

# GST – Who can group register?

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IS 24/03

This interpretation statement considers who can group register under s 55 of the Goods and Services Tax Act 1985. All legislative references are to the Goods and Services Tax Act 1985 (GSTA) unless otherwise stated.

## REPLACES | WHAKAKAPIA

- **QB (July 2004):** GST Group Registration of Trusts
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## Contents | Ihirangi

Summary   Whakarāpopoto .....	2
Introduction   Whakataki .....	4
Groups of companies .....	5
The definition of “company” .....	6
The “group of companies” rules in s IC 3, Income Tax Act 2007 .....	6
Unregistered companies .....	7
Non-resident companies .....	10
Mixed groups .....	12
Meaning of “control” in s 55(8) .....	15
Summary: legal control test .....	18
Applying the legal control test .....	19
Individuals .....	19
Companies .....	19
Trusts .....	23
Bare trusts .....	37
General partnerships .....	38
Limited partnerships .....	49
Joint ventures .....	56
How to register a GST group .....	60
Grouping non-residents registered under s 54B .....	61
Summary tables .....	63
Legislation .....	66
References   Tohutoro .....	67
About this document   Mō tēnei tuhinga .....	70

## Summary | Whakarāpopoto

1. This interpretation statement provides guidance on who can form a GST group. It makes the following key points.

### Groups of companies – s 55(1)

2. Under s 55(1), two or more companies can group register if they are a “group of companies” or part of a “group of companies” under s IC 3 of the Income Tax Act 2007. This requires that a “group of persons” holds 66% common ownership interests in the companies.
3. The GSTA specifies that look-through companies, multi-rate portfolio investment entities (PIEs) and listed PIEs can be members of a group of companies under s 55(1) if they meet the 66% common ownership interests test (despite not qualifying for inclusion in a “group of companies” under s IC 3 of the Income Tax Act 2007).
4. Limited partnerships registered under the Limited Partnerships Act 2008 (LPA 2008) similarly cannot be members of a group of companies under s IC 3 of the Income Tax Act 2007. This is because the tests used to determine common ownership interests in s IC 3 cannot be applied to limited partnerships. However, the GSTA specifies that limited partnerships can be members of mixed groups under s 55(8) (see from [8]).
5. Companies that are not GST-registered persons (**unregistered companies**) can be members of GST groups of companies under s 55(1), provided the group meets a “75% taxable supplies” requirement (see from [28]) (and provided the proposed group members meet the other requirements for GST grouping).
6. Non-resident companies can be members of GST groups of companies under s 55(1) (provided the proposed group members meet the requirements for GST grouping in that section). Non-resident companies (whether registered under s 51 or unregistered) may be members of GST groups that have New Zealand resident members, provided, if they are unregistered, they meet the requirements set out at [5].
7. Non-resident companies that do not make taxable supplies in New Zealand (and meet the other relevant requirements) may register under s 54B. A non-resident cannot become a member of a GST group with New Zealand resident members while it is registered under s 54B (even if it would otherwise qualify to do so), as discussed from [154].

## Mixed groups – s 55(8)

8. Under s 55(8), registered persons that are under common control can be members of a GST group. A group formed under s 55(8) (a **mixed group**) must contain at least one non-company or at least one limited partnership. All members must be registered persons. There is no requirement for a mixed group to contain a company.
9. Under s IC 3 of the Income Tax Act 2007, a “group of persons” must hold 66% common ownership interests. In contrast, under s 55(8):
  - **one person** in the GST group must control each of the others; or
  - **one person** outside the GST group must control all the GST group members; or
  - **two or more persons carrying on a taxable activity in partnership** must control all the GST group members.
10. “Control” in s 55(8) means legal control: *Case K54* (1988) 10 NZTC 444. Legal control means control through an identifiable legal power vested in a particular person or persons outside the entity. For example, they may have the power to vote in respect of company shares.
11. The meaning of legal control under s 55(8) for each of these types of GST registered persons is:
  - For **individuals** (eg sole traders) – an individual acting in their individual capacity (eg as a sole trader) is registered for GST in this capacity. The question of control does not arise for an individual who is registered for GST in their individual capacity.
  - For a **company** – legal control is in the hands of the shareholder holding a majority (ie greater than 50%) ownership interest (discussed further at [24], [26] and [66]). That interest is calculated under s IC 3 of the Income Tax Act 2007, with some modifications.
  - For a **trust** – generally, the trustee or trustees of a trust have control, acting in their capacity as trustee(s) of that trust. Because of the different capacity, trusts with the same trustee(s) cannot usually group with each other; that is, the trustee of one trust is treated as a different “person” from the same trustee acting in their capacity as trustee of another trust. However, if under the trust deed another person has the power to appoint and remove the trustees of a trust, the Commissioner considers that the person holding the power to appoint and remove trustees controls the trust.

- For a **partnership** – as a starting point, a majority of partners acting together exercise legal control, unless the partnership agreement makes a lawful modification to this. Partnership agreements will frequently modify the presumption in the legislation that partners have equal voting power and share profits equally.
  - For a **limited partnership** – a partner who can make “resolutions of the limited partnership” has legal control. This is usually a limited partner who has contributed at least 75% of the total partnership capital (although the written partnership agreement may modify this). Where capital contributions are split across several limited partners, however, this approach may establish that no “one person” controls the limited partnership. In some cases, it may be possible to identify who controls a limited partnership by referring to the respective partnership interests of the partners.
  - For a **joint venture** – the respective interests of the joint venturers determine legal control. In most cases the voting powers of the joint venturers as set out in the joint venture agreement will show who has legal control. However in some cases there may be legal arrangements in place which mean the ordinary voting powers of the joint venturers under the joint venture agreement will not show who has legal control. An alternative approach may be required, eg to refer to the joint venturers’ respective capital contributions and income entitlements as set out in the joint venture agreement or elsewhere. If the joint venture agreement requires all decisions to be made unanimously, it may be that no “one person” controls the joint venture.
12. A non-resident (company or non-company) may join a mixed group if it is a registered person and meets the control test described at [9].

## Introduction | Whakataki

13. We have been asked to clarify the Commissioner’s position on who can group register for GST under s 55. This interpretation statement updates and replaces “[QB \(July 2004\): GST Group Registration of Trusts](#)”.<sup>1</sup>
14. There are two tests for group registration. First, under s 55(1), companies that qualify as a “group of companies” under s IC 3 of the Income Tax Act 2007 (companies with at least 66% common ownership interests) can group register. Second, under s 55(8),

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<sup>1</sup> *Tax Information Bulletin* Vol 16, No 6 (July 2004): 32.

non-companies and limited partnerships may group register (with or without companies) as a mixed group if they are under common control.

15. This interpretation statement covers:
  - which entities can register as a GST group of companies under s 55(1);
  - which registered persons can register as a mixed group under s 55(8); and
  - various practical matters including how to register a GST group, and when to register a group consisting only of non-residents (eg, persons registered under s 54B).
16. For summary tables by entity, see from [163].

## Groups of companies

17. Section 55(1) sets out when two or more “companies” are eligible to be a GST group. The following are the requirements for grouping under s 55(1):
  - There must be two or more “companies”.
  - Under s IC 3 of the Income Tax Act 2007, the “companies” are a group of persons (the **eligibility group**) that:
    - is a group of companies; or
    - is part of a group of companies; or
    - would be a group of companies but is not, only because one or more members are a multi-rate PIE or a look-through company; or
    - would be a group of companies but is not, only because one or more members are a listed PIE.
  - The companies meet **either** or **both** of the following requirements:
    - The companies are each a registered person.
    - The companies, as the eligibility group (in a 12-month period that includes the current time) make at least 75% taxable supplies (as a percentage by value of their taxable and other supplies) to persons outside the eligibility group. For this purpose, “taxable supplies” include supplies that would be “taxable supplies” if a registered person made them.

## The definition of “company”

18. Section 2 sets out the definition of “company”. A “company” as defined means any body corporate whether incorporated in New Zealand or elsewhere; but does not include a local or public authority.
19. Section 2 confirms that a limited partnership registered under the LPA 2008 is a “company” under the GSTA.<sup>2</sup> However, limited partnerships cannot be members of “groups of companies” under s IC 3 of the Income Tax Act 2007. Limited partnerships are therefore grouped under s 55(8) (see from [37]).
20. A look-through company is a body corporate and may group under s 55(1).
21. Multi-rate PIEs and listed PIEs are treated as companies for GST grouping purposes and may group under s 55(1).

## The “group of companies” rules in s IC 3, Income Tax Act 2007

22. Under s 55(1), two or more companies are eligible to be a GST group if they are a “group of companies” or part of a “group of companies” under s IC 3 of the Income Tax Act 2007. Two or more companies are also eligible to be a GST group if they would be a “group of companies” but are not, only because one or more members are a multi-rate PIE, a look-through company or a listed PIE.
23. The “group of companies” test in s IC 3 of the Income Tax Act 2007 requires 66% common ownership between the companies that are members of the group.
24. Specifically, a “group of companies” means two or more companies, in relation to which a group of persons holds:
  - common voting interests that add up to at least 66%; and
  - if a market value circumstance exists for a company that is part of a group of companies, common market value interests that add up to at least 66%.
25. For **income tax** purposes, a look-through company cannot be a member of a “group of companies”, and multi-rate PIEs and listed PIEs require 100% common ownership to be members of a “group of companies”. However, for **GST grouping** purposes, these

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<sup>2</sup> A limited partnership registered under the LPA 2008 is a “body corporate”. See “QB 14/03: Goods and Services Tax – Transfer of interest in a partnership”, *Tax Information Bulletin* Vol 26, No 5 (June 2014): 57. (See references section for link.)

restrictions are ignored. Look-through companies, multi-rate PIEs and listed PIEs are eligible to be members of GST groups under s 55(1) if they meet the 66% common voting interests test and, if applicable, the 66% common market value interests test.

26. For information on how to calculate common voting interests and common market value interests, see "[IS 22/07: Company losses – ownership continuity, sharing and measurement](#)".<sup>3</sup>

## Company shares held on bare trust

27. Where a company's shares are held on bare trust for a beneficiary, for the purposes of deciding whether the company is a member of a "group of companies" under s IC 3 of the Income Tax Act 2007, its shares will be treated as held by the beneficiary of the bare trust (s YB 21, Income Tax Act 2007).<sup>4</sup>

## Unregistered companies

28. Under s 55(1)(b), two or more companies are eligible to be a GST group if they meet **either** or **both** of the following requirements:
  - At the time, they are each a registered person.
  - The companies, as the eligibility group (in a 12-month period that includes the current time) make at least 75% taxable supplies (as a percentage by value of their taxable and other supplies) to persons outside the eligibility group. For this purpose, "taxable supplies" include supplies that would be "taxable supplies" if a registered person made them.
29. Section 55(1)(b) allows for unregistered companies to be members of GST groups, provided the group meets the 75% taxable supplies requirement (see Example | Tairua 1).
30. In contrast, under s 55(8), the GST group must consist of "registered persons".

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<sup>3</sup> *Tax Information Bulletin* Vol 34, No 11 (December 2022): 53. Some provisions discussed in IS 22/07 are only relevant to the loss continuity rules. The provisions relevant to s IC 3 "groups of companies" are ss YC 2 – YC 6, s YA 5, s YB 21, and the related definitions in s YA 1 of the Income Tax Act 2007.

<sup>4</sup> See also "QB 16/03: Goods and Services Tax – GST treatment of bare trusts", *Tax Information Bulletin*, Vol 28, No 5 (June 2016): 16. (See references section for link.)



## An unregistered company cannot be the representative member of a GST group

31. An unregistered company cannot be the representative member of a GST group (s 55(3)(b)).<sup>5</sup> An application for registration as a group of companies should name a GST registered company as the proposed representative member of the group.

### Example | Taurira 1 – A group of companies with an unregistered holding company charging management fees

Companies A, B and C are members of a group of companies under s IC 3 of the Income Tax Act 2007 (A owns 100% of the shares of both B and C). Companies A, B and C are all New Zealand residents for GST purposes.

A does not make taxable supplies, other than supplies of management services to B and C. To date, A's supplies to B and C have not exceeded the \$60,000 registration threshold in a 12-month period and are not expected to do so in the next 12 months. In addition, A has not voluntarily registered for GST. A is therefore an unregistered company.

B and C are trading companies. They are each registered for GST. B makes a mix of taxable and exempt supplies to third parties. C makes only taxable supplies to third parties. B and C do not make supplies to each other or to A.

The GST exclusive value of B's supplies to persons outside the group in the 12-month period that includes the time is:

Taxable supplies	\$100,000
Other supplies	\$ 50,000

The GST exclusive value of C's supplies to persons outside the group in the 12-month period that includes the time is:

Taxable supplies	\$100,000
Other supplies	\$0

This means the supplies of the eligibility group are:

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<sup>5</sup> Every GST group must have a representative member. The representative member is the person generally responsible for carrying out tasks such as making returns, keeping records and paying tax for the group. This role is central to the operation of a GST group.

Taxable supplies \$200,000

Taxable and other supplies \$250,000

The "taxable supplies percentage" is:

$$\text{taxable supplies} / \text{taxable and other supplies} \times 100/1$$

$$\$200,000 / \$250,000 = 0.8 \times 100/1 = 80\%$$

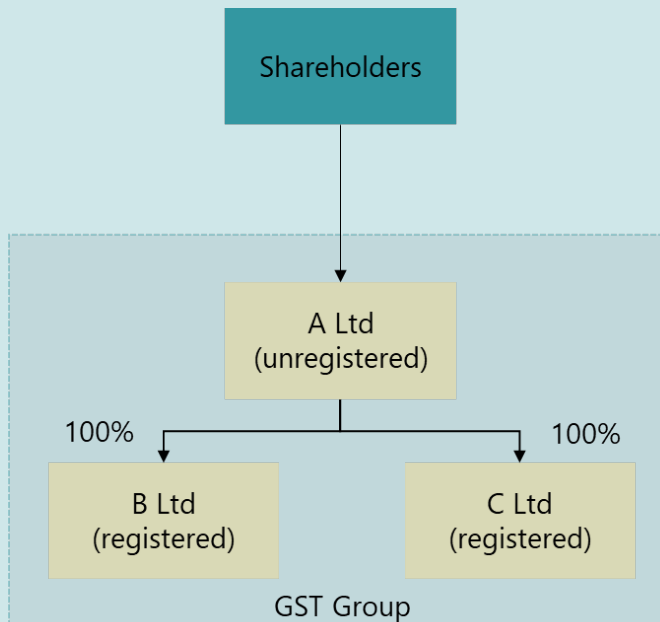
This is more than 75%, so meets the (at least) 75% taxable supplies requirement.

B and C can be members of GST group on the basis that they:

- are part of a group of companies; and
- are each a registered person.

Alternatively, A, B and C can be members of a GST group on the basis that:

- they are a group of companies; and
- the total value of their taxable supplies made to persons outside the group is at least 75% of the total value of all their supplies made to persons outside the group in the 12-month period that includes the time of testing their eligibility for grouping.



A, B and C opt to group all three companies. This means that A does not have to charge GST on the supplies of management services it makes to B and C as they are

ignored under the GST grouping rules. Note that A cannot be the representative member of the GST group because A is not registered. Any input tax A incurs that relates to the group's taxable supplies can be recovered by the representative member.

## Non-resident companies

32. Non-residents may be required to register for GST under the general registration provision (s 51). This may be because they carry on a taxable activity and have made taxable supplies in New Zealand over the GST registration threshold of \$60,000 in the previous 12-month period, or because they intend to do so in the next 12-month period. Non-residents may also be entitled to register voluntarily under s 51 because they carry on a taxable activity somewhere in the world (the term "taxable activity" is not limited to an activity carried on in New Zealand) and do not make taxable supplies in New Zealand that exceed the \$60,000 threshold: see [Registering for GST \(ird.govt.nz\)](#) and [GST for overseas businesses \(ird.govt.nz\)](#).
33. However, the Commissioner is entitled to deregister a non-resident that does not make taxable supplies in New Zealand (s 52(7)). Such persons may be entitled to register under s 54B (if they meet the relevant criteria): see from [155].
34. A non-resident company can be a member of a "group of companies" under s IC 3 of the Income Tax Act 2007: *CIR v Alcan New Zealand Ltd* (1994) 16 NZTC 11,175 (CA).
35. There is nothing that specifically prevents a non-resident company from being a member of a GST group. Therefore, if a non-resident is a member of a s IC 3 group of companies, it can be a member of a GST group made up of all or part of the s IC 3 group of companies if **either** or **both** of the following apply:
  - the companies are registered for GST in New Zealand.
  - the companies, as an eligibility group, meet the 75% taxable supplies requirement.
36. Example | Taura 1 illustrates the 75% taxable supplies requirement. Example | Taura 2 shows how a non-resident company may be part of a GST group.

### **Example | Taura 2 – A group of companies with an unregistered holding company includes a non-resident company**

Companies A, B and C are members of a group of companies under s IC 3 of the Income Tax Act 2007 (A owns 100% of the shares of both B and C).

A is a New Zealand resident for GST purposes. A does not make taxable supplies, other than supplies of management services to B and C. To date, A's supplies to B and C have not exceeded the \$60,000 registration threshold in a 12-month period and are not expected to do so in the next 12 months. In addition, A has not voluntarily registered for GST. A is therefore an unregistered company.

B is a New Zealand resident for GST purposes. B is a trading company and is registered for GST.

C is Australian resident for GST purposes. However, C makes taxable supplies in New Zealand over the registration threshold so is registered for GST in New Zealand.

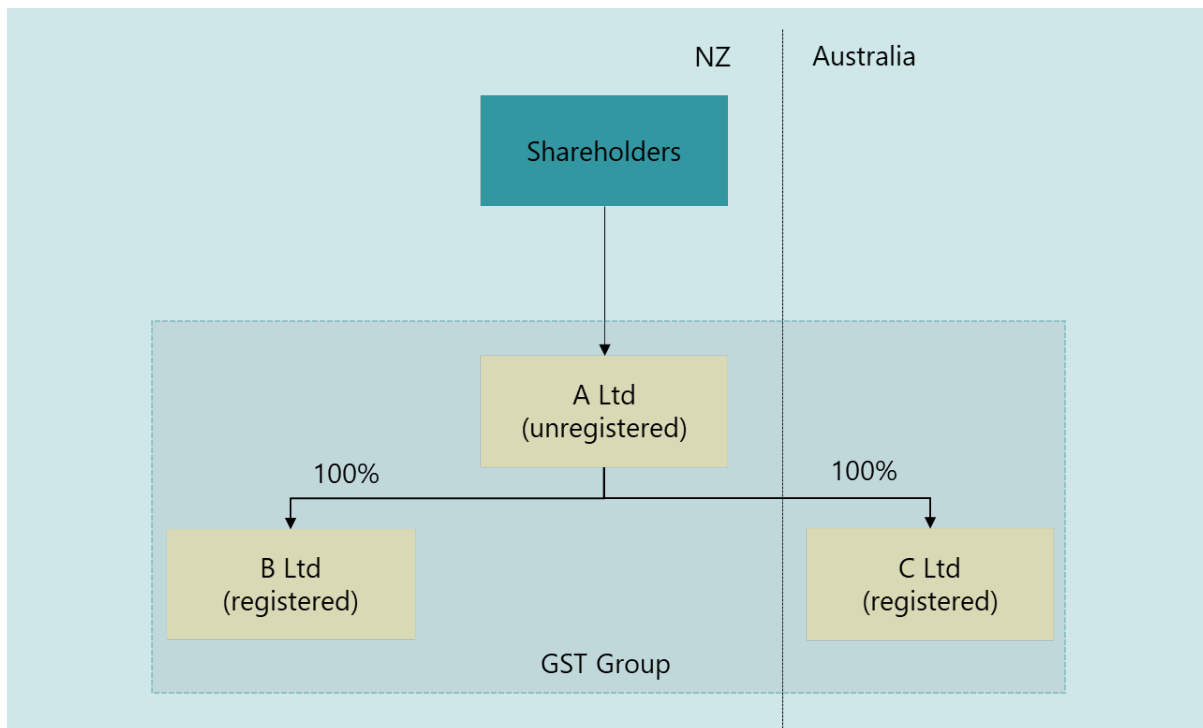
The taxable supplies percentage for the eligibility group consisting of A, B and C is 80%. (For the calculation method, see Example | Tauria 1.)

