reasons for the decision appear in the letter from the Commissioner's delegate dated 10 September 2015 together with an attached memorandum which he had prepared. The structure of the reasoning was as follows:

(a) The letter and memorandum first recorded the nature of the application and the sources of information which had been provided by the applicants. However neither document did so with any precision. Instead, they referred only to "information provided by [the applicants]" and to "information held by the Commissioner" without identifying what the information was. It will be necessary to return to that issue when considering the legitimacy of the Commissioner's seeking to supplement the written reasons with affidavit evidence.

(b) The memorandum (but not the letter) then recorded the bases on which the delegate had formed the view that the members of the Mewcastle group should be regarded as grouped together under the grouping provisions of the Act. Essentially, the explanation was that the delegate regarded each person as carrying on a business for which Mr Scott and Ms Bird held a "controlling interest" within the meaning of the Act had been grouped by operation of the provisions of the Act. No challenge is advanced to that view.

(c) The letter and memorandum then recorded the terms of the exclusion provisions in s 74 of the Act and the approach which the delegate took to those provisions. The approach was informed by the Commissioner's policy as expressed in Public Ruling PTA031.2. It will be necessary to return to the terms of that ruling and the fact of it having been taken into account because it forms the basis of one of the grounds for review advanced by the applicants.

(d) The letter and memorandum then recorded the terms of s 66 of the Act which sets out an inclusive definition of "business" and explained the view which had been taken in relation to the operation of that definition in the circumstances of the group members.

(e) The memorandum (but not the letter) then turned, under the heading "Business independence" (and a number of subheadings) to express certain findings which the delegate made which were relevant to the decisions which he subsequently expressed.

(f) Finally, both the letter and the memorandum recorded in respect of each applicant that the application for an exclusion order was refused, in the case of each applicant, because the delegate was not satisfied that the business carried on by the applicant was carried on independently of, and was not connected with the carrying on of, the

businesses carried on by the other members of the Mewcastle group. This was an expression of a decision in terms of s 74(2).

(g) In relation to Ms Bird and Mr Scott in their trust capacity, the delegate wrote:

> I am not satisfied that the business carried on by Cheryl Bird and Steven Scott as Trustees for [the Fund] is carried on independently of, and is not connected with the carrying on of, the businesses carried on by the other members of the Mewcastle group.
>
> I am not 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 business of Cheryl Bird and Steven Scott as Trustees for [the Fund] and the carrying on of the businesses conducted by any other members of the Mewcastle group and that the connections which do exist are no more than casual, irregular or occasional occurrences.
>
> In making that decision I have had regard to the fact that:
>
> 1. Cheryl Bird and Steven Scott, either individually or together, have ownership over all of the Mewcastle group entities and [the Fund].
> 2. Cheryl Bird and Steven Scott together have control, through shareholding and directorships, over all of the Mewcastle group entities and [the Fund].
> 3. Cheryl Bird and Steven Scott, either individually or together, manage all of the Mewcastle group entities and the [the Fund].
> 4. Cheryl Bird provides day to day administration each of the Mewcastle entities and [the Fund].
> 5. Wilson Ross Accountants have, throughout all relevant periods, acted as accountants for the Mewcastle group entities, [the Fund] and Cheryl Bird and Steven Scott individually. Wilson Ross Accountants (as Kelvin Grove Accountants Pty Ltd) were also a group member with the Mewcastle group entities between 2009 and 2012.
> 6. Cheryl Bird and Steven Scott, as Trustees for [the Fund], have entered into lease agreements with Mewcastle Ply Ltd, Mewcastle Internal Linings Qld Pty Ltd, Bull Recruitment Pty Ltd and B.E.B. Services Pty Ltd, each of which are group members. The lease agreements were not arm's length commercial transactions as demonstrated by the inconsistent rent amounts paid for the premises which was in any case far in excess of market rent.
> 7. Steven Scott and Cheryl Bird, as Trustees for [the Fund], invested fund money in the B Confidential Unit Trust, the trustee of which was a group member.
> 8. Steven Scott and Cheryl Bird, as Trustees for [the Fund], lent fund money to associates of Mark Wilson, who was their accountant and himself a group member. The loan was not at arm's length or on commercial terms.
> 9. Cheryl Bird applied funds owing to [the Fund] under that loan agreement to Mewcastle Pty Ltd.
> 10. Cheryl Bird and Steven Scott, as Trustees for [the Fund], lent fund money to Genuine Pty Ltd, who was a group member.
> 11. Cheryl Bird and Steven Scott, as Trustees for [the Fund], lent money to Mewcastle Pty Ltd, who was a group member.
> 12. Cheryl Bird and Steven Scott, as Trustees for [the Fund], lent money to Top End Commercial Interiors Pty Ltd, who was a group member.

(h) In relation to Can Barz in its trust capacity, the decision maker wrote:

> I am not satisfied that the business carried on by Can Barz Pty Ltd as Trustee for the Declaration of Custody Trust is carried on independently of, and is not connected with the carrying on of, the business carried on by Cheryl Bird and Steven Scott as trustee for [the Fund].

I am not 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 business of Can Barz Pty Ltd as Trustee for the Declaration of Custody Trust and the carrying on of business conducted by Cheryl Bird and Steven Scott as trustee for [the Fund] and that the connections which do exist are no more than casual, irregular or occasional occurrences.

In making that decision I have had regard to the fact that:

1. The business of carrying on by Can Barz Pty Ltd as Trustee for the Declaration of Custody Trust is intrinsically linked with the business of Cheryl Bird and Steven Scott as trustees for [the Fund] because Can Barz Pty Ltd is the custodian for that fund. This is demonstrated in the trust deeds entered by Can Barz Pty Ltd and Cheryl Bird and Steven Scott as trustees for [the Fund].
2. Can Barz Pty Ltd as Trustee for the Declaration of Custody Trust is required to follow the directions of Cheryl Bird and Steven Scott, as trustees for [the Fund], as stipulated in the Declaration of Custody Trust deed.
3. Can Barz Pty Ltd as Trustee for the Declaration of Custody Trust relies on payments made by Cheryl Bird and Steven Scott, as trustees for [the Fund] to satisfy loan repayments made in respect of the mortgages over the trust property.

