Income Tax Assessment (Debt and Equity Examples) Declaration 2016

I, …………….., Minister for Revenue and Financial Services, make the following declaration.

Dated   2016

…………………….. **[DRAFT ONLY—NOT FOR SIGNATURE]**

Minister for Revenue and Financial Services

Contents

Chapter 1—Preliminary

Part 1—Preliminary

1 Name

This is the *Income Tax Assessment (Debt and Equity Examples) Declaration 2016*.

2 Commencement

(1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. The whole of this instrument	At the same time as Schedule # (about debt and equity scheme integrity rules) to the *Tax and Superannuation Laws Amendment (Measures for a later sitting) Act 2016* commences. However, the provisions do not commence at all if that Schedule does not commence.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under subsection 974-155(3) of the *Income Tax Assessment Act 1997*.

4 Scope of this instrument

Each of the later Parts of this instrument is declared as an example for the purposes of subsection 974-155(3) of the Act.

Note: These examples illustrate the operation of the aggregation rule. That rule will apply if both the interdependence test and the design test are satisfied.

Section 5

5 Definitions

In this instrument:

Act means the *Income Tax Assessment Act 1997*.

aggregation rule means the rule in subsection 974-155(1) of the Act, as affected by paragraph 974-155(2)(a) of the Act.

design test means the test in paragraph 974-155(1)(c) of the Act.

interdependence test means the test in paragraphs 974-155(1)(a) and (b) of the Act.

law means a law of the Commonwealth or of a State or Territory, and includes a rule of common law or equity.

EXPOSURE DRAFT

Non-stapling examples **Chapter 2**
Shareholder loan: no aggregation **Part 2**
Main example **Division 1**

Section 6

Chapter 2—Non-stapling examples

Part 2—Shareholder loan: no aggregation

Division 1—Main example

6 Object

This example focuses on the operation of the interdependence test.

7 Explanation of facts

(1) A diagram explaining the facts for this example is as follows:
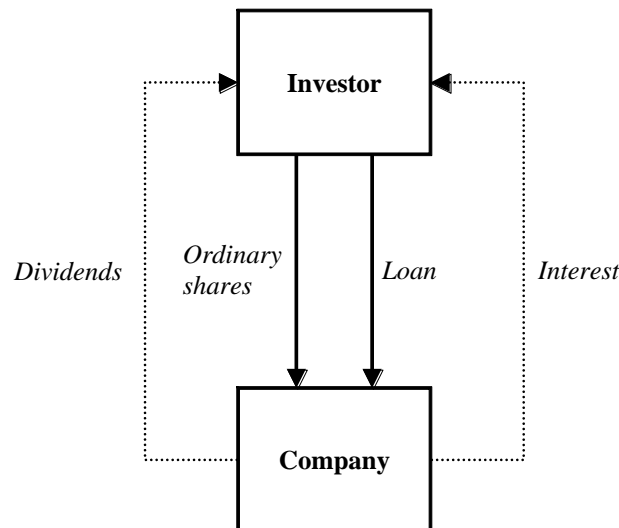
(2) An investor pays $100,000 to acquire all of the ordinary shares in a company.

(3) At the same time, the investor and the company enter into a loan agreement under which:

   (a) the investor lends $150,000 to the company; and

   (b) this principal of $150,000 is repayable at the end of 5 years; and

   (c) financial benefits in the form of loan interest are payable by the company to the investor each 6 months during the 5-year loan period at a rate of 5% per annum.

(4) The amount of the loan principal is proportionate to the subscription value of the ordinary shares. However, the loan agreement does not expressly refer to the ordinary shares or to their value.

(5) Dividends on the ordinary shares are payable at the discretion of the company's directors, subject to the requirements of the *Corporations Act 2001*. The pricing, terms and conditions under which the ordinary shares were issued to the investor do not expressly refer to the loan.