B and C can be members of a GST group on the basis that:

- they are part of a group of companies; and
- they are each registered for GST.

Alternatively, A, B and C can be members of a GST group on the basis that:

- they are a group of companies; and
- the total value of their taxable supplies made to persons outside the group is at least 75% of the total value of all their supplies made to persons outside the group in the 12-month period that includes the time of testing their eligibility for grouping.



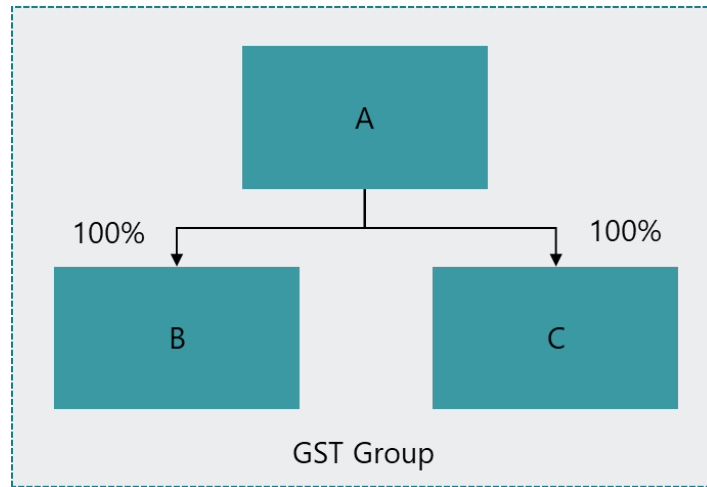
A, B and C opt to group all three companies, with B as the representative member. This means that A does not have to charge GST on the supplies of management services it makes to B and C as they are ignored under the GST grouping rules. The supplies that C makes in New Zealand will continue to be taxable (or exempt) as they were prior to grouping taking effect. Supplies that C makes outside New Zealand will be brought within the scope of NZ GST. However, such supplies will generally be zero-rated supplies.

## Mixed groups

37. Section 55(8) sets out when two or more “registered persons” that include a non-company or a limited partnership are eligible to be members of a GST group (a **mixed group**).
38. The requirements for grouping under s 55(8) are as follows:
  - There is a group of two or more “registered persons”.
  - At least one of the persons is not a “company”, or is a “company” but is a limited partnership.
  - The Commissioner is satisfied in relation to the members of the group that:
    - one of them controls each of the others (s 55(8)(a)); or

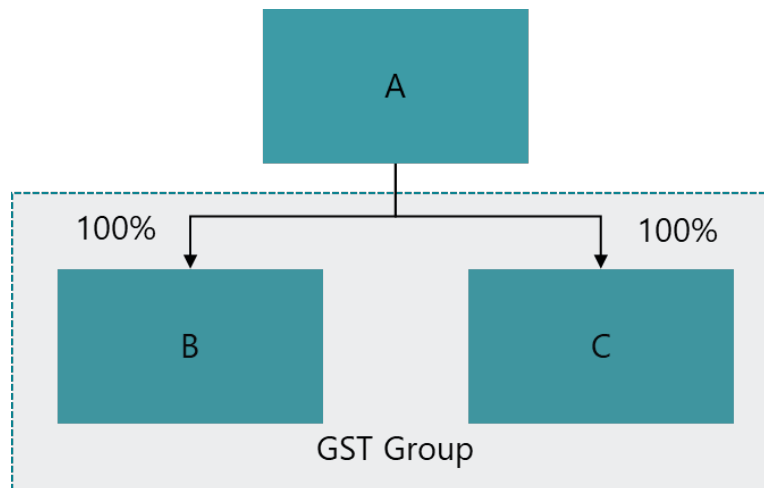
- one person controls all of them (s 55(8)(b)); or
  - two or more persons carrying on a taxable activity in partnership control all of them (s 55(8)(c)).
39. The first bullet at [38] requires that the persons are “registered persons”. A “registered person” is a person who is registered or who is liable to be registered under the GSTA. A person is liable to be registered if they carry on a taxable activity and have made taxable supplies in New Zealand over the GST registration threshold of \$60,000 in the previous 12-month period or there are reasonable grounds for believing they will do so in the next 12-month period. A person may register voluntarily if they carry on a taxable activity and their taxable supplies in New Zealand are below the registration threshold (see [Registering for GST \(ird.govt.nz\)](https://www.ird.govt.nz/registering-for-gst)). A non-resident can be a member of a mixed group if it is a registered person and meets the “control” requirements discussed from [42].
40. The second bullet at [38] requires that at least one of the persons is not a “company”, or is a company but is a limited partnership. We discussed the meaning of “company” from [18]. There is no requirement for a mixed group to contain a company.
41. The description “mixed” is used because such groups are likely to consist of a mix of persons, such as sole traders, partnerships, trusts, and companies. However, there is no requirement for there to be more than one type of person in a mixed group (as long as at least one of the group members is a non-company or is a limited partnership). For example, two trusts may form a mixed group, or two partnerships may form a mixed group, if they are both registered persons and the control requirements (discussed from [42]) are met.
42. The third bullet at [38] explains how to determine common control for s 55(8) purposes. Unlike under s 55(1), where a group of companies may be under 66% common control of a “group of persons”, common control under s 55(8) requires that **one person, or two or more persons carrying on a taxable activity in partnership**, exercise common control of the registered persons seeking to group register.
43. The following figures illustrate the common control requirements in s 55(8).
44. Figure | Hoahoa 1 illustrates the first of the three possible ways registered persons may group under s 55(8) (one member of the group controls each of the others). In this scenario, A, B and C can be members of a mixed group. This is because A (a member of the group) controls B and C.

**Figure | Hoahoa 1 – Common control: one group member controls each of the others**



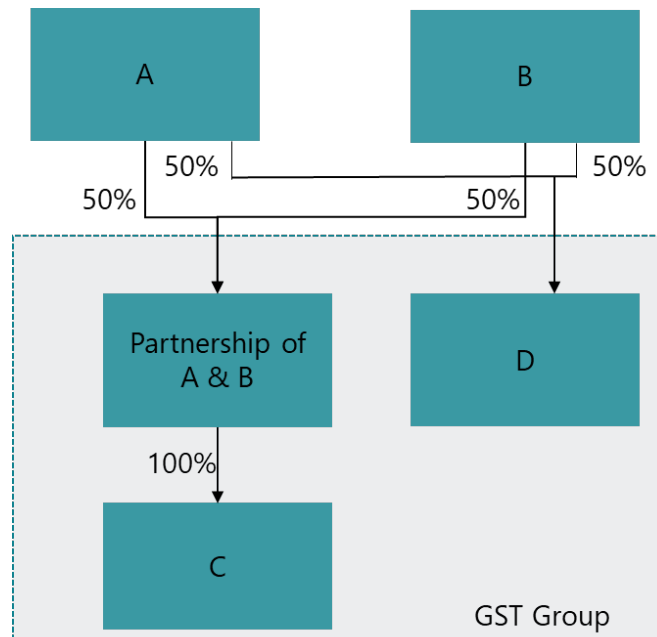
45. Figure | Hoahoa 2 illustrates the second way registered persons may group under s 55(8) (one person controls all of the group members). In this scenario, B and C can be members of a mixed group. This is because A controls B, and A also controls C.

**Figure | Hoahoa 2 – Common control: one person controls all of the group members**



46. Figure | Hoahoa 3 illustrates the third way registered persons may group under s 55(8) (two or more persons carrying on a taxable activity in partnership control all of the group members). In this scenario, a partnership of A and B, and persons C and D can be members of a GST group. This is because two persons carrying on a taxable activity in partnership (A and B) control all of them.

**Figure | Hoahoa 3 – Common control: two or more persons carrying on a taxable activity in partnership control all of the group members**



47. For information on how to apply for group registration, see from [150]. For information on the consequences of GST grouping, refer to [IS 24/02: GST – Grouping for companies](#). While IS 24/02 focuses on the GST grouping rules as they apply to companies, the same principles may apply to persons that are eligible to form a mixed group.
48. For the rest of this section, we discuss the meaning of “control” in s 55(8) and comment on matters relevant to the control of the following types of persons:
- individuals;
  - companies;
  - trusts;
  - general partnerships;
  - limited partnerships; and
  - joint ventures.

## Meaning of “control” in s 55(8)

49. The term “control” is not defined in the GSTA (or in the Income Tax Act 2007).



50. The *Oxford English Dictionary* defines “control” as follows:<sup>6</sup>

**control, v.** 3. a. *transitive*. To exercise power or authority over; to determine the behaviour or action of, to direct or command; to regulate or govern.

### **Case K54**

51. The Taxation Review Authority (TRA) considered the meaning of “control” in s 55(8) in *Case K54* (1988) 10 NZTC 444. Three cases were considered together.
52. Judge Bathgate held that the test for GST groups of companies in s 55(1) (which was based on s 191 of the Income Tax Act 1976 – now s IC 3 of the Income Tax Act 2007) should be used as a guide. This was on the basis that the test relied on for GST groups of companies (two-thirds or 66% common ownership interests) gives the persons holding the rights (typically shareholders) a discernible and usually effective source of control of all the companies in the group. The rights give the shareholders legal control of the group. The rights may not always give the shareholders “de facto” (ie factual) control, but no provision in s 191 (now s IC 3), or in s 55 of the GSTA, specified a factual control test:

The common question in issue in each of the cases is what is meant by “control” or “controls” in the sec 55(8) of the Goods and Services Tax Act. **I think that question is to be answered by looking at the situation where all members of a group are companies, because there seems no good reason to differentiate between a situation for grouping when all members are companies to that when only some members are companies, or where there are no members who are a company.**

Because companies depend on formal statutory or discernible written powers and liabilities it is possible to specify in detail what requirements must be met by all of the companies to be contained in a group. However when individuals and unincorporated entities come into the equation for grouping, with or without companies, and they do not always all have formal written documentation defining their powers and liabilities amongst themselves, more general and unspecified tests are to be applied for grouping purposes.

**Before 2 or more companies are eligible to be members of the group there must be a group of companies pursuant to sec 191 of the Income Tax Act. ... The significant factor is that the two-thirds entitlement specified in sec 191(3) is a discernible and usually effective source of control of the companies for the person or persons holding that entitlement. That gives them legal control of all the companies in the group. Whether or not it is always actual effective control may be debatable. It is however a statement of a variety of situations by which legal control rather than**

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<sup>6</sup> *Oxford English Dictionary*, OED Online Version (December 2022).

**actual, factual control is specified.** ...Under sec 7(2) of the Income Tax Act companies are deemed to be under the control of the persons holding the two-thirds of the rights or powers mentioned in sec 191(3). **Legal control may also be de facto control.**

**However there is no provision in sec 191 or for the registration of the grouping of companies where one or more persons may have only de facto control of the companies rather than legal control.** [Emphasis added]

53. In terms of legislative purpose, Judge Bathgate considered it would be inconsistent with the objects of the GSTA if "control" meant anything other than legal control. He also considered it would be inconsistent with the objects and intent of the GSTA if "control" between persons who were not companies was of a different nature to the control that exists between companies as a group. He considered that a factual control test would make it almost impossible to determine who was in control:

In the context of the Goods and Services Tax Act, and in particular sec 55 of the Act and having regard to the largely self-controlling nature of goods and services tax and compliance with the provisions of the Act, **it would not be in accordance with the objects of the legislation for control in sec 55(8) to mean anything other than legal control. Nor would it be in accord with the objects and intent of the Act for control between persons when all of them are not companies to be of a different nature and character of the control that exists between companies as a group; that is legal control. I think it would be well nigh impossible on occasions to discern whether or not there was de facto control, in the sense of one person acting for another ...**

There would be difficulties in ascertaining when that control starts and finishes, whether it is effective, who has control, what matters are relevant to that question, who decides whether or not there is control is it on a day-to-day basis or on a long term basis, is it to be effective only at the end of each month, two months or whatever the accounting period may be for goods and services purposes? It may well be that in fact in the cases mentioned A controls the partnership of A and B, not by reason of the partnership documents but by reason of the fact that A has actual control by physically undertaking all of the activities of A and B. However that may not be a discernible control, or a controllable control, because the situation could easily change from time to time. A could hand over physical control to B if, as in one case, A and B were two brothers. **The bewildering variety of facts that may have to be considered to determine whether or not there was de facto control by one or more persons of a group of persons, whether by reason of age, family ties, family seniority, business acumen, or whatever, and the lack of any yardstick to gauge what is or is not control, when it stops and starts, are all very good reasons why it could not have been the intent of parliament for sec 55(8) control to be other than discernible and effective legal control.** That is it is the same sort of control that applies in a group of companies before they obtain group registration. [Emphasis added]

54. Judge Bathgate concluded in *Case K54* that “control” in s 55(8) means legal control rather than factual control:

I conclude that “control” or “controls” in the context of sec 55(8) means discernible, **legal control**. Anything less would be unlikely to have been intended having regard to the objects of the Act, the method of implementation of the Goods and Services Tax Act and in particular the method provided for the registration of companies as a group.  
[Emphasis added]

### **Case L42**

55. In *Case L42* (1989) 11 NZTC 1,261, a partnership applied for group registration with an individual under s 55(8). The individual was a 50% partner in the partnership. The Commissioner declined the application. Judge Bathgate affirmed *Case K54* at 1,262, namely that there must be legal control. With only a 50% legal interest in the partnership, the individual did not have legal control of the partnership. Whether the individual had factual control of the partnership was irrelevant. The TRA held for the Commissioner.

### **Summary: legal control test**

56. For mixed GST groups under s 55(8), a registered person is “controlled” by one person, or by two or more persons carrying on a taxable activity in partnership, if that person has, or the partners of the partnership have, legal control of the registered person. The reasons for this are as follows:
- The test that applies to groups of companies in s 55(1) is a legal control test and it would be inconsistent to determine “control” under s 55(8) on a different basis.
  - It would be extremely difficult to work out who had factual control of a group of entities. It would require considering a wide range of factors such as age, family ties, family seniority and business acumen.
  - Even if it was possible to identify factual control of a group of entities at a given time, it might be very difficult to establish when that factual control started and stopped.
57. Legal control is usually exercised by one or more persons external to the registered person. For example, in the context of companies, the company’s shareholders (not its directors) exercise legal control.

## Applying the legal control test

58. This part of the item considers how the legal control test applies to different types of persons.<sup>7</sup>

### Individuals

59. An individual acting in their individual capacity (eg as a sole trader) is registered for GST in this capacity. The question of control does not arise for an individual who is registered for GST in their individual capacity.
60. If the individual becomes incapacitated (eg due to death or bankruptcy), a specified agent may be appointed: see "[IS 23/03](#): GST – Section 58: Specified agents of incapacitated persons, and mortgagees in possession".<sup>8</sup> The appointment of a specified agent does not affect GST grouping (s 55(4A)).

### Companies

61. Legal control of a company usually rests with a majority shareholder (ie a greater than 50% shareholder). In most cases where a company has no majority shareholder, no "one person" will have legal control of it for GST grouping purposes.
62. As noted at [53], in *Case K54*, Judge Bathgate considered that it would be inconsistent for the control of registered persons in mixed groups to differ from the control of groups of companies under s 55(1). Therefore, in most respects determining who the shareholder or shareholders are will involve applying the "group of companies" test in s IC 3 of the Income Tax Act 2007.
63. However, the legislative provision for mixed groups under s 55(8) differs from the legislative provision for groups of companies under s 55(1) in two ways:
- The test is one of "control" in s 55(8), rather than a 66% common voting or market value interests test.
  - "One person" or "two or more persons carrying on a taxable activity in partnership" must exercise control under s 55(8), rather than a "group of persons".

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<sup>7</sup> This list is not exhaustive. Other types of person may qualify for GST grouping as a member of a mixed group under s 55(8).

<sup>8</sup> *Tax Information Bulletin* Vol 35, No 5 (June 2023): 43.

64. In *British American Tobacco Company Ltd v IRC* [1943] AC 335, the appellant company British American Tobacco Company Ltd (BATCL) argued that to have a “controlling interest” in another company, the controlling shareholder must have a holding that is sufficient to pass special resolutions or other resolutions that need more than a bare majority of votes to pass. BATCL also argued that an indirect interest in a company was not a controlling interest, because “interest” meant “an interest of a proprietary nature”. Therefore, a shareholder company must hold the relevant interest itself (directly) to hold a “controlling interest”.
65. The House of Lords held that a bare majority (ie greater than 50% holding) was sufficient to give rise to a “controlling interest”. This was on the basis that the owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes. It was true that for some purposes a 75% majority vote may be required – for instance (under some company regulations), to remove directors who oppose the wishes of the majority. However, the bare majority can always refuse to re-elect those directors and so in the long run can remove them. Further, the articles of association of the company cannot be altered to defeat the wishes of the bare majority, because the bare majority can always prevent the passing of the necessary resolution. The House of Lords also held that the word “interest” had a wide meaning and could apply where a company held an indirect interest in another company. The indirect interest test is part of the common law when it comes to determining “control” of a company.
66. The Commissioner therefore considers that legal control of a company under s 55(8) is determined by applying the same tests that are applied for determining whether there is a group of companies under s 55(1) (ie the tests in s IC 3 of the Income Tax Act 2007 as to common voting interests and common market value interests). However, it is necessary to make the following modifications:
- The relevant percentage shareholding for control of a company under s 55(8) is “greater than 50%”, instead of 66% as is required for groups of companies under s 55(1).
  - The requirement to “look through” intermediate and ultimate holding companies in s YC 4(2) is “turned off” for ultimate holding company shareholders.
67. The Commissioner also notes these specific points:
- Many of the rules in subpart YC of the Income Tax Act 2007 only apply for the purposes of the continuity of ownership provisions (which determine whether tax losses and imputation credits may be carried forward). A common example is the “notional single shareholder” rule for direct interests of less than 10%

(s YC 10). These rules do not apply for the purposes of determining whether there is a “group of companies” under s IC 3. The Commissioner considers they similarly do not apply for the purposes of determining whether there is legal control under s 55(8).