[30] The reasons articulated in the letter and the memorandum were subsequently supplemented by an affidavit by the delegate. As to this:

(a) Objection was taken to the legitimacy of the Commissioner's supplementing the reasons for decision by the tender of such a document in reliance on *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 at [308] to [311], where Ashley and Redlich JJA held (footnotes omitted, emphasis added):

> [308] **A decision-maker should ordinarily be treated as bound by — and confined to — the reasons which the decision-maker gives for the decision in question. That is partly so because, as we have discussed, reasons have a particular importance and purpose. The right of persons affected to seek judicial review of a decision would be severely diminished if, a stated reason being indefensible, the decision-maker or those who seek to uphold the decision were then permitted to defend the decision on the basis of matters which were not mentioned in the statement of reasons but which were claimed to be in fact part of the reasons; or in reliance upon other matters which, although not adverted to, were capable of justifying the decision**, such that it could not be said to be "devoid of any plausible justification".
>
> [309] Authorities show that there is a considerable inhibition upon recourse to what may be called "other material" where challenge is made to an administrative law decision in which the decision-maker has stated reasons for decision. **The general principle is that a court, when considering the lawfulness of a decision, may admit evidence in quite limited circumstances so as to elucidate, but not fundamentally collide with, the reasons stated by the decision-maker**. …
>
> …
>
> [310] The principle has often been applied in cases in which there was a statutory duty to give reasons. **But the existence of a statutory obligation is not the *sine qua non* of the application of the principle. There is sound reason why it should equally apply to a case such as the present, in which the public reasons, founded on the obligation set out in the practice note, had a degree of formality**. For, as has often been emphasised, one purpose of reasons is to enable the parties — or, in a situation such as this, a group of persons intimately affected by the minister's decision — to understand the basis of the decision, and thus to permit persons adversely affected to assess whether they have any ground for challenging the decision; likewise to permit the court to undertake its function. As Hutchinson LJ observed in *Ermakov*, it would be inimical to that purpose if the stated reasons were able to be replaced by different reasons.

[311] Sometimes the variant reasons have been the late-made correction of the decision-maker. Speaking generally, there is particular reason to reject an attempt to rewrite history. Beyond that, it has understandably been said that use of a late-made document to remedy a manifest flaw in stated reasons will only be permitted in very exceptional cases. These are just examples of the principle in action.

(b) Notwithstanding some observations tending to the contrary in the earlier decision of *Herald & Weekly Times Limited v Correctional Services Commissioner* (2001) 18 VAR 316 at 327 [42] per Eames J, it seems to me that the approach described in *East Melbourne Group* is the approach I should take in relation to the affidavit of the Commissioner's delegate.

(c) To the extent that it is necessary to rule on objections to the affidavit evidence of the original decision maker I do so below.

Paragraph	**Objection and ruling**
8(b): "I did have regard to PTA031.2. It does not however, direct me to decide the matter without regard to the features of the case."	Objection was taken to the observation in the second sentence on the grounds that the reference to the document went beyond elucidation of the initial decision and amounted to the expression of a new reason. I allow the objection, but not for that reason. The observation is argumentative and irrelevant.
11: "In determining that [the lease agreements] were not on commercial terms, I considered the contents of an email from [an employee of the Mewcastle group's accountant at the time], to [the accountant acting for several Mewcastle group entities], dated 21 September 2011, which states, amongst other things that: a) 'Back out Rent paid to Mewcastle Super Fund $153,890' … k) '2007 – $43,600 2008 – 70,145 2009 – 141,919 2010 – nil 2011 – 78,100'."	Objection was taken to the reference to the email on the grounds that that evidence was an additional reason not referred to in the original letter or memorandum. I disallow the objection. It seems to me to be appropriate to admit the evidence because it elucidates on the evidence which was before the decision maker, which, as I noted at [29](a) above, was not identified with any precision in the original letter and memorandum.

13:	"Having considered the contents of [the employee's email above] and the response from [the solicitor for the applicants], I concluded that the lease agreements were not an arm's length commercial transaction, as demonstrated by: a) the inconsistent rent amounts paid from year to year; … c) [the employee's] notation of the significant difference in rent paid for Unit 11 and Unit 12 and the lack of any explanation in his email regarding that difference. I attended at the premises… where the units are located side by side. From my observation of the exterior, they appeared to be identical in size and aspect."	Objection was taken on the same basis as paragraph 11. I disallow the objection for the same reasons. The evidence is a permissible elaboration of the matters which were before the decision maker and that were not identified with any precision in the original letter and memorandum.
15:	"The non-arm's length nature of the transactions was only one factor of many to which I gave consideration. If I were wrong about it, I would still have made the same decision I did based on all those other considerations."	Objection was taken to the second sentence on the basis that it identifies an additional reason. I tend to agree that the observation in the second sentence goes beyond mere elucidation and amounts to an additional reason that was not expressed in the original letter or memorandum. But that is not the end of the question. The applicants also based their application on s 24(b) of the *Judicial Review Act* and – as will appear in the discussion at [96] below – the question of criticality to the decision maker's chain of reasoning becomes relevant on such an application. It seems to me to be legitimate that the paragraph is adduced and relied on in response to that aspect of the application. Accordingly I disallow the objection.

[31] It remains to note that the decision did not deal in any respect with the fact that, in addition to their application for an exclusion order in respect of the Mewcastle group, the applicants had also applied for an exclusion order in respect of their inclusion in another group, referred to as the Wilson/Voll Group. I make the following observations:

(a) The application for an exclusion order dealt with two groupings of which the applicants had been notified, namely the grouping in respect of the Mewcastle group and the grouping in respect of the Wilson/Voll Group.