EXPOSURE DRAFT

Chapter 2 Non-stapling examples
Part 2 Shareholder loan: no aggregation
Division 1 Main example

Section 8

8 Assumptions—separate schemes exist if the aggregation rule is disregarded

(1) Assume that, under Division 974 of the Act:

    (a) the issuing of the ordinary shares is a scheme (the ***share scheme***) that gives rise to equity interests in the company; and

    (b) the loan agreement is a separate scheme (the ***loan scheme***) that gives rise to a debt interest in the company.

(2) Disregard the aggregation rule for the purposes of these assumptions.

9 Applying the interdependence test to the schemes

(1) The interdependence test is not satisfied in relation to the share scheme and the loan scheme because the pricing, terms and conditions of either scheme:

    (a) are not dependent on, or linked to; and

    (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of the other scheme.

(2) This is because:

    (a) the company must perform its obligations under the loan agreement regardless of the pricing, terms and conditions attached to the issuing of the shares; and

    (b) nothing about the shares affects:

        (i) the amount of the financial benefits payable under the loan; or

        (ii) how rights under the loan can be exercised; or

        (iii) anything else about the loan scheme.

10 Applying the design test to the schemes

As the interdependence test is not satisfied, it is not necessary to consider whether the design test is satisfied in relation to the 2 schemes.

11 Conclusion

As the interdependence test is not satisfied, the aggregation rule does not apply to treat the share scheme and the loan scheme as a single aggregate scheme.

EXPOSURE DRAFT

Non-stapling examples **Chapter 2**
Shareholder loan: no aggregation **Part 2**
Changes to the main example **Division 2**

Section 12

Division 2—Changes to the main example

12 Changes that would not cause the aggregation rule to apply

(1) The aggregation rule would still not apply merely because of one or more of the following changes to the main example:

    (a) changes to the number of investors acquiring ordinary shares in the company under the share scheme;

    (b) changes to the comparative amount of equity and debt under the 2 schemes;

    (c) changes to the length of the loan period, or to the rate at which the loan interest is calculated, unless this was done by reference to:

        (i) the share scheme; or

        (ii) a matter related to the share scheme;

    (d) changes to the loan scheme so that the company obtained the loan funds by issuing the investor with mandatorily redeemable preference shares that gave rise to a debt interest in the company;

    (e) the stapling of the shares to the loan.

(2) The changes set out in each of paragraphs (1)(a) to (d) will not cause the aggregation rule to apply because the interdependence test will not be satisfied.

(3) Those changes do not of themselves:

    (a) demonstrate any dependency or link between; and

    (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of the 2 schemes, because the company has to meet its obligations under each scheme regardless of its obligations under the other scheme.

(4) The change set out in paragraph (1)(e) will not cause the aggregation rule to apply because that change will cause the stapling exception in subparagraph 974-155(2)(a)(ii) of the Act to apply.

13 Changes that may cause the aggregation rule to apply

(1) The aggregation rule may apply if the pricing, terms and conditions of the loan scheme were affected by a prohibition on the company repaying the loan principal unless there was a proportionate buy-back by the company of the shares covered by the share scheme.

(2) This change would:

    (a) demonstrate a dependency or link between pricing, terms and conditions of the schemes; or

    (b) operate to change the economic consequences of the pricing, terms and conditions of one or both of the schemes.

(3) However, whether or not the interdependence test is satisfied will depend on whether this change would cause the schemes (if they were treated as a single aggregate scheme) to no longer give rise to a debt interest in the company.

Section 13

Note 1: Paragraph 974-155(1)(b) of the Act will be satisfied if the schemes no longer give rise to a debt interest, which will mean that the interdependence test is satisfied.

Note 2: The schemes may no longer give rise to a debt interest if the change means that the company no longer has an effectively non-contingent obligation under the loan scheme to provide financial benefits (see paragraph 974-20(1)(c), and section 974-135, of the Act).