- The aggregation rules for associated persons contained in subpart YB of the Income Tax Act 2007 do not apply for the purposes of determining whether there is a “group of companies” under s IC 3. Again, the Commissioner considers they do not apply for the purposes of determining whether there is legal control under s 55(8).
68. The second modification at [66] recognises that the objectives of the GST grouping rules are to treat GST groups as if they were a single entity and to simplify GST administration. It applies where a mixed group of registered persons that would be a group of companies under s IC 3 of the Income Tax Act 2007 if all the registered persons in the mixed group were companies has an ultimate holding company. In this case, that ultimate holding company may be treated as “one person” that controls each of the others (see Example | Taura 3).
69. However, the specific legislative requirements of s 55(8) mean that if a group that would be a group of companies under s IC 3 of the Income Tax Act 2007 if all the registered persons in the mixed group were companies does not have an ultimate holding company, but instead each registered person is controlled independently by the same “group of persons”, that group of registered persons cannot group under s 55(8). Example | Taura 4 illustrates this situation. The exception would be where the “group of persons” consists of one person, which is possible under s IC 3, or are partners in a partnership that carries on a taxable activity.

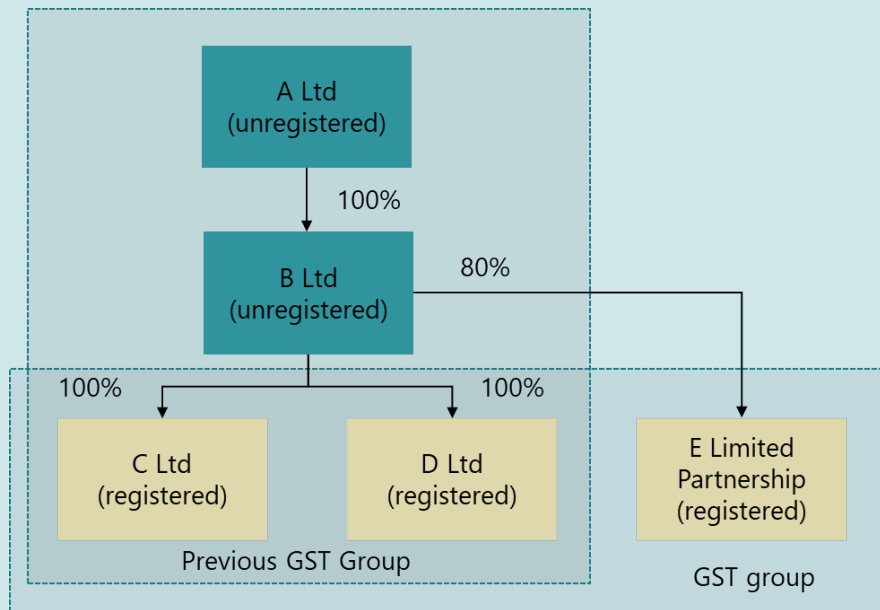
**Example | Taura 3 – Mixed group of companies and a limited partnership with a holding company controlling all the members of the GST group**

A Ltd is the ultimate holding company of a 100% owned group, comprising A Ltd, B Ltd, C Ltd and D Ltd. A Ltd owns 100% of B Ltd, and B Ltd owns 100% of both C Ltd and D Ltd.

A Ltd does not carry on a taxable activity and is not registered for GST. B Ltd similarly does not carry on a taxable activity and is not registered for GST. C Ltd and D Ltd each carry on a taxable activity and are each registered for GST. All four companies are members of a GST group of companies under s 55(1).

B Ltd acquires an 80% partnership interest in E Limited Partnership, that carries on a taxable activity and is registered for GST. B Ltd is a limited partner and does not

participate in the management of E Limited Partnership. However, under the E Limited Partnership Agreement, B Ltd, because it contributed at least 75% of the total partnership capital, can make decisions on matters listed in sch 1 of the Limited Partnerships Act 2008 (including a decision to remove the general partner, approve a replacement general partner and transfer the general partner’s partnership interest (if any)). Each partner’s entitlement to distributions under the E Limited Partnership Agreement, including on winding up, is proportional to the partnership capital it has contributed.



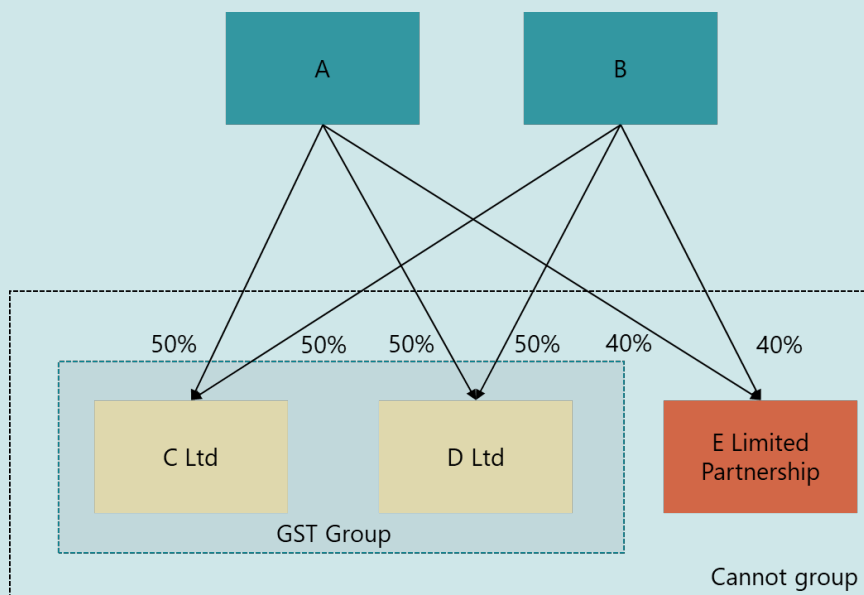
Going forward, C Ltd, D Ltd and E Limited Partnership can be members of a mixed group of registered persons under s 55(8). This is because “one person” (A Ltd or B Ltd) controls all the members of the GST group (C Ltd, D Ltd and E Limited Partnership). However, A Ltd and B Ltd cannot be members of the mixed group of registered persons under s 55(8), because they are not individually registered for GST.

**Example | Taura 4 – Mixed group of companies and a limited partnership with no holding company**

Individuals A and B each hold 50% of C Ltd and 50% of D Ltd. A and B are not carrying on a taxable activity in partnership.

C Ltd and D Ltd each carry on a taxable activity and are each registered for GST. C Ltd and D Ltd are members of a GST group of companies under s 55(1).

A and B each acquire a 40% interest in E Limited Partnership. A and B are limited partners and do not participate in the management of E Limited Partnership. However, under the E Limited Partnership Agreement, A and B together, because they are treated as having contributed 80% of the total partnership capital, can make decisions on matters listed in sch 1 of the Limited Partnerships Act 2008 (including a decision to remove the general partner, approve a replacement general partner and transfer the general partner's partnership interest (if any)). Each partner's entitlement to distributions under the E Limited Partnership Agreement, including on winding up, is proportional to the partnership capital it is treated as having contributed.



However, C Ltd, D Ltd and E Limited Partnership cannot be members of a mixed group of registered persons under s 55(8). This is because in this case, no "one person" controls all of C Ltd, D Ltd and E Limited Partnership (and A and B are not carrying on a taxable activity in partnership). The existing GST group under s 55(1) can continue.

## Trusts

70. Generally, the trustee or trustees of a trust exercise legal control of it, acting in their capacity as trustee(s) of that trust. An exception exists where a person holds the power to appoint and remove the trustee(s) of the trust.



## Standard position

71. A trust is an equitable obligation, which has four elements: a trustee, trust property, a beneficiary, and an obligation to deal with the trust property. The beneficiaries of a trust, subject to the terms of any deed constituting the trust, do not have the power to direct the trustee(s). Therefore, the beneficiaries of a trust are not the equivalent of the shareholders of a company. Instead, the deed permits the trustees to exercise control of the trust assets through unanimous or majority voting.
72. The common law recognises that trustees act under certain fiduciary obligations on behalf of the beneficiaries, and not in their own personal capacity: *Case K68* (1988) 10 NZTC 544; *Case L72* (1989) 11 NZTC 1,419; *Gasparini v Gasparini* (1978) 87 DLR (3d) 282; 20 OR (2d) 113. A person who is a trustee of more than one trust has a separate trustee capacity for each trust: *Fraser v Murdoch* (1880–81) LR 6 App Cas 855; *Commissioner of Taxes v Trustees of Joseph (deceased)* (1908) 2 NZLR 1085; 10 GLR 556; *Case 98* (1951) 1 CTBR (NS) 423.
73. The Commissioner considers that these common law principles apply under the GSTA. This is because the definition of “trustee” in the GSTA is inclusive. By using an inclusive definition, Parliament must have intended to rely partly on the common law meaning of “trustee”.<sup>9</sup>
74. While each trust is different, the standard position is that:
- the trustee or trustees of a trust have legal control of a trust and no person has legal control of the trustee(s);
  - because a trustee or trustees possess a separate trustee capacity for each trust of which they are a trustee, a trust cannot group with another registered person simply because it has the same trustee(s) as that other person; and
  - because a trustee’s personal or corporate capacity differs from their trustee capacity, a trustee of a trust cannot group the trust with a person they control in their personal capacity (if they are an individual trustee) or their corporate capacity (if they are a corporate trustee). For example, an individual trustee

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<sup>9</sup> The GSTA definition differs from the definition of “trustee” in the Income Tax Act 2007. The Income Tax Act 2007 (s YA 1) specifically states that a reference to a “trustee”, for a trust, “means the trustee only in the capacity of trustee of the trust”. The GSTA is silent on this point. Until 1988 both Acts had the same definition of “trustee” (the definition that the GSTA still uses). However, the Commissioner considers the amendment to the Income Tax Act 2007 was only for the purpose of clarifying the definition and did not change the meaning of “trustee” for income tax purposes.

cannot group a trust of which they are a trustee with a GST registered business they run as a sole trader in their personal capacity.

### **Exception to standard position: Power to appoint and remove trustees**

75. Many modern trust deeds include a clause granting a person (eg, the trust settlor) the power to appoint and remove the trustee(s) of the trust.
76. In *Concepts 124 Limited v CIR* (2014) 26 NZTC 21,100, the High Court held that an individual who held the power to appoint and remove the trustee(s) of a trust “controlled” the trust.
77. The trust in question had a corporate trustee. On the facts, the individual at [76] also held all the shares in the corporate trustee. Clifford J referred to this fact when stating the reasons for concluding that the individual controlled the trust.
78. However, the Commissioner considers that the key factor causing the individual to control the trust was that the individual held the power to appoint and remove the corporate trustee. If the shareholder of a corporate trustee causes the corporate trustee to act in a way that is not in accordance with the wishes of a person who holds the power to appoint and remove the corporate trustee, the person holding the power to appoint and remove the trustee(s) could exercise it to remove the corporate trustee.
79. The Commissioner therefore accepts that a person with the power to appoint and remove the trustee(s) of a trust will usually, subject to the terms of the trust, have legal control of the trust.
80. Such control is analogous to the control the shareholders of a company exercise over the company. (That is, both the shareholders and the person holding the power to appoint and remove the trustee(s) are persons outside the person in question.)

### **Corporate trustees**

81. The definition of “company” in s YA 1 of the Income Tax Act 2007 expressly excludes “a company that is acting in the capacity of trustee”. Therefore, a corporate trustee acting in its **trustee capacity** is not capable of being a member of a “group of companies” under s IC 3 of the Income Tax Act 2007. It follows that a corporate trustee acting in its trustee capacity cannot be a member of a s 55(1) group of companies.
82. For GST purposes, a trustee, including a corporate trustee, is treated as an unincorporated body of persons (s 57). Therefore, a corporate trustee acting in its trustee capacity can be a member of a mixed group of registered persons under

s 55(8). To join a GST group under s 55(8) in its trustee capacity, the corporate trustee must be registered for GST in its capacity as trustee of that trust.

83. On the other hand, a corporate trustee acting in its **corporate capacity** is a “company”, under the definition of “company” in both s 2 of the GSTA and s YA 1 of the Income Tax Act 2007. Therefore, a corporate trustee acting in its corporate capacity can be a member of a s 55(1) group or a member of a s 55(8) group. If a corporate trustee acting in its corporate capacity wishes to join a s 55(1) group, it may do so even if it is unregistered, as s 55(1) groups may contain unregistered companies.
84. The discussion in this section demonstrates that a corporate trustee may be registered as two separate registered persons: one in its trustee capacity, and the other in its corporate capacity. Further, a trustee acts in a different capacity in respect of each trust of which it is a trustee. Therefore, if a corporate trustee acts as trustee of two or more trusts, it may be registered as three or more registered persons.
85. However, a person cannot be a member of more than one GST group at one time in respect of a particular capacity in which they act. Therefore, a person may be a member of two GST groups if they act in two legal capacities, or three GST groups if they act in three legal capacities, and so on. However, for each legal capacity in which they act, they may only be a member of one GST group at any one time.

### **Special purpose corporate trustees of post-settlement governance entities**

86. Sometimes the constitution of a corporate trustee will provide that it can only act as trustee of one trust. This is typically the case in the context of a corporate trustee of a post-settlement governance entity (PSGE).
87. Under a typical PSGE structure, the shareholders (and the directors) of the corporate trustee will be elected representatives of the hapū members. The hapū members will also have the power to appoint and remove the trustee of the settlement trust.
88. If a corporate trustee can group with the settlement trust of which it is trustee, this will remove the requirement for the corporate trustee to charge GST on its trustee fees. The question is whether the corporate trustee and settlement trust are entitled to group (and, if so, on what basis).
89. As discussed at [38], for mixed GST groups there must be “one person” who controls each of the other members of the group (s 55(8)(a)) or “one person” who controls all members of the group (s 55(8)(b)).
90. Although the corporate trustee in its **trustee capacity** controls a settlement trust, the corporate trustee in its **corporate capacity** does not. Section 55(8)(a) is not satisfied.

91. However, if “one person” outside the proposed GST group controls both the corporate trustee in its trustee capacity and the corporate trustee in its corporate capacity, there will be “one person” who controls all members of the group for the purposes of s 55(8)(b).
92. In the case of a PSGE, the people with the potential to control both the corporate trustee and the settlement trust are the hapū. The hapū is a group of individuals, not one individual or one entity. However, a group of individuals may, in certain circumstances, be treated as an “unincorporated body of persons” for the purposes of the GSTA. An “unincorporated body of persons” is a “person” as defined in s 2.

### ***Unincorporated body***

93. A group of individuals may be treated as an unincorporated body if it has the following kinds of characteristics:
  - It is formed by its members for one or more common purposes;
  - There is some regulation of the relationship between its members;
  - It has agreed rules (not necessarily written) that govern for example, how decisions are made, how its funds may be used, and what happens when members join and leave the group; and
  - It is a structure recognised as a collective entity of its members.<sup>10</sup>
94. The Commissioner considers that the members of a hapū will usually have a sufficient degree of common purpose, regulation of relationships, agreed rules, and recognition of the hapū’s collective entity status to be treated as an “unincorporated body of persons”.<sup>11</sup> The hapū will therefore usually be treated as “one person” who controls:
  - the corporate trustee in its corporate capacity, because its shareholders act as elected representatives of the hapū, and
  - the corporate trustee acting in its trustee capacity (ie the trust) because the hapū members hold the power to appoint and remove the trustee of the trust.

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<sup>10</sup> *Taunton Syndicate v C of IR* (1982) 5 NZTC 61,106; (1982) 5 TRNZ 259; *Anglesea Builders Partnership v CIR* (1987) 9 NZTC 6,181; *McElwee v CIR* (1988) 10 NZTC 5,181; *Case P70* (1992) 14 NZTC 4,469; *Case U19* (1999) 19 NZTC 9,186.

<sup>11</sup> See also *Edwards v Legal Services Agency* [2003] 1 NZLR 145, in which the Court of Appeal treated an iwi as an unincorporated body.

95. Therefore, a corporate trustee acting in its corporate capacity may be a member of mixed group of registered persons with a settlement trust in a PSGE structure under s 55(8)(b) (assuming both are registered persons).

### Examples

96. Examples 5 to 8 illustrate the standard position for trusts. Examples 9 to 10 demonstrate the exception for trusts where the deed includes a power to appoint and remove the trustee(s) (including an example relating to a typical PSGE structure: see Example | Taura 10).

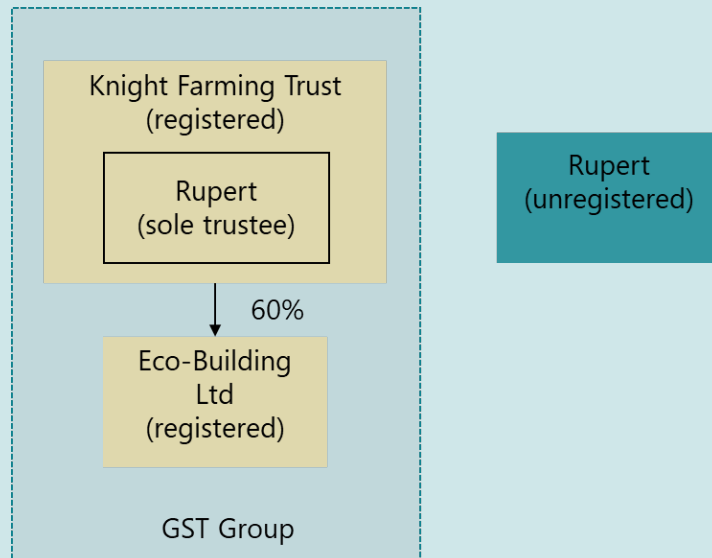
### Company

97. The trustee or trustees of a trust have legal control of a company when the trust holds more than 50% of the voting interests or, if a market value circumstance exists, more than 50% of the market value interests, in the company (see from [61]). This assumes that the trustees have the power to hold shares and vote at company meetings, in terms of the relevant trust deed (see Example | Taura 5).

### Example | Taura 5 – The trustee of a trust holds shares in a company on trust for the beneficiaries

Rupert is the sole trustee of the Knight Farming Trust. The trust deed for the Knight Farming Trust contains no power to appoint and remove the trustee.

The Knight Farming Trust owns 60% of the shares in Eco-Building Limited. Both the trust and the company carry on taxable activities (of farming and building respectively) and are registered for GST. The trust instrument states that Rupert, as trustee, has the legal authority to deal with the trust property for the financial benefit of the beneficiaries.