(b) However the application only contained supporting material in respect of the application for an exclusion order in respect of the Mewcastle group. The application merely asserted that "if the [applicants are] excluded from the Mewcastle Group, then there can be no basis upon which the [applicants] can be included within the Wilson/Voll Group".

(c) The Commissioner's delegate did not in fact make a decision on the application for an exclusion order in respect of the Wilson/Voll Group. In his affidavit, he explained that he took the view that, as no information was provided by the applicants, he was not able to consider the question. Unfortunately he had not otherwise communicated to the applicants that he had any difficulty with the application in so far as it pertained to the Wilson/Voll Group or that he required them to provide him with substantive information before he could decide the application.

(d) During the course of argument it became clear that the Commissioner would not oppose the only remedy which the applicants sought from the Court in relation to this aspect of their application, namely a direction by the Court that the Commissioner proceed to decide the application for an exclusion order in respect of the Wilson/Voll group. Accordingly, it is not necessary further to consider that part of the applicants' complaint.

The alleged grounds for review

[32] I turn now to address under separate headings the grounds for review which were pursued by the applicants.

[33] One preliminary matter which should be dealt with is the Commissioner's submission concerning the operation of s 77 of the *Taxation Administration Act* 2001 (Qld). That section precludes Parts 3 and 5 of the *Judicial Review Act* 1991 (Qld) applying to "an assessment" or to "a decision or conduct leading up to or forming part of the process of making an assessment". The Commissioner submitted that the exclusion decision was such a decision.

[34] If that submission were correct, its implications included the following:

(a) Since *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, s 77 could not be construed as effective to preclude review for jurisdictional error.

(b) It would, however, be effective to exclude the possibility of remedies under the *Judicial Review Act* for non-jurisdictional error. This might at the least preclude the possibility of relief under s 24(b) of the *Judicial Review Act*.

(c) It may also have affected the nature of the orders which the Court could give in the event of jurisdictional error: see the discussion in the Court of Appeal in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.

[35] I do not think that those implications need to be resolved because the exclusion decision sought to be reviewed is neither "an assessment" nor "a decision or conduct leading up to or forming part of the process of making an assessment". The former proposition is self-evident. The latter proposition may be advanced because the exclusion decision occurred after the two relevant assessments were issued[9] and has nothing to do with the process by which the relevant assessments were made.

[36] The result is that it is necessary to consider each of the grounds for review pursued by the applicants as grounds which justify relief under the *Judicial Review Act*.

Failure to take into account the fact that none of the applicants had any employees

[37] The applicants' complaint was that the Commissioner failed to take into account the fact that none of the applicants had any employees. For the purpose of analysis I will refer to this as "the employee consideration".

[38] The applicant submitted that:

> The nature of the business or the businesses is a mandatory relevant consideration which must be taken into account. It is therefore hard to imagine why the fact that a trust, not in fact carrying on any business, and which does not have any employees, would not be a relevant consideration which must be taken into account in the exercise of the statutory discretion referred to in s 74(2).
>
> This is more particularly the case since a trust is not a separate legal entity and is incapable in law of doing anything. The trustee of the trust might be said to be carrying on a business, where it is a trading trust, but the trusts in question here do not carry on any business in any normal sense of those words.
>
> The failure by [the Commissioner] to take into account this mandatory relevant consideration is an error of law which, in itself, justifies the grant of the relief sought in the application.

[39] This submission treats s 74(2) as though it conferred a statutory discretion on the Commissioner, and s 74(3) as identifying relevant mandatory considerations which must be taken into account in the exercise of that discretion. However, analysing s 74 in that way is inconsistent with the decision of the New South Wales Court of Appeal in *Seovic*, which I consider myself bound to follow.

[40] For the reasons mentioned at [19] above, the discretion to make an exclusion order is that which is conferred by s 74(1) and that discretion is only enlivened if the Commissioner is satisfied of the matters referred to in s 74(2), namely 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 the group." The formation of that state of satisfaction does not involve an exercise of a discretion, rather it requires the formation of an evaluative judgment. The formation of the specified evaluative judgment is a pre-condition to the existence of power to exercise the discretion.

[41] It is only if the decision maker forms the evaluative judgment referred to in s 74(2), that the discretion referred to in s 74(1) is enlivened. If the discretion is enlivened, the decision maker will be obliged to take into account the matters referred to in s 74(3), although there will be some necessary crossover between at least some of the first two considerations there referred to and the considerations which were relevant to the formation of the evaluative judgment

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9 See at [4] above.

referred to in s 74(2). It is nevertheless clear from *Seovic* that the discretion does not arise until s 74(2) is satisfied.

[42] Section 74(2) requires a decision maker to take these steps:

(a) identify the business(es) carried on by the person seeking the exclusion order;

(b) identify relevant business(es) carried on by the other members of the group;

(c) consider whether the decision maker should be satisfied that a business carried on by the applicant –

(i) is carried on independently of; and

(ii) is not connected with the carrying on of,

a business carried on by any other member of the group.

[43] In this case the decision maker deposed that he had "formed the view that whether or not the applicant had employees was not a relevant consideration as [the Act] does not require that a person have employees to be a group member or to be regarded as carrying on a business".

[44] Similarly, the Commissioner submitted that –

(a) nothing in the Act's definition of "business" requires that it be an activity in which persons were engaged as employees and nothing requires that, in order to be the member of a group, a person or entity be, or once have been, an employer; and

(b) s 51A of the Act makes plain that a person can be a member of a group and jointly and severally liable to pay the payroll tax a group member is required to pay whether or not the group member was an employer.