(4) The design test would be satisfied because, from the common involvement of the parties in both schemes, it would be concluded that the 2 schemes were designed to operate together to produce their combined economic effect.

Part 3—Chain of debt and equity: no aggregation

14 Object

This example focuses on the operation of the interdependence test.

15 Explanation of facts

(1) A diagram explaining the facts for this example is as follows:
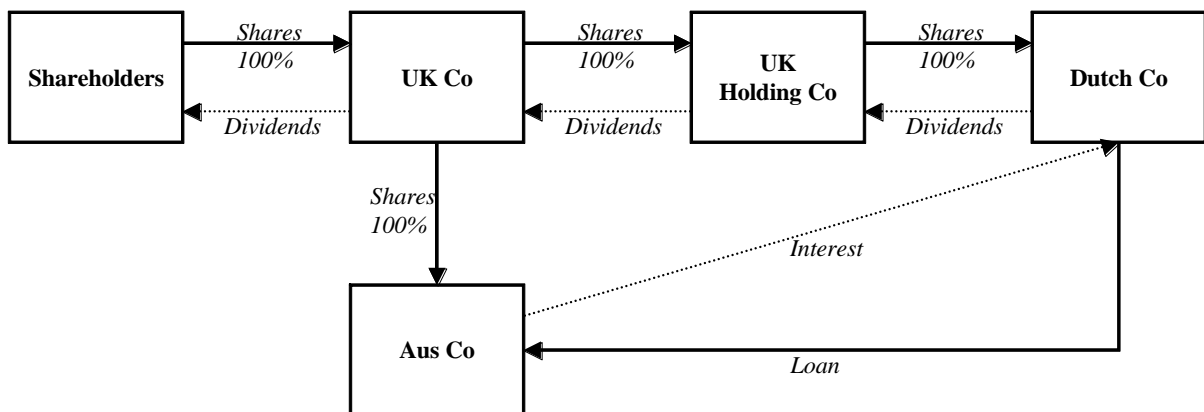
(2) A company (*UK Co*) is a widely held United Kingdom resident company.

(3) Another company (*UK Holding Co*) is a wholly owned subsidiary of UK Co. UK Holding Co is the holding company for a number of other group entities.

(4) UK Co has decided that the group will acquire a new business in Australia and that this business will be held by another company (*Aus Co*). In order to finance the acquisition, Aus Co requires $300 million.

(5) UK Co directs UK Holding Co to incorporate a special purpose company (*Dutch Co*) in the Netherlands.

(6) UK Holding Co contributes $300 million to acquire all the issued shares in Dutch Co.

(7) Dutch Co and Aus Co enter into a loan agreement under which:

   (a) Dutch Co lends $300 million to Aus Co; and

   (b) this principal of $300 million is repayable at the end of 9 years; and

   (c) financial benefits in the form of loan interest are payable periodically by Aus Co to Dutch Co during the 9-year loan period.

(8) Dutch Co pays dividends to UK Holding Co based on Dutch Co's available profits.

(9) UK Holding Co pays dividends to UK Co out of a pool of dividends received from subsidiaries, including Dutch Co.

(10) UK Co pays dividends to its shareholders.

Section 16

16 Assumptions—separate schemes exist if the aggregation rule is disregarded

(1) Assume that, under Division 974 of the Act:

(a) the acquisition by UK Holding Co of shares in Dutch Co is a scheme (the *share scheme*) that gives rise to equity interests in Dutch Co; and

(b) the loan agreement is a separate scheme (the *loan scheme*) that gives rise to a debt interest in Aus Co.

(2) Disregard the aggregation rule for the purposes of these assumptions.

17 Applying the interdependence test to the schemes

(1) The interdependence test is not satisfied in relation to the share scheme and the loan scheme because the pricing, terms and conditions of either scheme:

(a) are not dependent on, or linked to; and

(b) do not operate to change the economic consequences of;

the pricing, terms and conditions of the other scheme.