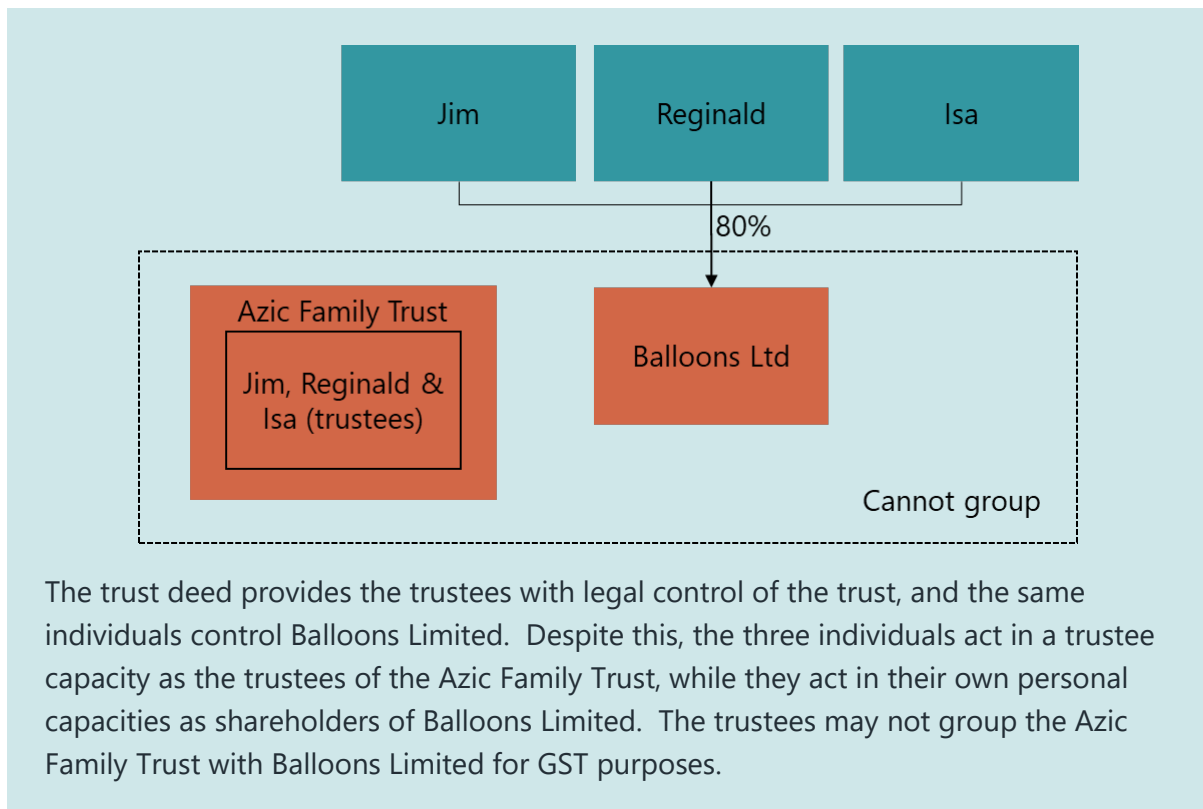
As the sole trustee of the Knight Farming Trust, Rupert has legal control of Eco-Building Limited because of the trust’s 60% shareholding in the company. The Knight Farming Trust and Eco-Building Limited can be members of a mixed group of registered persons for GST purposes.

98. The trustee or trustees of a trust cannot group with a company simply because they are the same persons as the company’s shareholder or shareholders. This is because the person(s) act in a separate capacity from their individual or corporate capacities when they are acting as trustee(s) (see Example | Taurira 6).

**Example | Taurira 6 – The trustees of a trust are the same individuals as the shareholders of a company**

In the deed forming the Azic Family Trust, Jim, Reginald and Isa have been appointed as trustees. The trust deed for the Azic Family Trust contains no power to appoint and remove the trustees. Jim, Reginald and Isa also own 80% of the shares in Balloons Limited. Both the Azic Family Trust and Balloons Limited carry on taxable activities.

The trust deed gives the trustees a wide discretion to exercise their powers. Jim, Reginald and Isa have met in their capacity as trustees to discuss the possibility of grouping with Balloons Limited and have unanimously agreed that it is in the interests of the trust to group.



The trust deed provides the trustees with legal control of the trust, and the same individuals control Balloons Limited. Despite this, the three individuals act in a trustee capacity as the trustees of the Azic Family Trust, while they act in their own personal capacities as shareholders of Balloons Limited. The trustees may not group the Azic Family Trust with Balloons Limited for GST purposes.

99. Although a land-owning trust and company operating a business that uses the land cannot group simply because the trustees of the trust are the same individuals as the shareholders of the company, where land holding costs must be charged to a trust as landowner (eg rates charged by a local authority), the trust may recover those costs from the related company in the form of lease rentals. Section 10(3) usually requires a supply that an associated person makes to be treated as a supply that they have made at open market value. However, no open market value requirement applies if the recipient of the supply is entitled to deduct input tax on the supply (see Example | Taura 7).

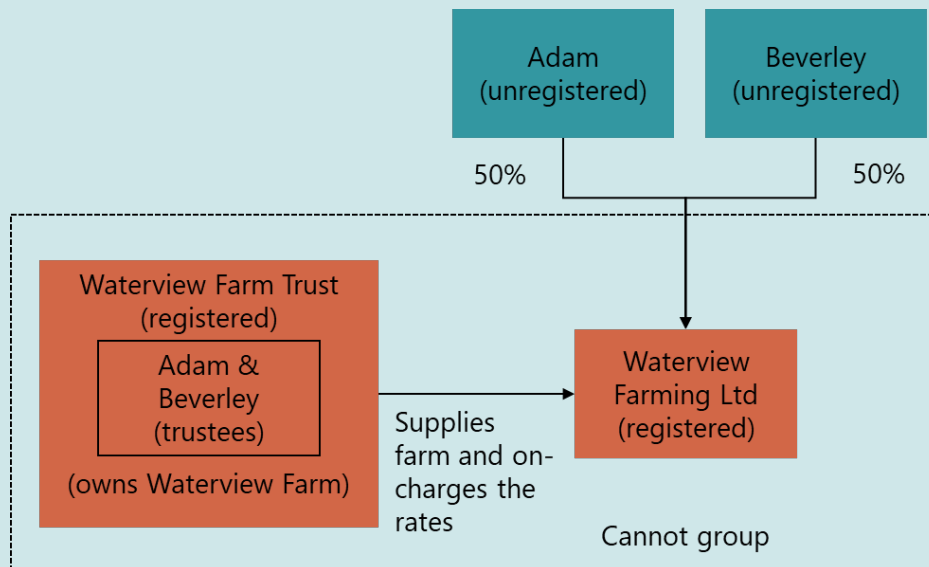
**Example | Taura 7 – A trust that recovers rates from a company**

Adam and Beverley are the settlors and trustees of the Waterview Farm Trust. There is no power to appoint and remove trustees under the trust deed.

The trust leases the Waterview Farm to a company, Waterview Farming Ltd. Adam owns 50% of the shares in Waterview Farming Ltd and Beverley owns the other 50%.

The Waterview Farm Trust has a taxable activity of leasing the farm, and charges Waterview Farm Ltd the GST-exclusive amount of the rates that the local authority

charges to the trust. The trust is registered for GST. Waterview Farming Ltd carries on a taxable activity of farming and is registered for GST.



Although Adam and Beverley are both the trustees of the trust and the shareholders of the company, they cannot register the trust and company as members of a mixed group for GST purposes. This is because Adam and Beverley act in a trustee capacity as trustees of the Waterview Farm Trust, and in their individual capacities as shareholders of Waterview Farming Ltd. As a result, there is no one person who controls, or two or more persons carrying on a taxable activity in partnership who control, both the trust and the company. However, as Waterview Farming Limited carries on a taxable activity and is registered for GST, it may recover the GST input tax on the lease rentals that the Waterview Farm Trust charges to it.

### **Partnership**

100. The terms of the partnership agreement will determine the degree of legal control a trustee has in a partnership. This is usually dictated by the level of voting power – see from [109].

### **Trust**

101. In certain circumstances, a trustee can group with another trust under s 55(8). This includes situations involving trustees of sub-trusts. The trustee of the principal trust will have control of the principal trust because of the terms of the trust deed. Where

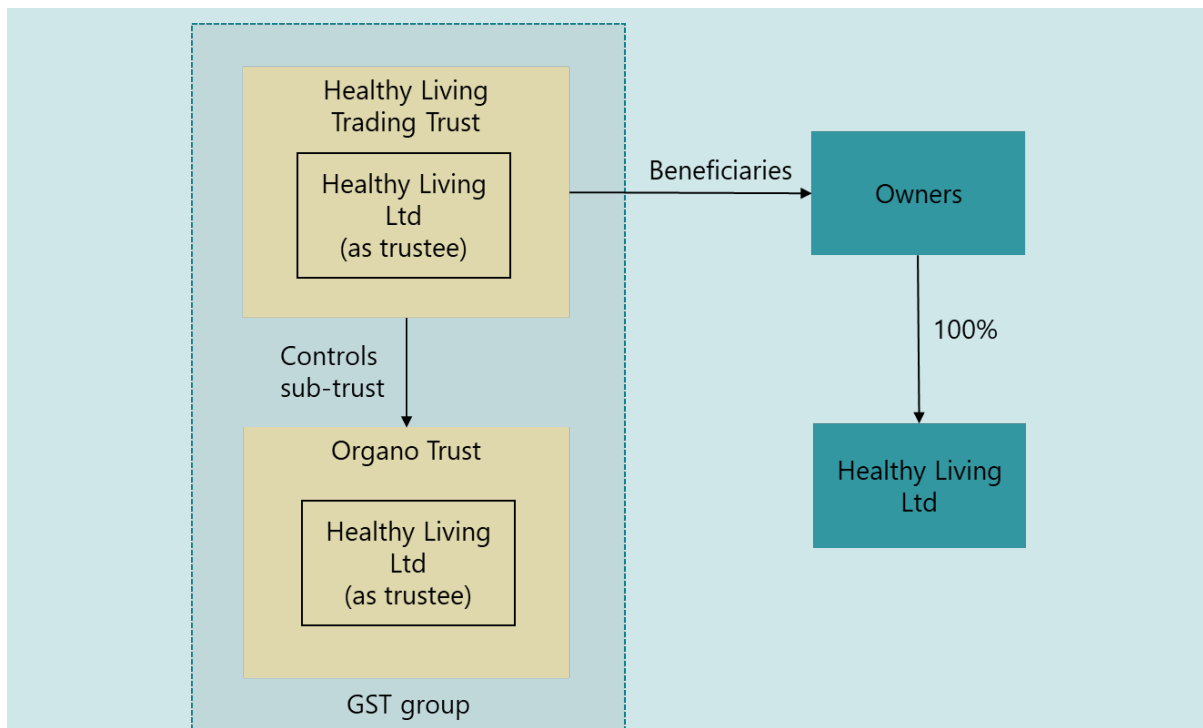


the trust deed vests in the trustees of the principal trust the same power for the sub-trust, the trustees of the principal trust may be considered to control the trustees of the sub-trust (see Example | Taura 8). However, careful analysis of the terms of the relevant trust deed by the Commissioner will normally be required before the Commissioner will accept this.

### **Example | Taura 8 – Trustees of principal trust control sub-trust**

Healthy Living Limited manufactures organic products. The company decides to create a trading trust called Healthy Living Trading Trust. Healthy Living Limited is appointed as the trustee. The beneficiaries are the owners of the company. Healthy Living Limited, acting as trustee, decides to create a sub-trust called Organo Trust under a power contained in the deed. The instrument settling the Healthy Living Trading Trust provides the trustee with the power to deal with Organo Trust for the financial betterment of the beneficiaries within the general purposes of the Healthy Living Trading Trust, including the power to appoint and remove trustees of the Organo Trust.

As the trustee of Healthy Living Trading Trust, Healthy Living Limited has legal control of both Healthy Living Trading Trust and Organo Trust. It is the trustee of both trusts, which are linked together beneficially in the principal deed. Healthy Living Limited can control the sub-trust (Organo Trust) for the benefit of the principal trust (Healthy Living Trading Trust). Therefore, the trusts may be members of a mixed group for GST purposes.



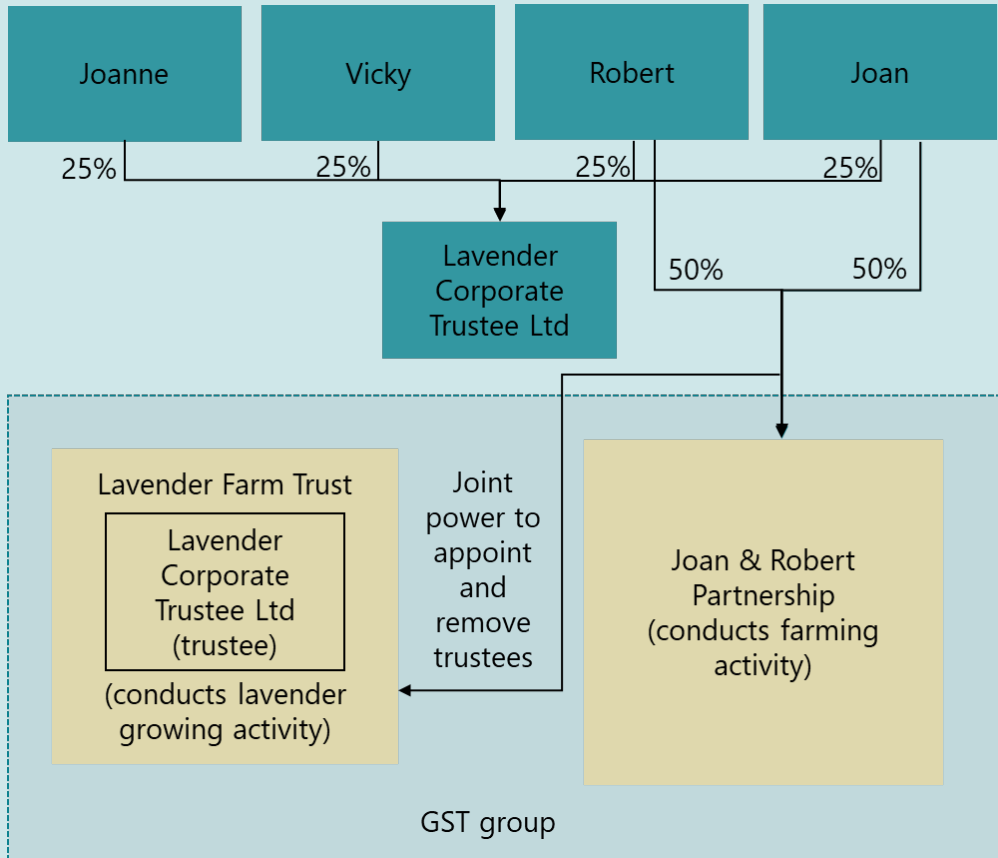
This reasoning will also apply where two or more trusts are not linked together by a principal deed, but the trustees of the first trust have the power to appoint and remove the trustees of the second trust, for the benefit of the first trust – see from [102].

102. A trust may be a member of a mixed group under s 55(8) if a person with the power to appoint and remove the trustee(s) of the trust also controls the other member(s) of the mixed group.
103. A trust may also be a member of a mixed group for GST purposes if two or more persons carrying on a taxable activity in partnership hold a power to appoint and remove the trustee(s) of the trust, and the two or more persons also control the other member(s) of the mixed group (see Example | Taura 9).

**Example | Taura 9 – Two or more persons carrying on a taxable activity in partnership have the power to appoint and remove the trustee(s) of a trust**

Robert and Joan are married and carry on a taxable activity of sheep and cattle farming in partnership. Robert and Joan are also the settlors of a trust, the Lavender Farm Trust. The trust carries on a taxable activity of growing lavender and manufacturing and selling lavender-scented soaps and hand creams. The beneficiaries of the trust are Robert, Joan and their two adult daughters, Joanne and Vicky. The trustee of the trust

is Lavender Corporate Trustee Limited, and Robert, Joan, Joanne and Vicky each own 25% of the shares in it. Under the deed of trust, Robert and Joan together have the power to appoint and remove the trustee(s) of the Lavender Farm Trust. The partnership and the trust are each registered for GST.



Robert and Joan together control the sheep and cattle farming partnership. Robert and Joan together also control the Lavender Farm Trust, through holding the power to appoint and remove the trustee of the trust (Lavender Corporate Trustee Limited). Therefore, the partnership and trust may be members of a mixed group of registered persons for GST purposes.

104. A corporate trustee may be registered in more than one capacity. It may be registered in its corporate capacity (ie the capacity in which it charges trustee fees) and it may be registered in its capacity (or capacities) as a trustee. Further, an unincorporated body of persons is treated as a “person” for the purposes of the GSTA. Therefore an unincorporated body of persons may be “one person” who controls all the members of a GST group under s 55(8)(b). If the same unincorporated body of persons controls a corporate trustee in both its corporate capacity and its trustee capacity, the two registered persons may be members of a GST group (see Example | Taura 10).

### **Example | Tauria 10 – Grouping the corporate trustee and trust for a post-settlement governance entity**

A hapū has received a settlement under The Treaty of Waitangi | Te Tiriti o Waitangi. The settlement is held on trust (the Settlement Trust) for the hapū members as beneficiaries.

A company has been incorporated and appointed to act as trustee of the Settlement Trust (the Corporate Trustee).

The trust deed of the Settlement Trust includes the following provisions:

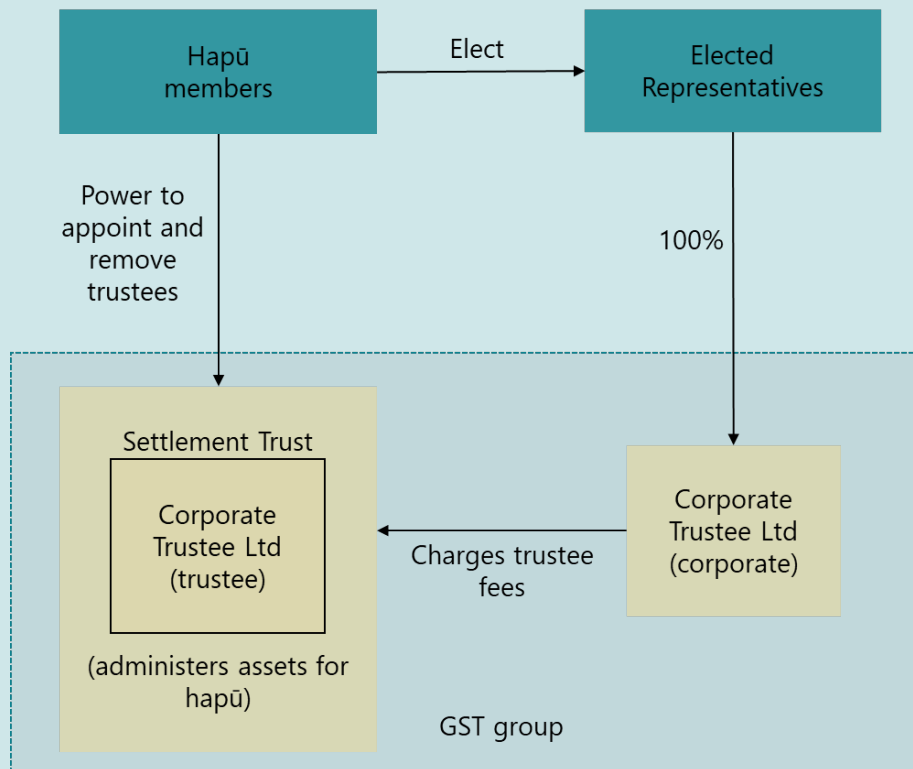
- A special resolution of the hapū members can remove the Corporate Trustee by appointing one or more substitute trustees.
- Representatives are elected from time to time to represent the hapū members as directors and shareholders of the Corporate Trustee (Elected Representatives).