[45] The decision maker's contention that the Act does not require that a person have employees to be a group member or to be regarded as carrying on a business is correct. So were each of the Commissioner's submissions. But neither the decision maker's contention, nor the Commissioner's two submissions were to the point. The questions made critical by s 74(2) are (1) whether an applicant's business is carried on **independently** of another business, and (2) whether an applicant's business is **not connected with** the carrying on of another business. It was wrong to approach either question by regarding (for the reasons given in the affidavit) as necessarily irrelevant one part of the picture of how the applicant carries on the business, namely whether it was done by the use of employees. It seems to me that the employee consideration might in some factual scenarios be relevant to assessing the independence and connection contemplated by the Act. In my view, the reasoning which led to the decision maker regarding the employee consideration as a necessarily irrelevant consideration – namely the reasoning which I have quoted at [43] above – involved an error of law.

[46] I should say, however, that whilst the reasoning which led the decision maker to exclude the employee consideration involved an error of law, it does not seem to me to be an error which would in the circumstances of this case justify my setting aside the decision and ordering that the exclusion decision be remade according to law. In my view the error of law did not lead to the failure to take account of a consideration which could have materially affected the decision in the circumstances of this case.

[47] It is appropriate to consider the applicants' arguments which sought to demonstrate the materiality of the employee consideration.

[48] At times, the applicants' contention seemed to verge on the proposition that the absence of employees necessitated an exclusion decision in the applicants' favour, as though it could never have been intended that the grouping provisions would operate to impose liability to pay payroll tax on someone who was not an employer because that was not the mischief to which the grouping provisions were directed. There is nothing in the structure of the Act or in a proper acknowledgment of the purpose of either the Act as a whole or the grouping provisions in particular which supports such a conclusion. The applicants were seeking to elevate their argument about the purpose of the grouping provisions into propositions which ignore the wording of s 74 and associated sections. I reject that approach.

[49] The applicants contended that they could not be regarded as carrying on a business because they were not carrying on any business in any "real sense", and "the statutory fiction created by s 66(d), which arguably has the effect of deeming the 'carrying on of a trust including a dormant trust' to be a 'business,' is of no assistance in this context."

[50] But that proposition flies in the face of s 66. I observe:

(a) Section 66 relevantly provides "business includes … the carrying on of a trust, including a dormant trust". It is a definition section intended to be used throughout Part 4. It cannot be ignored. It applies to s 74.

(b) It may be acknowledged that the words "carrying on of a trust" are clumsy and inelegant. A person may have the status of a trustee. A person may hold assets as a trustee. A person may perform or even "carry out" duties as a trustee, and have rights and be subject to obligations as a trustee. A person can even carry on business as a trustee. But a person does not in normal parlance "carry on" a trust.

(c) Nevertheless, effect must be given to the words. The words "including a dormant trust" negate the possibility that the intention was only to encompass trading trusts, or circumstances in which a trustee is actively exercising trust duties or powers. They seem to suggest a broad intention, in which the question of whether a trustee is actually doing anything as trustee is irrelevant. It seems to me that they would encompass circumstances in which a trustee is holding assets as a bare trustee.

(d) Despite the clumsiness of the wording of s 66(d), it is evident that the legislature specifically intended that a person acting as a trustee was to be regarded as carrying on a business for the purpose of, amongst other things, s 74. It would not matter that the applicants *qua* trustees might not have been carrying on a business in the normal sense. The employee consideration was not relevant as a matter of law to the question whether the applicants should be regarded as carrying on a business because of the operation of s 66(d).

(e) It seems to me that the decision maker made no error in applying the definition in s 66(d) to reach the conclusions that –

(i) Ms Bird and Mr Scott should be regarded as carrying on the trust constituted by the Fund, and therefore carrying on the business of that trust for the purposes of the grouping provisions of the Act; and

(ii) Can Barz should be regarded as carrying on the two custodian trusts in which it held property on trust for Ms Bird and Mr Scott as trustees of the Fund and therefore carrying on the business of those trusts for the purposes of the grouping provisions of the Act.

[51] Once those positions were reached, what became relevant was an evaluation of the factual considerations which, in the circumstances of this case, informed the answers to whether –

(a) (in the case of Ms Bird and Mr Scott) the business which was carried on by Ms Bird and Mr Scott –

(i) was carried on independently of; and

(ii) was not connected with the carrying on of,

a business carried on by any other member of the group; and

(b) (in the case of Can Barz) the businesses of the two custody trusts carried on by Can Barz –

(i) were carried on independently of; and

(ii) were not connected with the carrying on of,

a business carried on by any other member of the group.

[52] The applicants have not persuaded me that the employee consideration was material to the answers which were open to be given to those questions on the facts of this case. The fact that the applicants did not have employees was accurate but not, on the evidence, material to an assessment of the characteristics which sounded on the issues of independence and connection. Accordingly, I reject this ground of review.

Failure to take into account the fact that none of the applicants carried on any "business" within the meaning of s 74

[53] I have rejected the applicants' construction of "business" as it appears in s 74. Accordingly, I reject this ground of review.

Failure to take into account that each of the applicants operated independently of each other, and independently of each and every other entity in the Mewcastle group

[54] The applicants first complain that the decision maker made a finding, which was not open on the evidence before the decision maker, that the applicants all carried on businesses comprised of activities carried on for "fee, gain or reward". But this was only one of the bases on which the decision maker found that the applicants relevantly carried on the business in the way to which I have earlier referred. I have already found that there was no error involved in the conclusion which was reached by application of s 66(d) of the Act. It is unnecessary to consider this complaint further.

[55] The applicants then contended that the decision maker misconstrued the true meaning and effect of the words "independently of" and "not connected with" where they appear in s 74.

[56] In the case of Ms Bird and Mr Scott, s 74(2) required the decision maker to determine whether he was satisfied that the business of the Fund which was carried on by Ms Bird and Mr Scott –

(a) was carried on "independently" of; and

(b) was not "connected with" the carrying on of,

a business carried on by any other member of the group.