(2) This is because:

(a) Aus Co must comply with its obligations under the loan agreement regardless of the pricing, terms and conditions attached to UK Holding Co's acquisition of the shares in Dutch Co; and

(b) while in practice Dutch Co can only pay dividends on those shares if it receives interest under the loan, not paying dividends has no consequences for the pricing, terms and conditions of the loan scheme; and

(c) the funding exception in subparagraph 974-155(2)(a)(i) of the Act applies because the interest payable under the loan scheme merely funds a possible return on those shares, and this funding of a possible return is not part of the terms and conditions of either of the schemes.

18 Applying the design test to the schemes

As the interdependence test is not satisfied, it is not necessary to consider whether the design test is satisfied in relation to the 2 schemes.

19 Conclusion

As the interdependence test is not satisfied, the aggregation rule does not apply to treat the share scheme and the loan scheme as a single aggregate scheme.

Part 4—Offshore capital raising: aggregation

20 Object

This example focuses on the operation of the interdependence test and the design test.

21 Explanation of facts

(1) A diagram explaining the facts for this example is as follows:
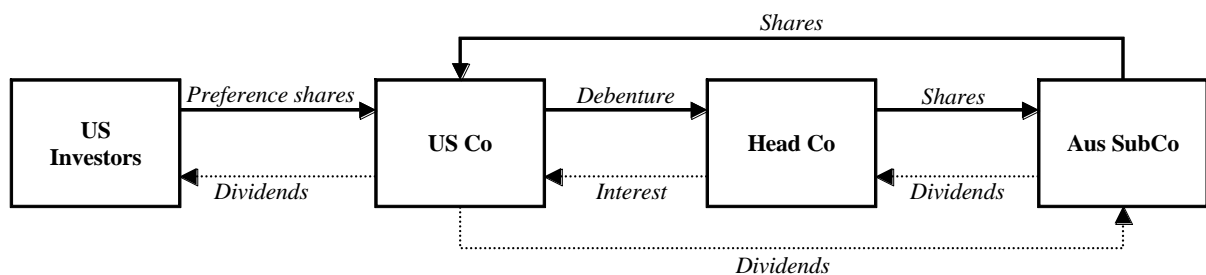
(2) A company (**Head Co**) initiates an arrangement to raise finance from US investors.

(3) Another company (**US Co**) is incorporated in Delaware by Head Co to facilitate the arrangement. US Co is a wholly-owned subsidiary of Aus SubCo, which is a subsidiary of Head Co.

(4) US Co issues preference shares in the US market. These preference shares in US Co are convertible into preference shares in Head Co at Head Co's discretion.

(5) US Co uses the US$350 million raised from issuing these preference shares to acquire a debenture from Head Co.

(6) The terms and conditions for the issue of these preference shares mention:
   (a) that the US investors are entitled to 6 monthly non-cumulative dividends; but
   (b) that this entitlement is subject to US Co receiving a corresponding amount of interest from Head Co on the debenture.

(7) The interest received by US Co from Head Co on the debenture is cumulative.

22 Assumptions—separate schemes exist if the aggregation rule is disregarded

(1) Assume that, under Division 974 of the Act:
   (a) the issuing of the preference shares in US Co is a scheme (the **share scheme**) that gives rise to equity interests in US Co; and
   (b) the debenture from Head Co is a separate scheme (the **loan scheme**) that gives rise to a debt interest in Head Co.

(2) Disregard the aggregation rule for the purposes of these assumptions.

Section 23

23 Applying the interdependence test to the schemes

(1) The interdependence test is satisfied in relation to the share scheme and the loan scheme for the reasons set out in subsections (2) and (3).

(2) Both:

    (a) the pricing, terms and conditions of the share scheme are dependent on, or linked to, the pricing, terms and conditions of the loan scheme; and

    (b) the pricing, terms and conditions of the loan scheme operate to change the economic consequences of the pricing, terms and conditions of the share scheme;

because:

    (c) the entitlement to 6 monthly non-cumulative dividends under the share scheme is subject to US Co receiving a corresponding amount of interest from Head Co on the debenture; and

    (d) the preference shares under the share scheme are convertible into preference shares in Head Co at Head Co's discretion.