The Corporate Trustee's constitution includes the following provisions:

- The sole purpose of the Corporate Trustee is to act as corporate trustee for the Settlement Trust.
- The Corporate Trustee's shareholders are the Elected Representatives, and they are the only persons eligible to hold shares. The Elected Representatives cannot transfer their shares except in the way the constitution sets out.
- If a person ceases to be an Elected Representative, they must transfer the shares they hold to one of three persons: to their replacement; to the chairperson of the board to hold on trust until they have a replacement; or back to the Corporate Trustee if the number of elected representative positions has been reduced. No consideration is provided for this transfer.
- The Elected Representatives cannot receive any dividends.
- If the Corporate Trustee is liquidated, all its assets are distributed to and vested in the successor trustee of the Settlement Trust.

The Corporate Trustee, acting in its corporate capacity, provides trustee services and charges trustee fees to the Corporate Trustee acting in its capacity as trustee (ie to the Settlement Trust). The Corporate Trustee, acting in its corporate capacity, is carrying on a taxable activity (providing trustee services) and is registered for GST.

The Corporate Trustee, acting in its capacity as trustee of the Settlement Trust, receives, administers, manages, protects and governs the settlement assets on trust for the cultural, commercial and social development of the hapū. The Corporate Trustee, acting in its trustee capacity, is carrying on a taxable activity and is registered for GST.



The Corporate Trustee acting in its corporate capacity and the Corporate Trustee acting in its capacity as trustee of the Settlement Trust may be members of a mixed group of registered persons.

This is because the hapū members, as an “unincorporated body of persons” (which is a “person” for the purposes of the GSTA), are treated as “one person” who controls:

- the Corporate Trustee acting in its corporate capacity, because the Elected Representatives hold the shares of the Corporate Trustee only while they act as such, and are appointed by and act for the hapū members, and
- the Corporate Trustee acting in its capacity as trustee of the Settlement Trust, because the hapū members have the power to appoint and remove, by special resolution, the trustee of the trust.

## Bare trusts

105. Control of a bare trust rests with the beneficiary or beneficiaries of the trust. It is generally the beneficiary or beneficiaries who carry on the taxable activity and are registered for GST. Therefore GST grouping is not usually relevant to bare trusts, because if multiple bare trusts exist for the same beneficiary or beneficiaries, there will usually only be one GST registered person (ie the beneficiary or, where there are multiple beneficiaries, there may be a partnership or unincorporated body of which the beneficiaries are the partners or members).

### Nature of a bare trust under common law

106. A bare trust is a type of trust under which the trustee holds property on trust without any duties to perform other than to convey the trust property to the beneficiary or as the beneficiary directs. The reference to “duties” in this definition is to duties that the settlor has specified. For example, the trustee may have been appointed to hold the property as nominee, or the settlor may have required that the beneficiary be maintained until becoming entitled to call for capital and income on reaching the age of majority. Once the beneficiary reaches the age of majority, the trustee no longer has a duty to maintain the beneficiary. In both situations, the trustee is “bare” of any duties specified by the settlor. However, so long as a trustee holds property on trust, they always retain their legal duty to take reasonable care of the trust property. The trustee cannot escape this duty: *Herdegen v FCT* 88 ATC 4995 (FCA).

### Bare trusts under the GSTA

107. Where there is a bare trust, the beneficiary rather than the bare trustee is the party that makes and receives taxable supplies of the trust property, unless the trustee and the beneficiary agree otherwise under s 60(1B). This is because it is the beneficiary who carries on the taxable activity and may be registered or liable to be registered under s 51. This is discussed in detail in “[QB 16/03: Goods and Services Tax – GST treatment of bare trusts](#)”.<sup>12</sup>
108. Therefore where assets are held by the same bare trustee (or by different bare trustees) on two bare trusts for the same beneficiary and are used by the beneficiary for making taxable supplies in the same taxable activity, there will only be one GST registered person (the beneficiary of the two bare trusts). The question of group registration does not arise.

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<sup>12</sup> *Tax Information Bulletin*, Vol 28, No 5 (June 2016): 16.

## General partnerships

109. The default position under partnership law is that each partner has equal voting power and the partnership profits are shared equally between the partners. Therefore, if there are four partners, three (a majority) must vote in favour to pass a resolution and each partner will be entitled to receive one quarter of the partnership profits. It follows that under the default position a majority of partners (ie more than 50% of the partners) exercise legal control of a partnership. This will not place legal control of the partnership in the hands of “one person”, because no one partner will hold more than 50% of the voting power where it is deemed equally shared. However, the partnership agreement may modify the default position. Partnership agreements do frequently modify this presumption of equal voting power and equal profit-sharing between the partners, so that one partner’s vote carries greater weight than another’s, and one partner is entitled to receive a greater share of partnership profits than another. If so, a majority partner (ie any partner who holds more than 50% of the voting rights and profit-sharing entitlements) will exercise legal control.

### Nature of a general partnership under partnership law

110. The law relating to general partnerships is set out in the Partnership Law Act 2019 (PLA 2019).<sup>13</sup>
111. A partnership is the relationship that exists between persons carrying on a business in common with a view to profit (s 8, PLA 2019). The term “person” includes a natural person. In legislation, the term “person” also includes a corporation sole, a body corporate and an unincorporated body (s 13, Legislation Act 2019). However, certain Acts restrict who may be a partner in a professional partnership to natural persons holding specific qualifications.
112. Co-ownership of property does not by itself create a partnership in relation to the property, even if the owners share profits made from use of the property (s 12, PLA 2019). Similarly, sharing the gross returns of a venture does not by itself create a partnership (s 13, PLA 2019). However, if a person receives a share of the profits of a business, it is presumed, unless there is evidence to the contrary, that the person is a partner in the business (s 14, PLA 2019).<sup>14</sup>

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<sup>13</sup> The rules of equity and common law that apply to partnerships also apply, except if they are inconsistent with express provisions of the PLA 2019 (sch 1, part 1).

<sup>14</sup> Despite s 14, there is no presumption of partnership if a person: (1) is an employee or agent of a person engaged in the business and receives a share of the business profits under a contract as

### **Control of a general partnership under partnership law**

113. Under partnership law, all partners are entitled to share equally in the capital and profits of the partnership business, and all the partners must contribute equally towards the losses (s 45, PLA 2019). Every partner may take part in the management of the partnership business (s 48, PLA 2019).
114. Any difference about ordinary matters connected with the partnership business may be decided by a majority of the partners. However, no change may be made to the nature of the partnership business without the consent of all existing partners (s 51, PLA 2019).
115. The rules at [113] to [114] are subject to any agreement (express or implied) between the partners (s 44, PLA 2019).

### **Legal control of a general partnership**

116. A partner with a majority (greater than 50%) partnership interest exercises legal control of a general partnership. The majority partner may be (with some restrictions for professional partnerships) a natural person, a body corporate (eg a company), a corporation sole or an unincorporated body (eg the trustees of a trust – see Example | Taura 11). It may be that no one partner controls the partnership.

#### **Example | Taura 11 – A trust controls a partnership**

The High Country Trust carries on a taxable activity of sheep farming. The trustees of the High Country Trust are registered for GST for the sheep farming activity. There is no power to appoint and remove trustees in the trust deed of the High Country Trust.

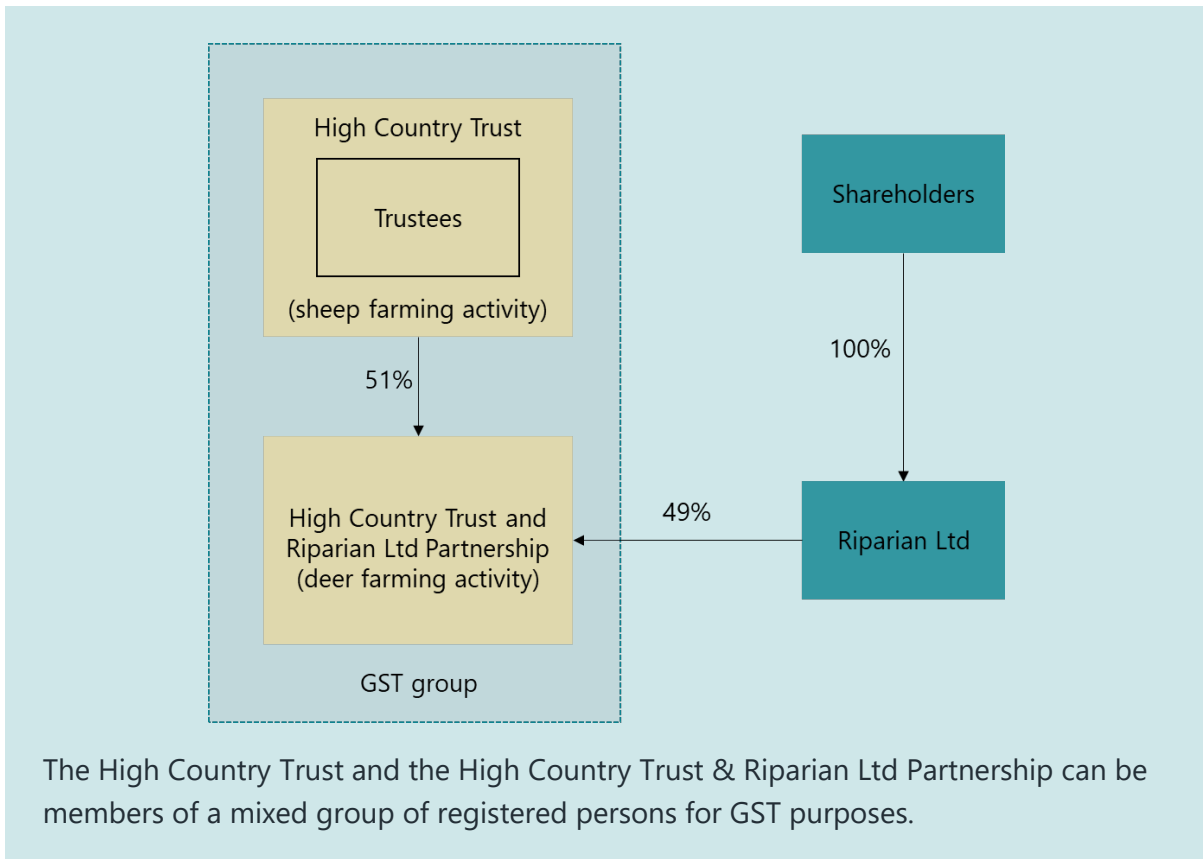
The High Country Trust holds 51% of the voting power and is entitled to 51% of the profits of the High Country Trust & Riparian Ltd Partnership. The High Country Trust & Riparian Ltd Partnership carries on a taxable activity of deer farming and is also registered for GST.

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remuneration, (2) in specified circumstances, receives the amount in payment of a debt or repayment of a loan, (3) receives the amount as an annuity when they were the spouse or child of a deceased partner of the business, or (4) receives the amount as consideration for the sale of the goodwill of the business (s 15, PLA 2019).

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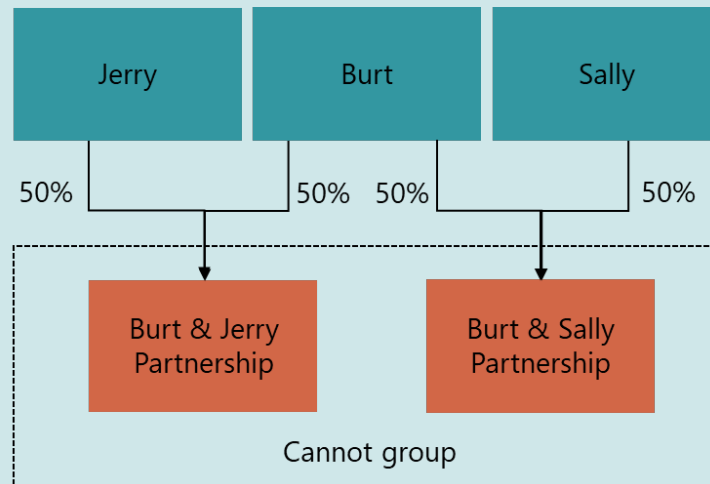
117. If there is no majority partner, no “one person” controls the partnership in terms of s 55(8). This is the case, for example, in a 50:50 partnership of two persons (see Example | Taura 12 and Example | Taura 13).

**Example | Taura 12 – Two partnerships, same individual is 50% partner in each**

Burt carries on a taxable activity in partnership with Jerry (the Burt & Jerry Partnership). Burt and Jerry are each entitled to 50% of the partnership profits.

Burt also carries on a (separate) taxable activity in partnership with Sally (the Burt & Sally Partnership). Burt and Sally are each entitled to 50% of the partnership profits.

Both partnerships are registered for GST. Burt applies to form a GST group consisting of the two partnerships as members.

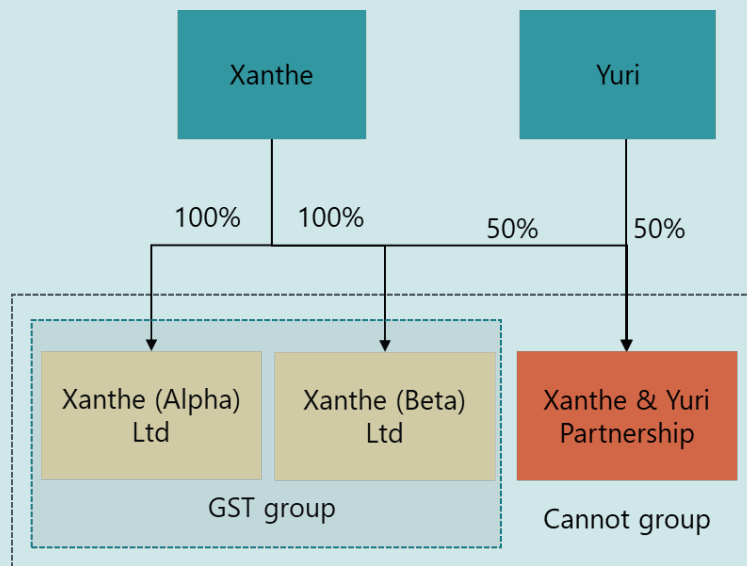


The two partnerships are unable to be members of a GST group. Burt, as a 50% partner in each partnership, does not have legal control of either partnership.

**Example | Taura 13 – Two companies 100% owned by one of the partners in a 50:50 partnership**

Xanthe owns 100% of the shares in Xanthe (Alpha) Ltd and 100% of the shares in Xanthe (Beta) Ltd. Xanthe is also a 50% partner in a business with her colleague Yuri.

Xanthe (Alpha) Ltd, Xanthe (Beta) Ltd and the Xanthe & Yuri Partnership are each carrying on a taxable activity and are each registered for GST. Xanthe has grouped Xanthe (Alpha) Ltd and Xanthe (Beta) Ltd. She wants to know if, for ease of administration, she can add the Xanthe & Yuri Partnership to the group to form a mixed group of registered persons for GST purposes.



Xanthe (Alpha) Ltd, Xanthe (Beta) Ltd and the Xanthe & Yuri Partnership cannot be members of a mixed group for GST purposes. Xanthe controls both Xanthe (Alpha) Ltd and Xanthe (Beta) Ltd. However, Xanthe’s 50% share in the Xanthe & Yuri Partnership does not give her legal control of the partnership.

Yuri has no ownership interest in Xanthe (Alpha) Ltd or Xanthe (Beta) Ltd. Therefore, the three entities cannot group on the basis that two or more persons carrying on business in partnership control all three entities.

- 118. However, s 55(8) allows a partnership to be a member of a mixed group of registered persons “... if the Commissioner is satisfied in relation to the members of the group that 2 or more persons carrying on a taxable activity in partnership control all of them”.
- 119. Partnerships may therefore be members of mixed groups with entities that they control (ie where more than 50% of the other entity’s ownership interests are partnership property). Example | Taura 14 illustrates this situation.

**Example | Taura 14 – Partnership owns 51% of the shares in a company**

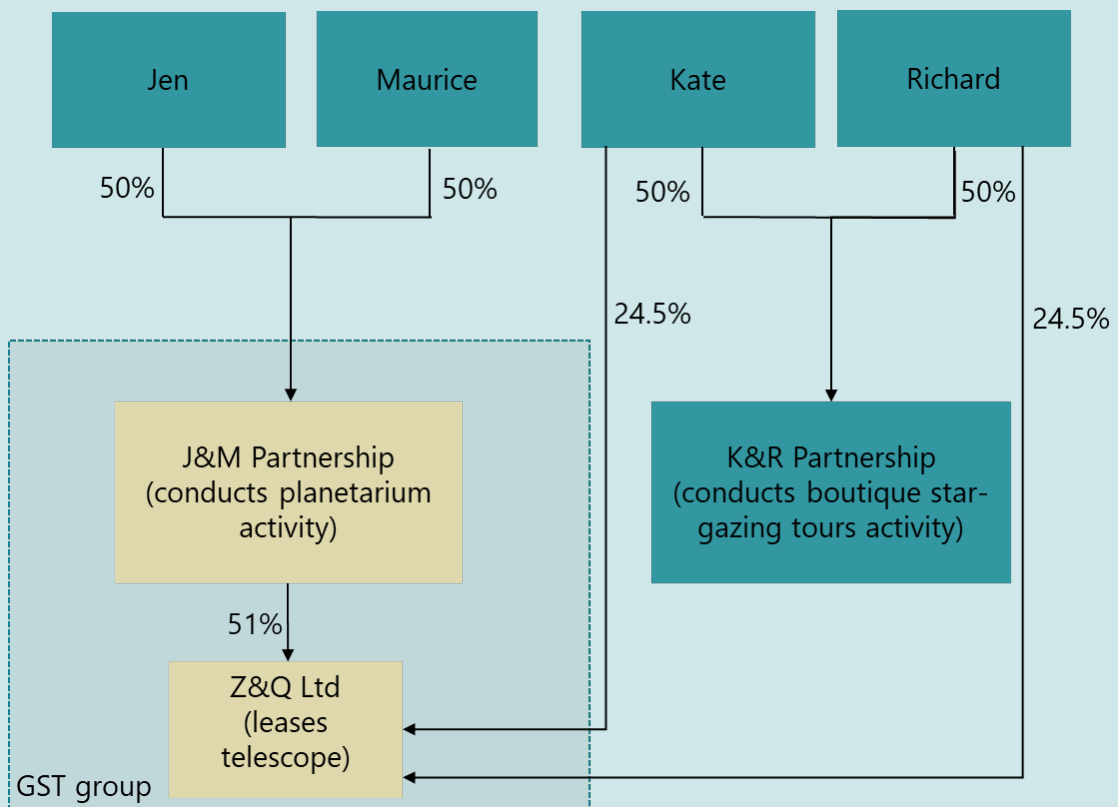
Jen and Maurice are 50:50 partners in a partnership, the J&M Partnership. The J&M Partnership carries on the taxable activity of running a planetarium and is registered for GST.

Kate and Richard are also 50:50 partners in a partnership, the K&R Partnership. The K&R Partnership carries on a taxable activity of running boutique star-gazing tours and is registered for GST.