[57] In the case of Can Barz, s 74(2) required the decision maker to determine whether he was satisfied that the businesses of the two custody trusts carried on by Can Barz –

(a) were carried on independently of; and

(b) were not connected with the carrying on of,

a business carried on by any other member of the group.

[58] The case law sheds light on the relevant meaning of the concepts of independence and lack of connection. Thus:

(a) In *Mead Packaging (Aust) Pty Ltd v Commissioner of Pay-roll Tax (NSW)* (1978) 8 ATR 477 at 486, Rath J regarded analogous wording to require a consideration of the businesses and their control.

(b) In *Denham Constructions Pty Ltd v Chief Commissioner of State Revenue (NSW)* (1998) 40 ATR 416 at 424, Studdert J considered the meaning of "substantial independence and substantial absence of connection" and concluded that –

(i) the former required the absence of a present substantial relationship in a business sense with any other member of the group; and

(ii) the latter required that any connections were no more than casual, irregular or occasional occurrences.

(c) In *John French Pty Ltd* v *Commissioner of Pay-roll Tax (Qld)* [1984] 1 Qd R 125 at 141, McPherson J (with whom Campbell CJ agreed) said of statutory precursor to s 74 that "an examination of both business activities and management is clearly justified as part of the inquiry directed by the section".

(d) In *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* (2012) ATR 880 at 898, Meagher JA (with whom Barrett JA and Sackville AJA agreed) noted *John French* as authority for the proposition that an enquiry as to whether a business was carried on "substantially independently", and was not "substantially connected" with another business, made it necessary to consider the interrelation of the activities of the businesses and the ability of the principal of one business to influence the management and decision-making of the other.

[59] In the formation of his conclusion in relation to the s 74(2) question, the decision maker applied the terms of PTA031.2 referred to at [29](c) above. In consequence of so doing –

(a) he treated the statutory concept that one business by carried on "independently" of another business as requiring that there not be a continuous course of active and significant relationship, in a business or commercial sense, between the carrying on of the first business and the carrying on of the other business; and

(b) he treated the statutory concept that one business not be "connected with" the carrying on of another business as requiring that the connections which did exist amounted to no more than casual, irregular or occasional occurrences.

[60] He also specifically regarded it as appropriate to consider the nature and extent of all relevant dealings between the applicants and other members of the group, including in particular –

(a) the nature and degree of ownership and control of the businesses carried on by the applicants and the other members of the group, in relation to which he found:

(i) Ms Bird and Mr Scott controlled, as trustees, the business of the Fund;

(ii) Ms Bird and Mr Scott were both sole directors and shareholders of a number of group entities;

(iii) that, having regard to their directorships, shareholdings and relationship as husband and wife, he considered Ms Bird and Mr Scott to have complete control over the entities in the Mewcastle group and he was not satisfied that any of the entities would be operated without regard to the other group entities and contrary to the group's interests;

(b) the extent to which members shared resources, facilities or services, including premises, staff, management and accounting services, in relation to which he found:

(i) until it was sold in February 2015, Ms Bird and Mr Scott's principal place of residence was also the principal place of business for Can Barz and other group entities;

(ii) that, as there was no apparent place of business for the Fund, it was reasonable to conclude that the business of the Fund was conducted from the same locations as the other members of the group;

(iii) Ms Bird and Mr Scott were the only apparent management of the entities in the Mewcastle group;

(iv) the same firm of accountants had been retained for each of the Mewcastle group entities;

(c) the extent to which there were financial interdependencies, including intra-group loans or guarantees and common banking facilities, and the terms and conditions attached to such agreements, in relation to which he found:

(i) Can Barz held real property in Queensland and the Northern Territory as custodian trustee for Ms Bird and Mr Scott in their capacity as trustees for the Fund;

(ii) the Northern Territory property had been continuously leased to a group entity;

(iii) the rental payments for both properties were made to the Fund bank account and those funds then transferred to the relevant loan account for Can Barz;

(iv) Ms Bird and Mr Scott as trustees for the Fund own two "very similar" commercial units in Queensland;

(v) one of the units had been leased to a third party, while the other, between 2011 and 2015, had been leased to several Mewcastle group entities, and that those entities had paid as much as three times the market rate in rental payments;

(vi) there had been several occasions between 2009 and 2015 when the Fund had loaned to, or invested in, group entities or associates of group members, and that

one of those transactions had not been an "arm's length commercial agreement";

(d) the degree to which there is a connection between the applicant and the other members of the group in the purchase or sales of goods and services, in relation to which he found that there did not appear to be any purchase or sales of goods or services in respect of Can Barz or Ms Bird and Mr Scott as trustees of the Fund;

(e) the extent to which there was a connection between the nature of the businesses of the applicant and other members of the group, in relation to which he found:

(i) Can Barz's only apparent business was holding commercial property as a custodian trustee for Ms Bird and Mr Scott in their capacity as trustees for the Fund;

(ii) there was a "very strong" connection between the businesses carried on by Can Barz and the business carried on by Ms Bird and Mr Scott as trustees of the Fund;

(iii) there was "no connection" between the nature of the businesses carried on by Can Barz, Ms Bird and Mr Scott and the plastering and carpentry businesses carried on by the other group entities;

(iv) that, in isolation, this ground may support an exclusion order being made, but it does not overcome the connections established by the other relevant dealings; and

(f) the extent to which there is a connection between the ultimate owners of the applicants and other members of the group, in relation to which he found that Ms Bird and Mr Scott were the ultimate owners of each of the Mewcastle group entities.

[61] Having conducted the analysis identified in the previous two paragraphs, the delegate reached the conclusions quoted at [29](g) and [29](h) above.

[62] Having regard to the foregoing, I agree with the submissions of the Commissioner that the factors set out in the ruling which the decision maker applied were consistent with the factors taken into account by the Courts having regard to the meaning of analogous uses of the concepts of independence and lack of connection. I do not think that the applicants have demonstrated that the decision maker either misconstrued s 74(2) or inflexibly applied policy. The policy was, in any event, less a policy document and more an elaboration in an unexceptionable manner of considerations which were in fact relevant to the s 74(2) question.

[63] Otherwise, it seemed to me that the applicants' submissions in support of this ground –

(a) rested on the submission, rejected at [53] above, that the applicants did not relevantly carry on business;

(b) again sought to elevate their argument about the purpose of the grouping provisions into propositions which ignore the wording of s 74 and associated sections, an approach which I rejected at [48] above; and

(c) otherwise trespassed upon impermissible merits review of conclusions which were open to be reached on the evidence.

[64] I reject this ground of review.

Failure to take into account that none of the applicants were connected with any of the other entities included in the Mewcastle group

[65] This ground of review has been addressed by the examination of the previous ground of review. For the reasons there expressed, I do not think that the applicants have demonstrated that the decision maker misconstrued s 74(2) in relation to connection.

[66] The applicants submitted -

(a) it could not be suggested that s 74(2) contemplated that, any connection, no matter how remote, was sufficient to require refusal of the exercise of the discretion; and

(b) the focus has to be on the degree of connection, the nature and degree of ownership and control.

[67] That much may be accepted, but the approach of the decision maker did not take the approach impugned in (a) and did have the focus suggested in (b).

[68] No reviewable error has been demonstrated. The effect of the applicants' submission is to invite me to embark upon an impermissible merits review.

Failure to take into account that the sole purpose of the Fund was to provide old aged pensions for its members

[69] The applicants submitted, correctly, that they had placed before the decision maker evidence which demonstrated that the sole lawful purpose of the Fund was to provide old aged pensions for its members.

[70] The complaint then seemed to be that the decision maker erred because he did not refer to that consideration and regard it as determinative in relation to the evaluative judgment called for by s 74(2).

[71] The applicants' submission seemed to be that an appreciation of the statutory framework which regulated the conduct of the trustees of a superannuation fund[10] (which, the applicants contended, had the effect that the trustees' activities "must by law therefore be carried out entirely independently of their activities in any other capacity, including any activity which they had to perform as directors of other entities in the Mewcastle group") would inevitably have driven the decision maker to reach a contrary view to the view he reached in relation to s 74(2). He did not reach that view therefore he must have failed to take into account the consideration to which the applicants point.

[72] The effect of the applicants' submission is to invite me to embark upon an impermissible merits review. There is no evidence that the decision maker failed to appreciate that the purpose of the Fund was the provision of old age pensions. The approach which the decision maker took was to focus on what the evidence revealed concerning the matters made relevant by s 74 and, in particular, what the applicants in fact did as trustees of the Fund and as custodial trustee. As to the former, he made relevant findings at points 6 to 12 quoted at [29](g) above and, as to the latter, at points 1 to 3 quoted at [29](h) above. No reviewable error is demonstrated.

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10 *Superannuation Industry (Supervision) Act* 1993 (Cth).

Taking into account irrelevant considerations, namely the conception of independence and absence of connection referred to at [59]

[73] It follows from my analysis at [62] above, that I reject the contention that the decision maker took into account irrelevant considerations in the way for which the applicants contend.

Taking into account irrelevant considerations, namely various matters of evidence

[74] The applicants first complain that the Commissioner took into account –

(a) the alleged fact that the same accounting firm had throughout all relevant periods acted as accountants for the Mewcastle group entities, the Fund and Ms Bird and Mr Scott individually; and

(b) the alleged fact that the same accounting firm was also a member of the Mewcastle group between 2009 and 2014.

[75] I am, however, unable to accept the view that this amounts to a reviewable error. The identity of the accountants was treated as one piece of evidence assessed with the other circumstances to reach the evaluative judgment expressed in the reasons. It was evidence which, with other evidence, was capable of being probative of the considerations which s 74(2) required be considered.

[76] Next, the applicants complain that the decision maker took account of the facts referred to at points 6 to 12 quoted at [29](g) above. Their submission in this regard was:

> 125 The existence of the Lease Agreements might be a relevant consideration that could be taken into account pursuant to [s 74(3)(c)]. The problem is that the decision-maker wrongly concluded that the relevant Lease Agreements were not "arm's length commercial transactions" on an entirely spurious basis. [See affidavit of Ms Bird filed 24 November 2015 (Court File Document 12), paragraphs 17 to 18.]
>
> 126 The existence of intercompany loans might, depending upon the terms of the loans and the duration of the loans, be a relevant consideration which the decision-maker could properly take into account pursuant to [s 74(3)(c)]. However, the decision-maker has wrongly concluded, based on no probative or logical grounds, that the loans were not at "arm's length" or on "commercial terms".
>
> 127 The decision-maker failed to make any proper enquiries before making these serious adverse findings and failed to give proper, genuine and realistic consideration to the merits of the Applicant's case.
>
> 128 The true facts are set out in [Ms Bird's affidavit filed 24 November 2015] at paragraphs 30 to 45. There was no basis upon which the decision-maker could conclude that the relevant loans were not at arm's length or on commercial terms. He clearly chose to take this adverse finding into account in making the decisions under review. In so doing he committed legal error.

[77] The attempt (in paragraphs 125 and 128) to rely on evidence adduced by Ms Bird which was not before the decision maker may be rejected immediately as not admissible in relation to the present ground of review.

[78] I agree with the Commissioner's submissions to me that this part of the applicants' argument is not a legitimate ground of review unless it amounts to the proposition that there was in fact no evidence before the decision maker capable of founding the conclusion he reached.