Initially, Kate and Richard each own 50% of the shares in Z&Q Ltd. Z&Q Ltd owns a powerful telescope, which it leases to the K&R Partnership. However, as tourist numbers are down, Kate and Richard decide to sell some of their shares in Z&Q Ltd. The J&M Partnership agrees to acquire a 51% share in Z&Q Ltd from Kate and Richard, who collectively retain 49% (24.5% each).

Following the acquisition of shares, Jen and Maurice relocate the telescope to the planetarium's premises. Z&Q Ltd lets the telescope to both partnerships on a time-shared basis. Z&Q Ltd is registered for GST.

The J&M Partnership and Z&Q Ltd can be members of a mixed group of registered persons for GST purposes. This is because the J&M Partnership holds 51% of the ownership interests in Z&Q Ltd.



120. The Commissioner considers that partnerships may also be members of mixed groups with entities that are controlled by some (ie two or more) or all of the partners of a partnership. Example | Taura 15 illustrates this situation.

**Example | Taura 15 – Two or more persons carrying on a taxable activity in partnership own shares in a company**

John, Paul and George carry on business together in partnership (the JPG Partnership). The partnership agreement provides the partnership interests are as follows:

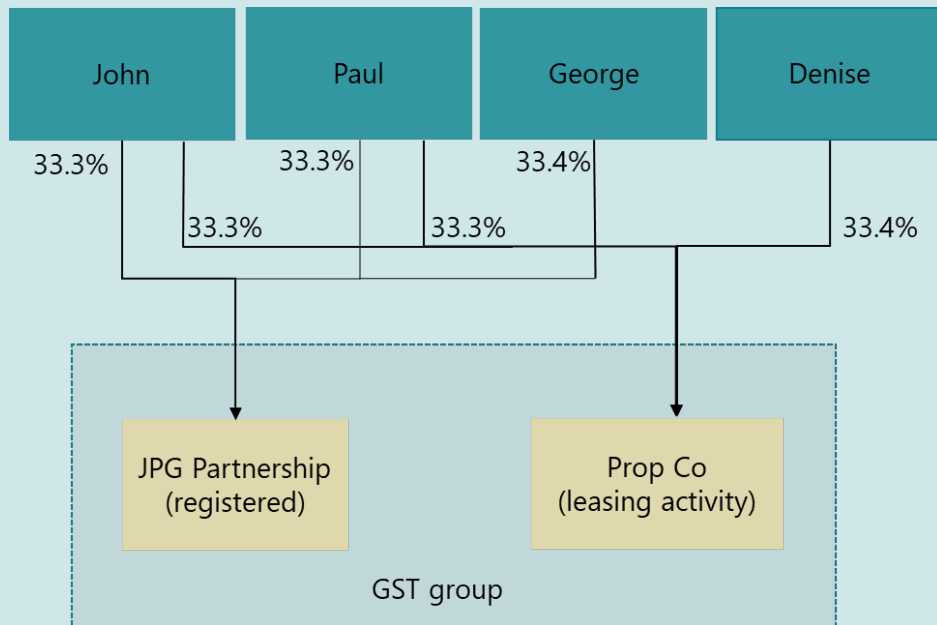
	<b>John</b>	<b>Paul</b>	<b>George</b>
Partnership interest	33.3%	33.3%	33.4%

The partnership carries on a taxable activity and is registered for GST.

The partnership's landlord decides to sell the commercial building, part of which the partnership rents as its business premises. John, Paul and their business associate Denise decide to acquire the building in a company incorporated for this purpose (Prop Co). Prop Co carries on a taxable activity of letting commercial property to the partnership and to other commercial tenants. It is registered for GST.

The shareholdings in Prop Co are as follows:

	<b>John</b>	<b>Paul</b>	<b>Denise</b>
Shareholdings	33.3%	33.3%	33.4%



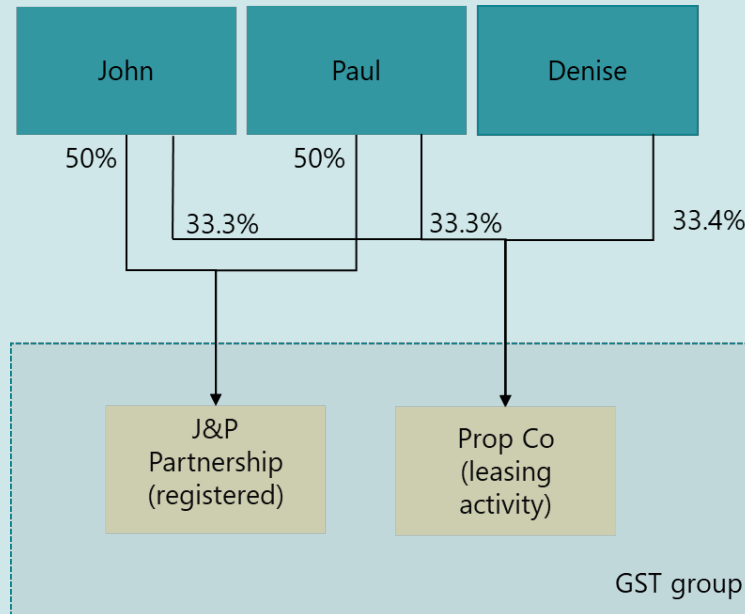
The JPG Partnership and Prop Co can be members of a mixed group of registered persons for GST purposes. This is because two persons who carry on a taxable activity in partnership (John and Paul) together hold more than 50% of the shares in Prop Co (66.6%) and so “control” Prop Co and they also together control the JPG partnership.

**Variation 1**

George decides to retire from the partnership. The JPG partnership ends and a new partnership between John and Paul (J&P Partnership) begins. The J&P Partnership agreement provides the partnership interests are held 50:50. The shareholdings in Prop Co remain the same.

The partnership interests and shareholdings are therefore as follows:

	<b>John</b>	<b>Paul</b>	<b>Denise</b>
Partnership interest	50%	50%	0%
Shareholdings	33.3%	33.3%	33.4%



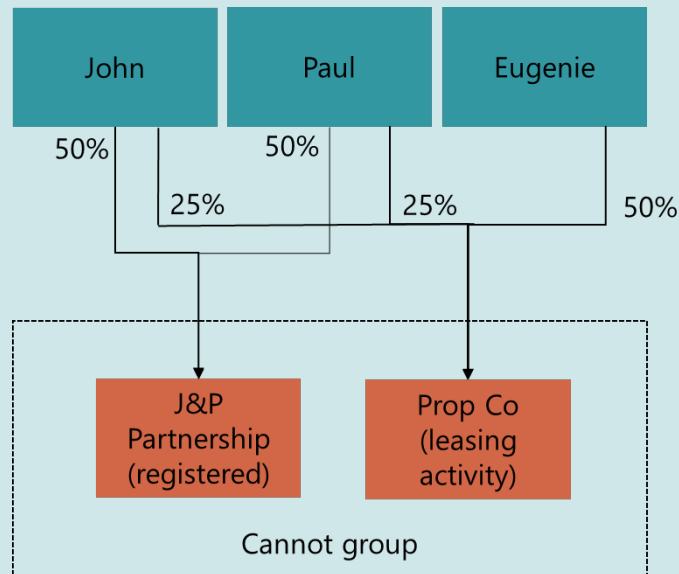
The J&P Partnership and Prop Co can be members of a mixed group of registered persons for GST purposes. John and Paul are two persons who carry on a taxable activity in partnership and control the partnership. Together, their voting interests in Prop Co are greater than 50% (ie 66.6%). Therefore, together, John and Paul control both the J&P Partnership and Prop Co.

**Variation 2**

A year later, Denise decides to exit Prop Co. She finds a buyer for her shares in Prop Co (Eugenie). Eugenie indicates to John and Paul that she is interested in acquiring some or all their shares in Prop Co if they wish to sell. John and Paul each decide to sell an 8.3% shareholding in Prop Co to Eugenie.

After the sale, the partnership interests and shareholdings in Prop Co are as follows:

	John	Paul	Eugenie
Partnership interest	50%	50%	0%
Shareholdings	25%	25%	50%



After the sale, the J&P Partnership and Prop Co cannot be members of a mixed group of registered persons for GST purposes. This is because the two persons carrying on a taxable activity in partnership (John and Paul) together hold only 50% of the shares in Prop Co, and so do not "control" Prop Co.

121. Co-owners of property who are not carrying on a taxable activity in partnership cannot use the method of grouping in s 55(8)(c). Example | Taura 16 illustrates this situation.

**Example | Taura 16 – Co-owners of property own 50% each of a company, and hold the power to appoint and remove the trustees of a trust**

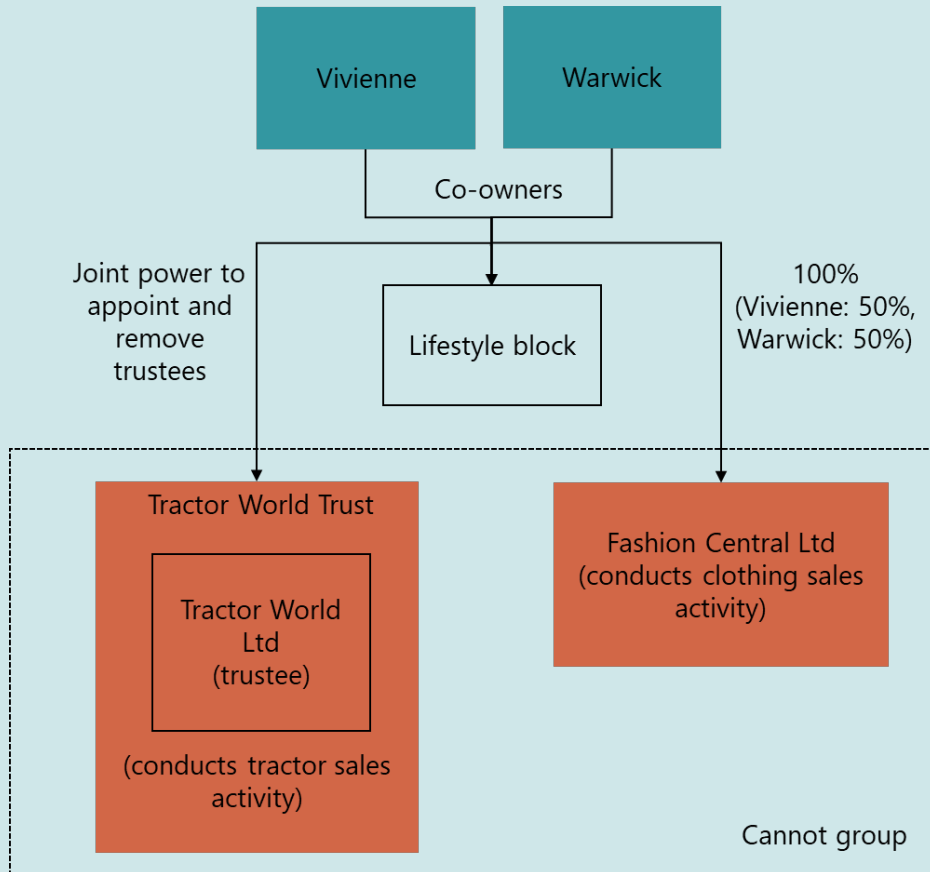
Vivienne and Warwick own and occupy a lifestyle block as tenants in common. Their 18-year-old twins, Tony and Ursula, live with them.

Vivienne and Warwick each own 50% of the shares in Fashion Central Ltd (FCL). FCL imports and sells clothing items from France and Italy. It rents business premises in the local town. The premises include both a shop and sufficient storage for excess merchandise. Vivienne manages the business. FCL is registered for GST.

Vivienne and Warwick are also settlors of the Tractor World Trust (TWT), and jointly hold the power to appoint and remove the trust's corporate trustee, Tractor World Ltd. TWT imports and sells tractors. It operates from business premises on the outskirts of the local town. Warwick manages the business. TWT is registered for GST.



Vivienne and Warwick want to reduce their GST compliance costs so apply to form a mixed group of registered persons consisting of FCL and TWT.



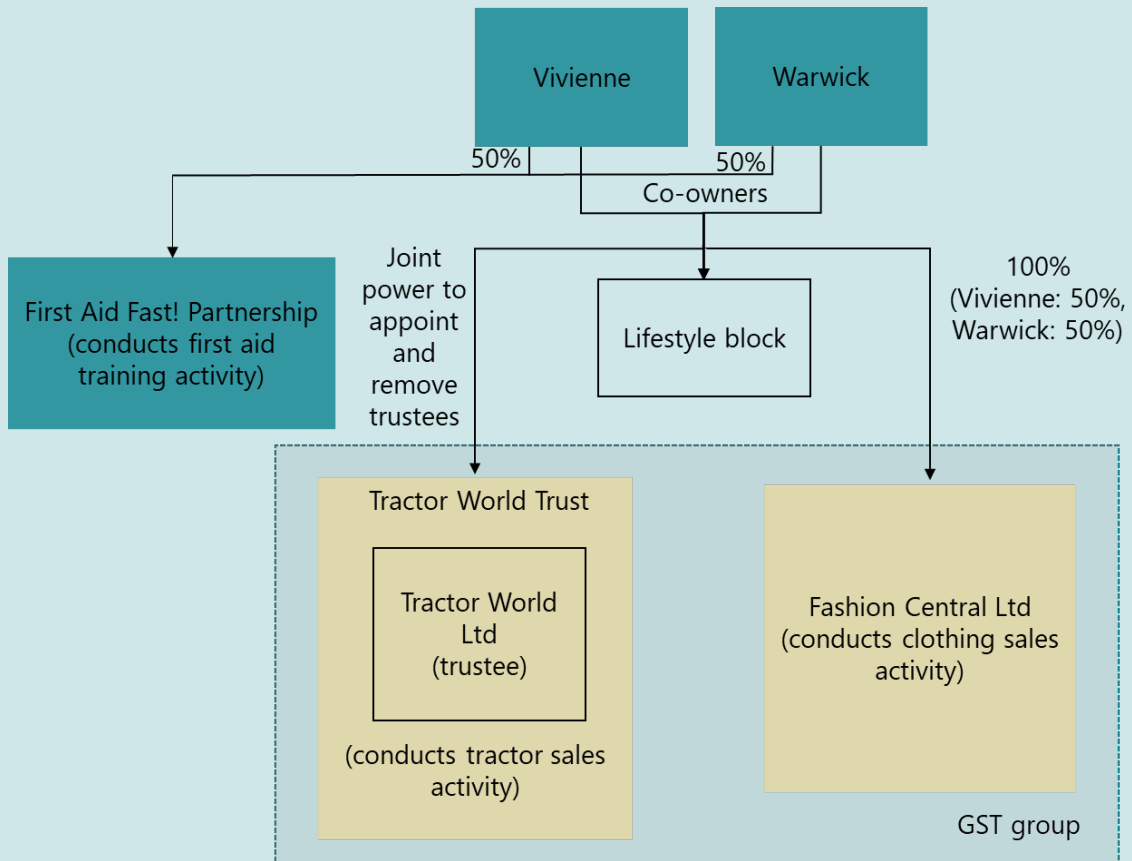
FCL and TWT cannot be members of a mixed group of registered persons for GST purposes. Vivienne and Warwick each hold 50% of the shares in FCL, so neither of them, as “one person”, controls FCL. Similarly, Vivienne and Warwick jointly hold the power to appoint and remove the trustees of TWT. Although they jointly control TWT, neither Vivienne nor Warwick controls TWT on their own. Vivienne and Warwick do not carry on a taxable activity together in partnership.

**Variation**

Five years later, Vivienne and Warwick decide to employ their son Tony to manage Tractor World (with oversight from Warwick) and their daughter Ursula to manage Fashion Central (with oversight from Vivienne).

Vivienne and Warwick decide to establish a partnership providing first-aid training to local schools, businesses and government agencies, the First Aid Fast! Partnership (FAF Partnership). They expect the taxable supplies that the FAF Partnership will make in the

first 12-month period will be about \$50,000 (ie under the registration threshold of \$60,000). Vivienne and Warwick decide they will not voluntarily register the partnership for GST; however, on the advice of their accountant, they apply again to group register FCL and TWT.



Following the establishment of the FAF Partnership, FCL and TWT can be members of a mixed group of registered persons. This is because two or more persons carrying on a taxable activity in partnership (Vivienne and Warwick) control both FCL (through their 100% combined shareholding) and TWT (through their joint power to appoint and remove trustees).

## Limited partnerships

122. As noted at [19], a limited partnership registered under the LPA 2008 is a “company” under the GSTA.<sup>15</sup> However, limited partnerships cannot be members of “groups of

<sup>15</sup> A limited partnership registered under the LPA 2008 is a “body corporate”. See “QB 14/03: Goods and Services Tax – Transfer of interest in a partnership”, *Tax Information Bulletin* Vol 26, No 5 (June 2014): 57. (See references section for link.)

companies” under s IC 3 of the Income Tax Act 2007. Limited partnerships are therefore grouped under s 55(8).

123. Legal control of a limited partnership registered under the LPA 2008 will usually be exercised by a partner that can make “resolutions of the limited partnership” without requiring the support of other partners. Under the LPA 2008, the default percentage of capital contribution required to make a resolution is at least 75% of all the capital contributions to the limited partnership. However, the actual level of capital contribution required to pass a resolution will depend on the terms of the partnership agreement for the limited partnership in question.

### **Nature of a limited partnership**

124. In New Zealand, the law governing limited partnerships is not grounded in general partnership law. Although the LPA 2008 includes some provisions from the Partnership Act 1908 (now the PLA 2019) and from the Companies Act 1993, the LPA 2008 is intended to be a “code” (ie a self-contained set of rules governing limited partnerships). This recognises that a limited partnership is a hybrid of a company and a general partnership.<sup>16</sup>
125. A limited partnership is a partnership that is registered under the LPA 2008 (s 6, LPA 2008). A limited partnership only exists when it is registered (s 7, LPA 2008). A limited partnership must have at least one limited partner and one general partner, but a person cannot be both a limited partner and a general partner of the same limited partnership at the same time (s 8, LPA 2008). Once registered, a limited partnership is a separate legal person (s 11, LPA 2008).
126. Any person (including a general partnership or an overseas limited partnership) may be a limited partner in a limited partnership (s 18, LPA 2008). The general partner must be a natural person, a limited partnership, a general partnership, a company or an overseas company, and must have a connection with New Zealand (as described in s 8(4), LPA 2008).

### **Control of a limited partnership**

127. A limited partnership must have a written agreement (s 9, LPA 2008). The partnership agreement must deal with certain issues, including (among other things):

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<sup>16</sup> N Wells and P Wilkie, *Wells' Limited Partnership Handbook* (Wellington, LexisNexis NZ Limited, 2008), [1.1.2].

- meetings and procedure; and
- entry and exit from the limited partnership (including whether a partner may be expelled from the limited partnership) (s 10, LPA 2008).

128. Decisions are made by a “resolution of the limited partnership”. The default position under the LPA 2008 is that a resolution must be passed or signed by partners that have contributed at least 75% of the capital contributions of all the partners. So under this position, for example, a partner who has contributed 51% of total partnership capital does not “control” the limited partnership. However, the partnership agreement may modify this requirement (s 4, LPA 2008).