[79] In this regard I observe that –

(a) the delegate had before him:

(i) the contents of an email from an employee of the firm of accountants retained by various entities within the Mewcastle group detailing, amongst other things, inconsistencies in the yearly totals of the rent paid by the Mewcastle group lessees;

(ii) the response given by the applicants' solicitor when shown that email;

(iii) knowledge of his observation of the exterior of the relevant leased premises;

(iv) bank records, company searches and births, deaths and marriages records relating to Ms Bird and Mr Scott and their immediate family;

(v) company records and copies of trust documents of a Mewcastle group entity in which the Fund had invested monies;

(vi) the financial statements of the Fund; and

(vii) documentation provided by, and discussions with, Ms Bird and Mr Scott in relation to a loan agreement entered into with associates of their accountant.

(b) the delegate explained his reasoning at [7](f), [10] to [13] and [16] of his affidavit as follows:

> 7 In response to the allegation … that I took into account irrelevant considerations, I say as follows:
>
> …
>
> (f) I had regard to the fact that the lease agreements, referred to in the previous sub-paragraph above, were not arm's length commercial transactions. In determining that [the lease agreements] were not at arm's length, I considered that each of the lessees were group members and that [Ms Bird] has a controlling interest under [s 71 of the Act] in each of the corporations when the lease was entered into. The nature and extent of any commercial transactions between group members is a factor mentioned in PTA031.2 at paragraph 10(a).
>
> …
>
> 10 … [F]or the reasons stated in paragraph 7(f) above, I determined that [the lease agreements] were not at arm's length.
>
> 11 In determining that they were not on commercial terms, I considered the contents of an email from [an employee of the Mewcastle group's accountant at the time], to [the accountant acting for several Mewcastle group entities], dated 21 September 2011, which states, amongst other things that:
>
> a) 'Back out Rent paid to Mewcastle Super Fund $153,890'
>
> b) 'Amend 2010 Mewcastle Internal Linings tax return – back out rent $53,000, and soak up remaining losses to Bull';
>
> c) 'Adjust 2010 Mewcastle P/L tax return – back out rent $56,000 increase to tax payable';
>
> d) 'Could examine possibility of raising invoice between BEB and Mewcastle in 2010 on actual basis';
>
> e) 'Lodge BEB 2010 tax return on cash basis and take up invoice in 2010 year – bit dodgy as no money paid from Mewcastle to BEB in 2011 year';
>
> f) 'Amend the BAS's for each entity $13,990 (super fund will get credit, may alert ATO)?';
>
> g) 'This will still leave a problem that past rent has been overpaid';

h) 'We need to establish what the rent should be and pay this amount only';

i) 'Thay are receiving about $43,000 from Unit 12';

k) '2007 – $43,600

2008 – 70,145

2009 – 141,919

2010 – nil

2011 – 78,100'.

12 On 3 September 2015, I showed this email to [the solicitor for the applicants] when he attended a meeting at the Office of State Revenue. Attached and marked KE-09 is a copy of that email.

13 Having considered the contents of that email and the response from [the solicitor for the applicants], I concluded that the lease agreements were not an arm's length commercial transaction, as demonstrated by:

a) the inconsistent rent amounts paid from year to year;

b) [the employee's] conclusion that it was necessary to establish what rent should be paid for the premises; and

c) [the employee's] notation of the significant difference in rent paid for Unit 11 and Unit 12 and the lack of any explanation in his email regarding that difference. I attended at the premises… where the units are located side by side.

From my observation of the exterior, they appeared to be identical in size and aspect.

…

16 … [I]n reaching the conclusion that the loan was not at arm's length or on commercial terms, I relied on the following documents collected from [the applicants' accountants]:

a) a copy of a loan agreement between [the Fund] and Dallas and Kenneth Mahnken dated 29 March 2010 and executed by Dallas and Kenneth Mahnken. The terms of the loan included repayment in 8 weeks with interest of 15% (which is a rate of 90% per annum) and a default interest rate of 30%. Exhibited and marked DE-10 is a copy of the loan agreement. Having investigated a significant number of matters over 5 years and having read a number of loan agreements, I formed the view that these interests rates were not on commercial rates.

b) a deed made between the same parties dated 19 November 2012 regarding the debt. Exhibited and marked KE-11 is a copy of the deed.

c) The First Applicant not enforcing the contractual terms within a reasonable time, and the forgiveness of interest lent support to my view at the time that the loan was not an arm's length transaction on commercial terms.

[80] When one has regard to the affidavit of the decision maker responding to these grounds it is apparent that there was material before him which was capable of supporting the conclusions which the decision maker reached. Although the assertion to the contrary was made in written submissions by the applicants, no serious attempt was made to seek to grapple with that evidence with a view to trying to demonstrate that it could not arguably or logically support the findings which were made. The submissions were rightly characterised by the Commissioner as not submissions that irrelevant considerations were taken into account by the decision maker, but merely submissions that the decision maker's conclusions were wrong. I reject this ground of review.

Exercising the power in accordance with a rule or policy without regard to the merits of the particular case

[81] I have already dealt with and rejected this ground of review: see at [62] above.

Exercising the power in a way that was so unreasonable that no reasonable person could have so exercised the power

[82] The applicants relied on *Minister for Immigration v Li* (2013) 249 CLR 332 to contend –

(a) that no sensible decision maker acting with due appreciation of his responsibilities would have decided as this decision maker did[11].

(b) the decision maker clearly failed to give adequate weight to a relevant matter of great importance, namely that there was no connection between the nature of the businesses carried on by the applicants and the other members of the group, and gave excessive weight to the irrelevant matters referred to previously herein[12].

(c) that the decision maker reasoned illogically and irrationally and failed to observe the requirements of ss 74(2) and (3) of the Act as particularised previously herein[13]. The decisions under review lack any evident and intelligible justification and were not reached by means of any logical pathway[14].

[83] These submissions were merely assertions phrased in terms of propositions expressed in *Minister for Immigration v Li*. What was missing was any reasoned explanation justifying the application of the propositions. It is apparent from my analysis at [49] to [51], [55] to [61], and [75] to [80], that far from being capable of being characterised in these ways, the decision maker sought, in an unremarkable way, to identify the concepts made relevant by the wording of the statute and then to evaluate the evidence before him having regard to those concepts.

[84] There is no merit to this ground of review.

The decision involved errors of law

[85] The applicants submitted that the decision-maker misconstrued the true meaning and effect of ss 74(2) and (3) of the Act. What was significant was the approach taken to s 74(2), because that was the consideration which was relevant to the question whether the jurisdiction was enlivened. For reasons I have already given, I reject the contention that the decision maker misconstrued s 74(2) in the respects complained of.

[86] The applicants submitted there was no evidence or other material before the decision maker capable of justifying the factual findings which he made and took into account as a relevant consideration that the lease agreements were not at arm's length and were not commercial transactions or that the rent amounts paid for the premises the subject of those Lease

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11 See *Minister for Immigration v Li* (2013) 249 CLR 332 at [71] per Hayne, Kiefel and Bell JJ.

12 See *Minister for Immigration v Li* (2013) 249 CLR 332 at [75] per Hayne, Kiefel and Bell JJ; *McCloy v New South Wales* (2015) 89 ALJR 857 at 863 [3].

13 See *Minister for Immigration v Li* (2013) 249 CLR 332 at [75] to [76] per Hayne, Kiefel and Bell JJ; referred to with approval in *Flegg v Crime and Misconduct Commission* [2014] QCA 42 at [14].

14 See *Minister for Immigration v Li* (2013) 249 CLR 332 at [75] to [76]; *Flegg v Crime and Misconduct Commission* [2014] QCA 42 at [15]; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [44]; *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at [6] and [13]; *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 at [52].

Agreements were far in excess of market rent. I reject this submission for the reasons expressed at [79] to [81] above.

[87] The applicants submitted there was no evidence or other material before the decision maker that the alleged loan between Ms Bird and Mr Scott as trustees and alleged associates of Mr Mark Wilson, were not at arm's length or on commercial terms. I reject this submissions for the reasons expressed at [79] to [81] above.

There was no evidence or other material to justify the making of the decisions

[88] This ground of review was based on reading together ss 20(2)(h) and 24(b) of the *Judicial Review Act*.

[89] Those sections provide:

> **20 Application for review of decision**
>
> (1) A person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision.
>
> (2) The application may be made on any 1 or more of the following grounds—
>
> …
>
> (h) that there was no evidence or other material to justify the making of the decision;
>
> …
>
> **24 Decisions without justification—establishing ground (ss 20(2)(h) …)**
>
> The ground mentioned in sections 20(2)(h) … is not to be taken to be made out—
>
> (a) unless—
>
> (i) the person who made, or proposed to make, the decision was required by law to reach the decision only if a particular matter was or is established; and
>
> (ii) there was no evidence or other material (including facts of which the person was or is entitled to take notice) from which the person could or can reasonably be satisfied that the matter was or is established; or
>
> (b) unless—
>
> (i) the person who made, or proposes to make, the decision based, or proposes to base, the decision on the existence of a particular fact; and
>
> (ii) the fact did not or does not exist.

[90] The applicants' submitted that the delegate based his decision on the existence of particular facts and that those facts did not exist.

[91] In advancing its submission that the decision this ground of review the applicants relied on paragraphs 125 to 128 of their submissions (extracted at [76] above). Accordingly, it seemed that the applicants' argument was that there were two "facts" attracting the s 24(b) ground of review, namely –

(a) that certain relevant lease Agreements were not "arm's length commercial transactions"; and

(b) that certain loans were made and were not at "arm's length" or on "commercial terms".

[92] In oral argument, counsel for the applicants confined the s 24(b) case to the first alleged fact.

[93] An applicant relying on this ground must show that –

(a) first, the decision maker based the impugned decision (in this case the decision that decision maker was not satisfied a business carried on by the applicants was carried on independently of, and was not connected with the carrying on of, a business carried on by any other member of the group) on the existence of a particular fact; and

(b) second, that that fact did not exist[15].

[94] In dealing with this alleged ground of review it suffices to make only two points.

[95] First, it is only where the alleged fact is a fact which is capable of existing or not existing that s 24(b) is engaged. If the alleged "fact" was an evaluative opinion formed by the decision maker, then it is difficult to see that s 24 has any part to pay beyond ensuring that the requisite opinion exists: see *Pierce v Rockhampton Regional Council* [2014] QSC 104 at [92] per McMeekin J. In this case, the alleged "fact" was an opinion which was formed by the decision maker. And there was no doubt that – as an evaluative opinion – the opinion did exist and was held by the decision maker.

[96] Second, the principal difficulty is that the impugned decision must be **based** on the fact which allegedly did not exist. That means that the existence of that fact must be seen to be critical to the making of the decision: see *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR 212 at 220 to 221. Whilst there is some divergence in approach as to how highly to put the relevant aspect of criticality (as to which see *Pierce v Rockhampton Regional Council* at [98] to [101] and the cases there cited) it must nevertheless be possible to explain why the posited "fact" was critical to the reasoning. On the face of the initial letter and memorandum which recorded the reasons for the decision, it is apparent that the alleged "fact" was simply one of multiple considerations treated as relevant. Having regard to that material alone, I do not think that criticality has been demonstrated by the applicants. That view is confirmed if I have regard to the affidavit evidence by the decision maker who said that he would have made the same decision even without having regard to the non-arms length nature of the transactions to which he had referred.

[97] I reject this ground of review.

Orders

[98] For the reasons identified at [31] above, there will be a direction that the Commissioner proceed to decide the application for an exclusion order in respect of the Wilson/Voll group.

[99] Otherwise, the application will be dismissed.

[100] I will hear the parties as to costs.

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15 *Pierce v Rockhampton Regional Council* [2014] QSC 104 at [89] per McMeekin J.