### ***Role of safe harbours***

129. The general partner is responsible for managing the limited partnership (s 19, LPA 2008). Limited partners cannot usually participate in managing the limited partnership (s 20, LPA 2008). If they do so, these partners may lose (or partially lose) their limited liability status (s 30, LPA 2008). At first glance, it may appear that the combined effect of ss 19, 20 and 30 would be to reduce limited partner resolutions to a few or perhaps none, meaning that the LPA 2008, in most cases, would confer legal control of a limited partnership on the general partner.
130. However, a limited partner can participate in decision-making on a list of matters that, under the LPA 2008, do not constitute taking part in the management of a limited partnership. These matters are known as “safe harbours” (s 31 and sch 1, LPA 2008).
131. One of the “safe harbours” is to take part in a decision to replace the general partner. Therefore, if the partnership agreement grants a limited partner a right to participate in a decision to replace the general partner, the limited partner may participate in the decision without losing (or partially losing) their limited liability status.
132. Depending on the specific clauses of the partnership agreement, the safe harbours therefore ensure that the limited partners can exercise control over the general partner’s management of the limited partnership (and therefore over the limited partnership).

### ***Partnership interest includes rights to receive distributions, other benefits, and liabilities and burdens***

133. In a limited partnership, a partner’s “partnership interest” is:
- the partner’s share of the assets of the limited partnership;

- the partner's right to receive distributions from the limited partnership;
  - the partner's right to any other benefit that the partnership agreement confers; and
  - any liability or other burden of the partner in relation to the limited partnership (s 38, LPA 2008).
134. Unlike general partnership law, the LPA 2008 does not contain a presumption that the partners in a limited partnership will share the profits equally between them. Instead, it requires that the partnership agreement specifically deals with the partners' entitlement to distributions (s 10(c), LPA 2008).
135. There may be circumstances in which the amount of the partner's capital contribution (which usually determines their voting rights) does not accurately reflect who has legal control of the limited partnership. Other relevant factors in assessing control include the right to receive distributions, the right to receive other benefits that the partnership agreement confers, and the liabilities and other burdens of a partner in relation to the limited partnership.
136. The Commissioner considers that where either or both of the following apply, the relevant partner may be seen as having legal control of the limited partnership:
- The partner has the right, under the partnership agreement or otherwise, to receive distributions from the limited partnership (including on winding up) that are not proportional to the partner's capital contribution and are not proportional to its voting rights. For example, assume there are two limited partners in a limited partnership. Under the partnership agreement, each limited partner's capital contribution is 49.5% of the total partnership capital and each has 49.5% of the voting rights. (The general partner is required to contribute 1% of the total partnership capital and has 1% of the voting rights. Each limited partner holds 50% of the shares in the general partner.) However, the partnership agreement does not entitle each limited partner to receive 49.5% of the total amount distributed by the limited partnership. Instead, it entitles Limited Partner A to receive 59.5% and Limited Partner B 39.5% of the total amount distributed. (The general partner is entitled to receive 1% of the amount distributed.) In this case, Limited Partner A may be considered to have legal control of the limited partnership.
  - The partner has the right, under the partnership agreement or otherwise, to receive any other benefit that is not conferred on all the other partners (after taking into account any liability or burden that the partnership agreement confers on that partner). For this reason, its economic entitlements are not

proportional to its voting rights. For example, assume the partner contributions, voting rights and shareholdings in the general partner are the same as in the bullet point above. However, Limited Partner A is entitled to receive from the limited partnership, each year for the first 5 years, an amount equal to 8% of the limited partnership's net profit for that year. Limited Partner B is not entitled to receive any amount from the limited partnership for the first 5 years. From year 6, each limited partner is entitled to receive a distribution equal to 4% of the limited partnership's net profit for the year. In this case, Limited Partner A may be considered to have legal control of the limited partnership during the first 5 years.

137. However, in this type of situation, it would be necessary to carefully assess all clauses of the partnership agreement and other relevant documents to confirm whether Limited Partner A has legal control.
138. Therefore, who has legal control of a limited partnership will depend on the provisions of the partnership agreement governing the limited partnership. The default position under s 4, LPA 2008 is that one or more partners who have contributed at least 75% of the partnership capital can make resolutions of the limited partnership. The default position under s 31 and sch 1 is that limited partners can participate in decision-making on all safe harbour matters, which include replacing the general partner, without compromising their limited liability status.
139. The Commissioner considers that the following positions apply under a "standard" limited partnership agreement (ie one that adopts the default positions covered in this section and provides that distributions (including on winding up) are made proportionally to the partners' capital contributions):
  - A limited partner who has contributed at least 75% of the total partnership capital would, usually, have legal control of the limited partnership.
  - If no one person has contributed at least 75% of the partnership capital, then no one person would control the limited partnership for GST grouping purposes.
140. However, if the partnership agreement allows a partner who has contributed more than 50% of total partnership capital (a majority partner) to make resolutions without the support of any of the other partners, the majority partner would, usually, have legal control of the limited partnership (see Example | Tauria 17).
141. In some limited partnerships, no "one partner" is able to make resolutions of the limited partnership. Instead, the limited partnership will be under the joint control of some or all of the limited partners, and no "one person" will control the limited partnership for GST grouping purposes (see the variation in Example | Tauria 17).

### **Example | Taurira 17 – 51% controlled partnership; 50:50 jointly controlled partnership**

The NZ ESL Limited Partnership is a limited partnership registered under the LPA 2008. It carries on a taxable activity of teaching English as a second language (ESL) to secondary school students in New Zealand and is registered for GST.

The NZ ESL Limited Partnership has two limited partners: the Flora Family Trust (which has contributed 50.5% of partnership capital) and the NZ ESL Charitable Trust (which has contributed 48.5%). The general partner, NZ ESL GP Ltd, has contributed 1%. The Flora Family Trust holds 51% of NZ ESL GP Ltd's shares and the NZ ESL Charitable Trust holds the other 49%.

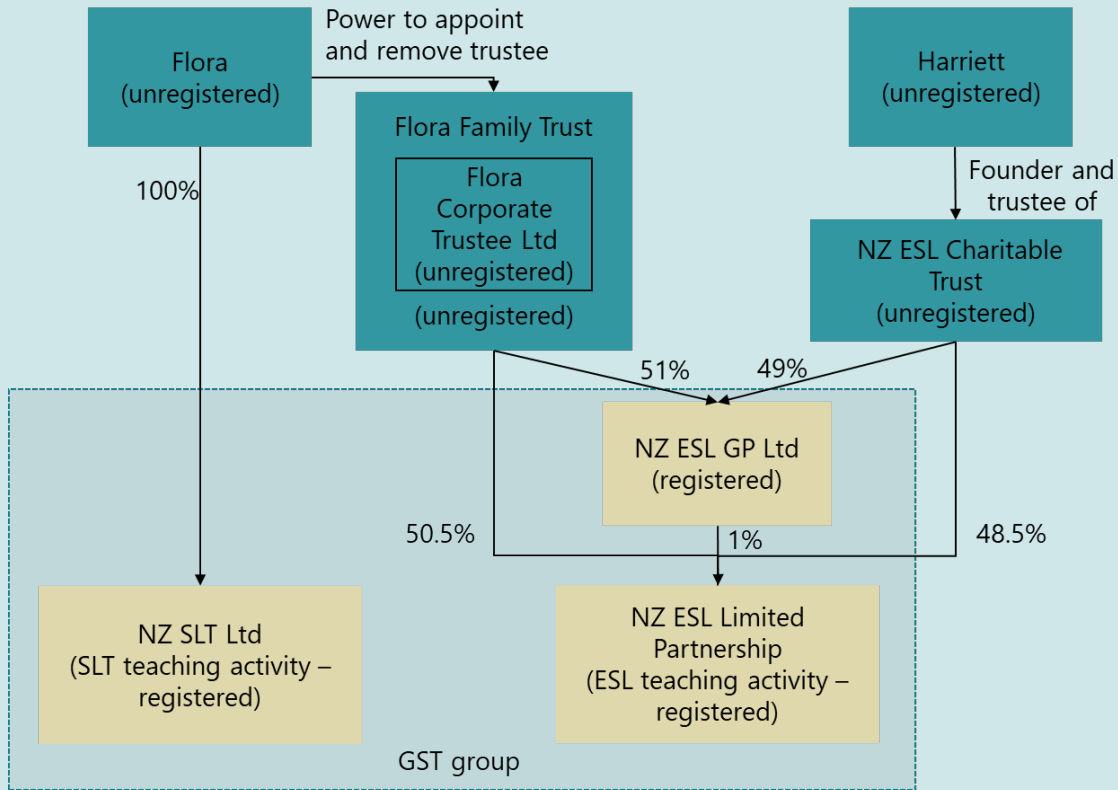
Flora is a settlor of the Flora Family Trust. The trust has a corporate trustee, Flora Corporate Trustee Ltd, of which Flora is the sole shareholder. Under the trust deed, Flora holds the power to appoint and remove the trustee of the trust. Before the NZ ESL Limited Partnership was registered, Flora was an ESL teacher. She developed many of the materials the NZ ESL Limited Partnership now uses and trained many of the ESL teachers it now employs. She also trained the business manager, Iris.

Flora has since retrained and NZ SLT Ltd now employs her as a private speech language therapist. NZ SLT Ltd is a look-through company and is registered for GST. Flora owns 100% of NZ SLT Ltd's shares.

Harriett is the founder and trustee of the NZ ESL Charitable Trust. Before the NZ ESL Limited Partnership's registration, Harriet was also heavily involved in developing the educational materials the NZ ESL Limited Partnership now uses and in training the teachers it now employs.

The partnership agreement for the NZ ESL Limited Partnership states that a partner or partners that have contributed more than 50% of the capital contributions of all the partners must pass or sign any resolution of the limited partnership. The partnership agreement also allows limited partners to participate in decisions on all safe harbour matters listed in sch 1, LPA 2008. The partnership agreement states that distributions (including on termination) are to be made proportionately to the partners' capital contributions.

Flora wishes to simplify the GST filing for the NZ ESL Limited Partnership and NZ SLT Ltd and applies for them to be treated as members of a mixed group of registered persons for GST purposes.



The NZ ESL Limited Partnership and NZ SLT Ltd can be members of a mixed group of registered persons for GST purposes. Flora controls the NZ ESL Limited Partnership because:

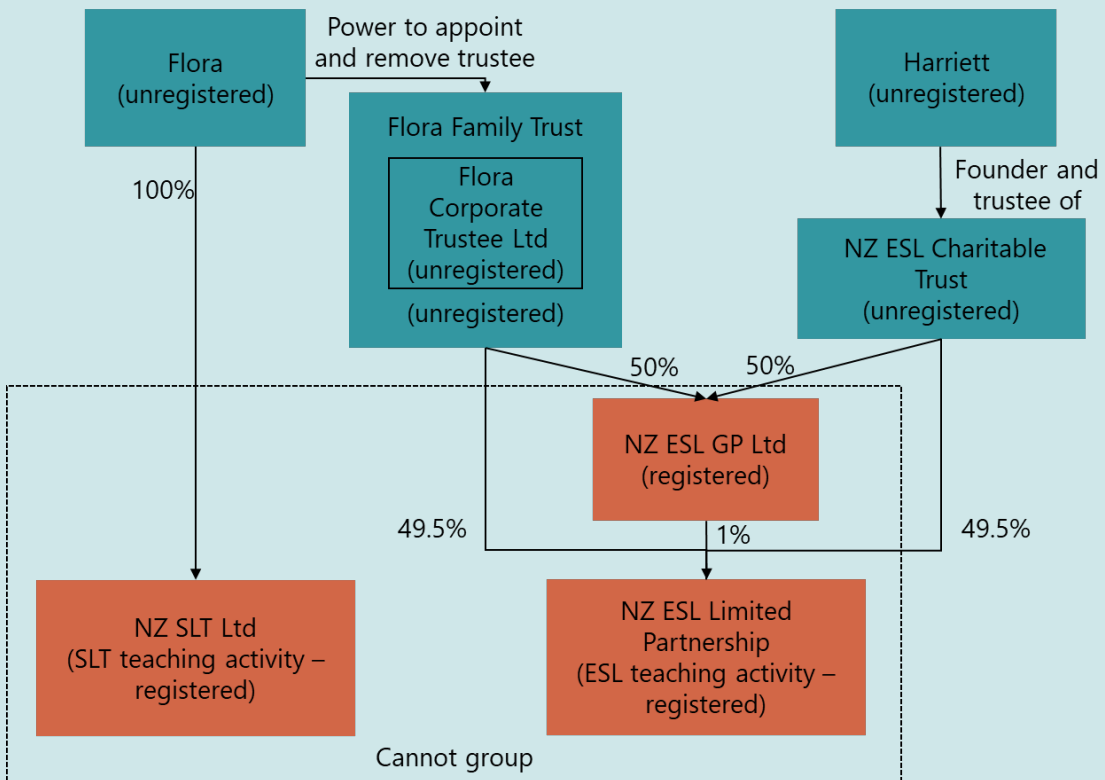
- the Flora Family Trust (as limited partner) has contributed more than 50% of the partnership capital and holds more than 50% of the voting rights in the NZ ESL Limited Partnership (and is entitled to more than 50% of the distributions, including on winding up). The Flora Family Trust therefore controls the NZ ESL Limited Partnership; and
- Flora controls the Flora Family Trust, through holding the power to appoint and remove the trust's corporate trustee.

Flora also controls NZ SLT Ltd because she holds 100% of the ownership interests in NZ SLT Ltd. The NZ ESL Limited Partnership and NZ SLT Ltd are each registered for GST.



### Variation

The facts are as above, but the contributions to the NZ ESL Limited Partnership are: Flora Family Trust 49.5%, NZ ESL Charitable Trust 49.5%, NZ ESL GP Ltd 1%. The Flora Family Trust holds 50% of the shares in NZ ESL GP Ltd and the NZ ESL Charitable Trust holds the other 50%.



The NZ ESL Limited Partnership and NZ SLT Ltd cannot be members of a mixed group of registered persons for GST purposes. Although both entities are registered persons and Flora controls NZ SLT Ltd, Flora does not control the NZ ESL Limited Partnership. This is because the Flora Family Trust (which Flora still controls) can no longer pass resolutions of the limited partnership without the support of other partners.

### Joint ventures

142. In most cases, the way to determine legal control of a joint venture is to refer to the voting powers contained in the contracts establishing the joint venture (joint venture agreement). However, if the joint venture agreement requires all decisions to be made

unanimously, this approach will establish that the joint venture has no “one person” that controls it. In some cases there may be legal arrangements outside the joint venture agreement which mean the ordinary voting powers of the joint venturers under the joint venture agreement will not show who has legal control of the joint venture. An alternative approach will be required, eg to refer to the joint venturers’ respective capital contributions and income entitlements set out in the joint venture agreement, or in other legally enforceable agreements or arrangements. Such entitlements (potentially combined with other legally enforceable agreements or arrangements as to voting or refraining from voting) may determine who has control of the joint venture.

### **The nature of a joint venture**

143. There is no particular legal definition of a joint venture (*United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 and *Commercial Factors Ltd v Scenic Hotel Group Ltd* [2019] NZHC 2370). However, case law indicates that a joint venture will have the following features.
144. The term usually refers to a situation where parties come together for a particular common commercial goal (*Commercial Factors*). There must be a joint undertaking where plans are worked through for the benefit of, and with input from each party (*Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC)).
145. Joint ventures are fundamentally formal contractual associations (although the contract does not need to be in writing). Joint ventures are usually distinguishable from partnerships because they are not formed to conduct a general and ongoing business but tend to have a finite and confined purpose (*Commercial Factors*).
146. To have a joint venture, something more is needed than mere fortuitous co-ownership as would have occurred if somehow each side independently purchased 50% of an asset without reference to the other (*Fletcher Challenge*). There must also be something more than mere passive co-ownership, where each party advances money and is interested merely in a return without any participation in decision-making (*Fletcher Challenge*).

### **Control of a joint venture**

147. The general approach to determining legal control of a joint venture is to refer to the respective interests of the joint venturers in the joint venture, as outlined in the joint venture agreement.

148. In most cases, to determine who has legal control of the joint venture it will be sufficient to refer to the voting powers of the joint venturers as outlined in the joint venture agreement. An alternative approach, where the voting powers in the joint venture agreement do not accurately reflect the joint venturers' legal interests in the joint venture, is to refer to the joint venturers' respective capital contributions and the profit-sharing arrangements contained in the joint venture agreement (or in other legally enforceable agreements or arrangements, if relevant).
149. If the joint venture agreement requires all decisions to be made jointly, it may be that no "one person" controls the joint venture (see Example | Tauira 18).

**Example | Tauira 18 – A 50:50 or 60:40 joint venture; unanimous agreement required**

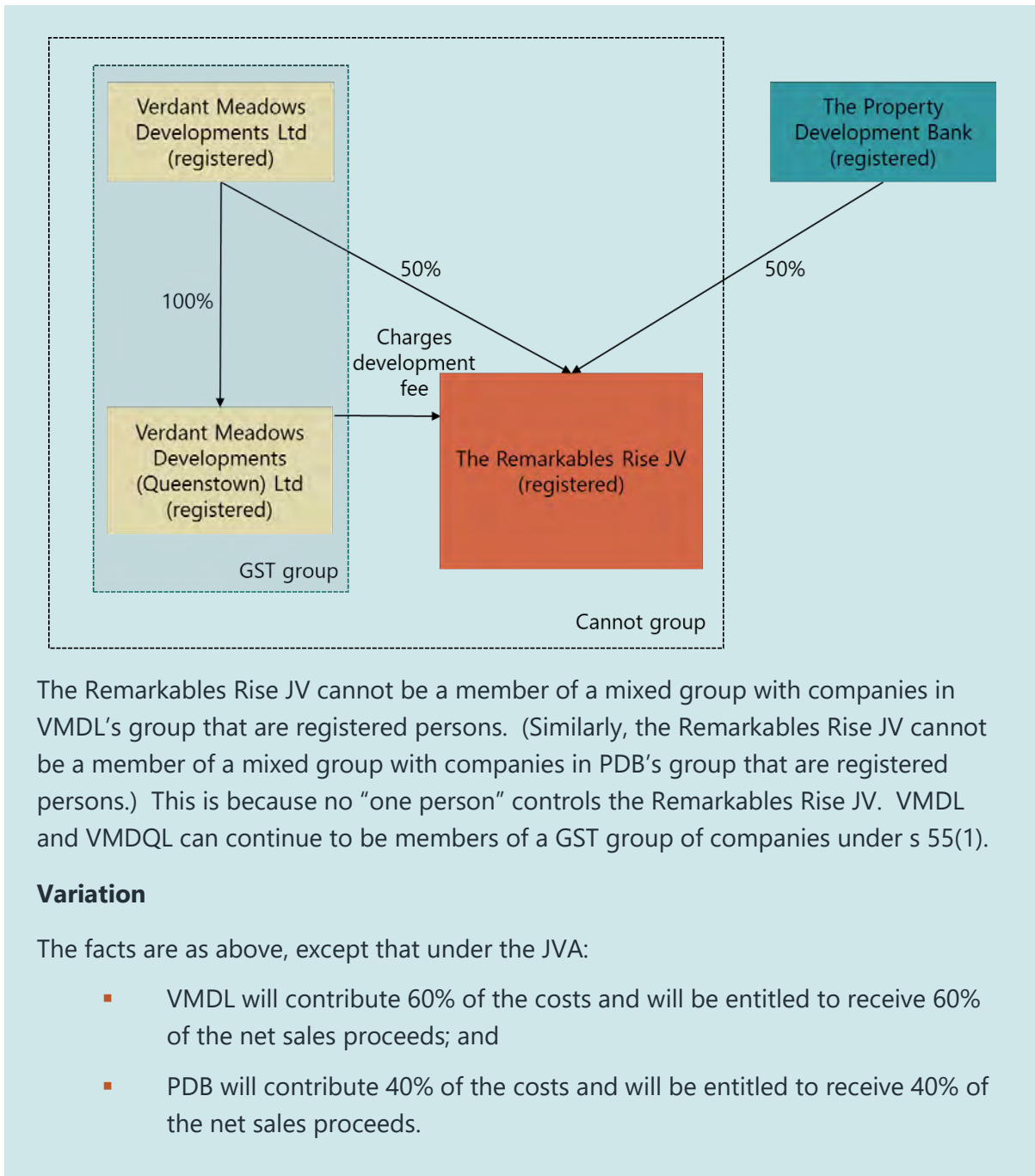
Verdant Meadows Developments Ltd (VMDL), a property development company, has identified a potential site for a residential development near Queenstown. The site has commanding views of the Remarkables. VMDL starts negotiations with the landowner but cannot agree on a price it can afford without bringing a funder on board.

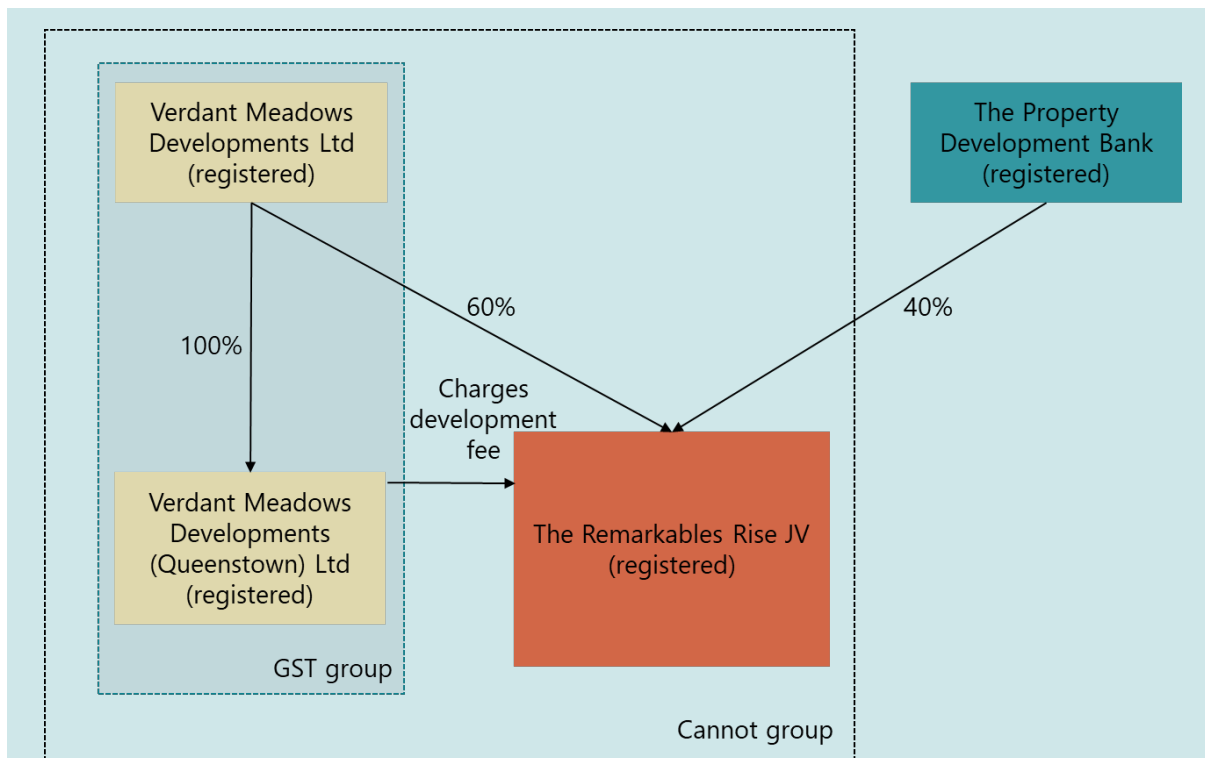
VMDL approaches the Property Development Bank (PDB) with a development proposal for the site, which will be marketed as "Remarkables Rise". PDB agrees to contribute 50% of the total amount required to purchase, develop and subdivide the land into lots ready for sale, on the basis it will be entitled to 50% of the net sales proceeds. Verdant Meadows Developments (Queenstown) Ltd (VMDQL), a VMDL group company, will provide the expertise and equipment necessary to carry out the development work and charge a development fee. VMDL and PDB will each be responsible for their own administrative costs relating to the joint venture.

The parties record their agreement in a written contract, the Remarkables Rise Joint Venture Agreement (JVA). The JVA also:

- provides that in making any decisions about the joint venture, both VMDL and PDB must pass or sign a resolution; and
- confirms that the parties do not intend to create a partnership.

The development begins and the Remarkables Rise JV is registered for GST on the basis that it carries on a taxable activity of property development. VMDL applies to the Commissioner to include the Remarkables Rise JV in the VMDL GST group.





The requirement for unanimous decision-making remains unchanged.

The Remarkables Rise JV still cannot be a member of a mixed group with companies in VMDL's group that are registered persons. (Similarly, the Remarkables Rise JV cannot be a member of a mixed group with companies in PDB's group that are registered persons.) This is because, due to the requirement for unanimous decision-making, no "one person" controls the Remarkables Rise JV. VMDL and VMDQL can continue to be members of a GST group of companies under s 55(1).

## How to register a GST group

150. A GST group of companies under s 55(1) or a mixed group of registered persons under s 55(8) must be registered with Inland Revenue.
151. Persons seeking to register a GST group of companies or a mixed group should either apply to Inland Revenue through myIR or complete form [IR 374](#) and submit it through IR's secure online service. Include the following information:
  - the name and IRD number of the proposed representative member;
  - the IRD number for each proposed member of the GST group. If one or more of the proposed members has no IRD number, then they need to apply for one.

They can do so online – see [IRD numbers for businesses and organisations \(ird.govt.nz\)](https://ird.govt.nz/ird-numbers-for-businesses-and-organisations). Each proposed member of a mixed group under s 55(8) will also need to be registered for GST. For instructions on registering for GST, see [Register for GST \(ird.govt.nz\)](https://ird.govt.nz/register-for-gst);

- the name and IRD number (if applicable) of each person who controls the proposed GST group;
- if a trust will be a member of the GST group, a copy of the trust deed, showing the name of each trustee of the trust and, if relevant, the clause granting a person the power to appoint and remove trustees; and
- if a limited partnership will be a member of the GST group, a copy of the partnership agreement for the limited partnership, or relevant clauses showing who may make resolutions of the limited partnership, and the rules governing contribution of partnership capital, distributions, and any other benefits or burdens making up a partner's partnership interest.

152. An unregistered company cannot be the representative member of a GST group. Therefore, the application should name a GST registered person as the proposed representative member.

153. For further information, see [Register for GST as a group \(ird.govt.nz\)](https://ird.govt.nz/register-for-gst-as-a-group). For a discussion of the consequences of GST grouping, see "[IS 24/02: GST – Grouping for companies](#)".

## Grouping non-residents registered under s 54B

154. Non-residents may be required to register for GST under the general registration provision (s 51) because they carry on a taxable activity and have made taxable supplies in New Zealand over the GST registration threshold of \$60,000 in the previous 12-month period, or they intend to do so in the next 12-month period. Non-residents may also be entitled to register voluntarily under s 51 because they carry on a taxable activity and do not make taxable supplies in New Zealand that exceed the \$60,000 threshold: see [Registering for GST \(ird.govt.nz\)](https://ird.govt.nz/registering-for-gst) and [GST for overseas businesses \(ird.govt.nz\)](https://ird.govt.nz/gst-for-overseas-businesses). The special rules discussed in this section do not apply to non-residents registered under the general registration provision (s 51).

155. Non-residents that do not make taxable supplies in New Zealand (and that meet certain other requirements) are entitled to register for GST under s 54B to recover

New Zealand GST they have incurred (see "[IS 21/03: GST – Registration of non-residents under section 54B](#)"<sup>17</sup>).

156. Non-residents who are registered under s 51 may have a branch or division that does not make taxable supplies in New Zealand. The non-resident may register that branch or division under s 54B, if it meets the requirements for registration in s 54B(1). The branch or division will be treated as a separate person (s 54B(4)-(5)).
157. Section 55(1B) sets out special rules for persons registered under s 54B who are members of GST groups. Section 55(1B) provides that non-residents registered under s 54B cannot group register with persons who are New Zealand residents. However, s 55(1B) does not prevent non-residents who are registered under s 54B from group registering with other non-residents.
158. One of the consequences of GST group registration is that supplies members of the group make are usually treated as made by the representative member (s 55(1AE)).
159. If all the proposed members of a GST group are registered under s 54B, then none of the proposed group members will make taxable supplies in New Zealand.
160. However, if some of the proposed members of the group are s 51 registered persons who make taxable supplies in New Zealand, and their supplies are treated as made by the representative member who is a s 54B registered person, this will disqualify the person from being registered under s 54B.
161. Therefore, in practice, the Commissioner will only allow a s 54B registered person to be the representative member of a GST group if all members of the group are s 54B registered persons. An application for group registration containing non-residents registered under both s 51 and s 54B should name a person registered under s 51 as the proposed representative member.
162. The comments at [161] apply to a non-resident's branch or division registered under s 54B as if it were a separate person (s 54B(5)). Therefore, the Commissioner will not process an application that names a branch or division registered under s 54B as the representative member of a GST group that contains persons registered under s 51. For this purpose, persons registered under s 51 include the non-resident of which the s 54B registered person is a branch or division, assuming the non-resident is registered under s 51 when the application for group registration is made. A non-resident registered under s 51 that has a branch or division registered under s 54B may be the representative member of a GST group.

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<sup>17</sup> *Tax Information Bulletin* Vol 33, No 6 (July 2021): 140.

## Summary tables

### Groups of companies

163. Figure | Hoahoa 4 summarises, for various types of “company” that may group register under s 55(1), considerations that can help you determine whether group registration is available. This list is not exhaustive. It is relevant only to the requirements of s 55(1)(a). The companies must also meet the requirements of s 55(1)(b).

**Figure | Hoahoa 4 – Entities that may be members of GST groups of companies**

Entity	Comments
Companies Act 1993 company	A company can group if there is 66% common ownership between it and the other companies.
Look-through company	A look-through company can group if there is 66% common ownership between it and the other companies.
Multi-rate PIE	A multi-rate PIE can group if there is 66% common ownership between it and the other companies.
Listed PIE	A listed PIE can group if there is 66% common ownership between it and the other companies.
A body corporate that is none of the above, whether incorporated in New Zealand or elsewhere, but excluding a local authority or a public authority (eg a foreign company)	<p>Is capable of being a member of a “group of companies” under s IC 3, ITA 2007 if 66% commonly owned. Also satisfies the s 2 definition of “company”. Can group if there is 66% common ownership between it and the other companies.</p> <p><b>Note:</b> If the body corporate is a non-resident registered under s 54B, it can only group with other non-residents. A s 54B registered person cannot be the representative member of a GST group, unless all group members are s 54B registered persons.</p>



## The control test for mixed groups

164. Figure | Hoahoa 5 summarises, for various types of registered person, considerations that can help you determine who has legal control of the registered person, and therefore when it may group register for GST under s 55(8). This list is not exhaustive.

**Figure | Hoahoa 5 – Legal control for members of mixed groups**

Person	Comments
<p>An individual (eg a sole trader)</p>	<p>An individual acting in their individual capacity (eg as a sole trader) is registered for GST in this capacity. The question of control does not arise for an individual who is registered for GST in their individual capacity.</p> <p>If an individual becomes incapacitated (including on death or bankruptcy), a specified agent may be appointed under s 58. The appointment of a specified agent does not affect GST grouping (s 55(4A)).</p>
<p>A “company” as defined in s 2, excluding a limited partnership. For example, it may be:</p> <ul style="list-style-type: none"> <li>• a company incorporated under the Companies Act 1993,</li> <li>• a look-through company,</li> <li>• a multi-rate PIE or listed PIE that is established as a body corporate, or</li> <li>• a foreign company.</li> </ul> <p>A multi-rate PIE or a listed PIE that is not established as a body corporate, but is a “company” as defined in s YA 1 of the Income Tax Act 2007.</p>	<p>A person has legal control of a company (or multi-rate PIE or listed PIE) if they hold more than 50% of the ownership interests.</p> <p>At least one member of the group must be a non-company or a limited partnership.</p>
<p>A trust</p>	<p>The general rule is that the trustee or trustees have legal control of a trust and so “control” the trust in their capacity as trustee(s) of that trust.</p> <p>Despite the above, the Commissioner considers that the following person(s) have legal control of the trust (where they exist):</p> <ul style="list-style-type: none"> <li>• a person with the power under the trust deed to appoint and remove trustees, or</li> <li>• two or more persons carrying on a taxable activity in partnership who jointly hold the</li> </ul>

	<p>power under the trust deed to appoint and remove trustees.</p>
A partnership	<p>Under s 51 of the Partnership Law Act 2019, a majority of the partners generally exercise legal control of a partnership. Where a majority of the partners exercise legal control, there will be no “one person” that controls the partnership.</p> <p>However, where all partners have consented to one partner making decisions about ordinary matters connected with the partnership business, that partner will have legal control of the partnership.</p>
A limited partnership	<p>The general rule is that a partner “controls” the limited partnership if they can make resolutions of the limited partnership without the support of the other partners. Under a standard limited partnership agreement, a partner will be able to do so if they have contributed at least 75% of the partnership capital.</p> <p>If there are multiple limited partners (or two 50% limited partners), there may be no “one person” that controls the limited partnership.</p> <p>In a limited number of cases, legal control may be determined by referring to the partners’ respective partnership interests.</p>
A joint venture	<p>The general approach to determining legal control of a joint venture is by referring to the respective interests of the joint venture partners in the joint venture.</p> <p>In most cases it will be sufficient to refer to the voting powers of the joint venturers contained in the joint venture agreement.</p> <p>If the joint venture agreement requires decisions to be made unanimously, this approach will establish that no “one person” controls the joint venture.</p> <p>In some cases, where voting powers do not accurately reflect legal control of the joint venture, it may be necessary to adopt an alternative approach of referring to the profit-sharing arrangements and the joint venturers’ respective capital contributions.</p>

## Legislation

165. Sections 55(1), (1B) and (8) provide:

### 55 GST groups

- (1) For the purposes of this Act, 2 or more companies (the companies) are eligible to be a GST group at a time if,—
- (a) at a time and under section IC 3 of the Income Tax Act 2007, the companies are a group of persons (the eligibility group) that—
    - (i) is a group of companies; or
    - (ii) is part of a group of companies; or
    - (iii) would be a group of companies but for 1 or more members being a multi-rate PIE or a look-through company; or
    - (iv) would be a group of companies but for 1 or more members being a listed PIE; and
  - (b) the companies meet either or both of the following requirements:
    - (i) at the time, are each a registered person:
    - (ii) as the eligibility group and in a 12-month period that includes the time, make supplies to persons outside the eligibility group that are taxable supplies, or would be taxable supplies if made by a registered person, and that have a total value of at least 75% of the total value of the taxable supplies and other supplies made in that period by persons in the eligibility group to persons outside the eligibility group.
- ...
- (1B) Despite subsections (1) and (4)(a), a person registered under section 54B may not apply to be a member of a GST group or for a further company to be a member of a GST group, if the resulting GST group would have both resident and non-resident persons as members.
- ...
- (8) If the members of a group of 2 or more registered persons include a person that is not a company or is a limited partnership and the Commissioner is satisfied in relation to the members of the group that—
- (a) one of them controls each of the others; or
  - (b) one person controls all of them; or
  - (c) 2 or more persons carrying on a taxable activity in partnership control all of them,—

the Commissioner may accept that the registered persons are a GST group, and subsections (2) to (6) apply to the group of registered persons as a GST group and to each of the registered persons as a member of the GST group.

166. Section 2 provides:

## 2 Interpretation

(1) In this Act, other than in section 12, unless the context otherwise requires,—

...

**company** means any body corporate, whether incorporated in New Zealand or elsewhere, and any limited partnership registered under the Limited Partnerships Act 2008; but does not include a local authority or a public authority

...

**trustee** includes an executor and administrator; and also includes Public Trust and the Māori Trustee

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*Income Tax Act 2007 – ss IC 3, YA 1 (definitions of “company”, “market value interest” and “trustee”), YA 5, YB 21 and YC 2 – YC 6*

*Legislation Act 2019 – s 13 (definition of “person”)*

*Limited Partnerships Act 2008 – ss 4, 6–11, 18–20, 30–31, 38 and sch 1*

*Partnership Law Act 2019 – ss 8, 12–15, 44–45, 48, 51 and sch 1, part 1*

## Case references | Tohutoro kēhi

*Anglesea Builders Partnership v CIR* (1987) 9 NZTC 6,181

*British American Tobacco Company Ltd v IRC* [1943] AC 335

*Case 98* (1951) 1 CTBR (NS) 423

*Case K54* (1988) 10 NZTC 444

*Case K68* (1988) 10 NZTC 544

*Case L42* (1989) 11 NZTC 1,261

*Case L72* (1989) 11 NZTC 1,419

*Case P70* (1992) 14 NZTC 4,469

*Case U19* (1999) 19 NZTC 9,186

*Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC)

*Commercial Factors Ltd v Scenic Hotel Group Ltd* [2019] NZHC 2370

*Commissioner of Taxes v Trustees of Joseph (deceased)* (1908) 2 NZLR 1085; 10 GLR 556

*Concepts 124 Limited v CIR* (2014) 26 NZTC 21,100

*Edwards v Legal Services Agency* [2003] 1 NZLR 145

*Fraser v Murdoch* (1880-81) LR 6 App Cas 855

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*Taunton Syndicate v C of IR* (1982) 5 NZTC 61,106; (1982) 5 TRNZ 259

*United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1

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## About this document | Mō tēnei tuhinga

Interpretation statements are issued by the Tax Counsel Office. They set out the Commissioner's views and guidance on how New Zealand's tax laws apply. They may address specific situations we have been asked to provide guidance on, or they may be about how legislative provisions apply more generally. While they set out the Commissioner's considered views, Interpretation Statements are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further [Status of Commissioner's advice](#) (December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in an interpretation statement will not necessarily lead to the same tax result. Each case must be considered on its own facts.