Note 1:   Paragraph (c) means the entitlement to a return payable to the US investors is legally contingent on US Co receiving interest on the debenture from Head Co.

Note 2:   The funding exception in subparagraph 974-155(2)(a)(i) of the Act does not apply because the contingent nature of the entitlement is part of the terms and conditions of the share scheme.

(3) The schemes (if they were treated as a single aggregate scheme) would give rise to equity interests in Head Co held by the US investors.

Note: These equity interests would be covered by item 3 of the table in subsection 974-75(1) of the Act.

24 Applying the design test to the schemes

The design test is satisfied because, having regard to the following:

    (a) the common involvement of Head Co and US Co in the 2 schemes;

    (b) the relationships between 2 of the parties to the 2 schemes, as US Co is indirectly owned by Head Co;

    (c) normal commercial understandings and practices;

it would be concluded that the 2 schemes were designed to operate together to produce their combined economic effect.

Note: That combined economic effect being a way for Head Co to raise finance from the US investors while paying them discretionary returns.

25 Conclusion

As the interdependence test and design test are satisfied, the aggregation rule applies to treat the share scheme and the loan scheme as a single aggregate scheme.

Part 5—Contra-put scheme: aggregation

26 Object

This example focuses on the operation of the interdependence test and the design test.

27 Explanation of facts

(1) A diagram explaining the facts for this example is as follows:
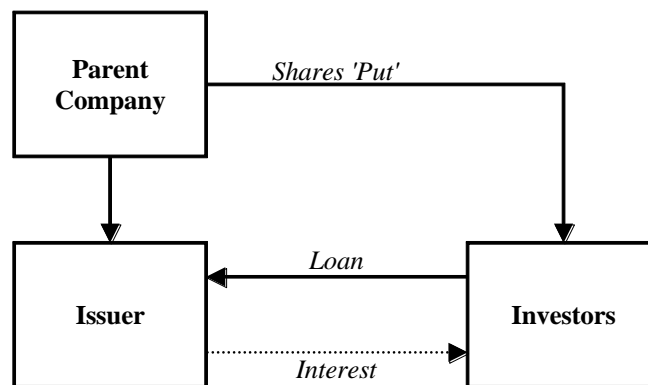
(2) A company (the *issuer*) is a wholly-owned subsidiary of another company (the *parent company*).

(3) The issuer and the investors enter into arrangements (the *loan*) under which:

    (a) the investors agree to lend a total of $10 million to the issuer; and

    (b) at the end of 9 years either:

        (i) the issuer must repay the $10 million loan principal; or

        (ii) if the parent company exercises the put option referred to in subsection (4)—the issuer need not repay that loan principal; and

    (c) financial benefits in the form of loan interest are payable by the issuer to the investors periodically during the 9-year loan period at a rate of 9% per annum.

(4) The parent company and the investors enter into arrangements under which the investors give the parent company a put option over parent company shares, so that at the end of the 9-year loan period referred to in subsection (3), the parent company may sell the investors 1 million parent company shares for a total of $10 million.

28 Assumptions—separate schemes exist if the aggregation rule is disregarded

(1) Assume that, under Division 974 of the Act:

    (a) the giving of the put option is a scheme (the *option scheme*) that gives rise to an equity interest in the parent company; and

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Section 29

    (b) the loan is a separate scheme (the ***loan scheme***) that gives rise to a debt interest in the issuer.

    (2) Disregard the aggregation rule for the purposes of these assumptions.

29 Applying the interdependence test to the schemes

    (1) The interdependence test is satisfied in relation to the option scheme and the loan scheme for the reasons set out in subsections (2) and (3).

    (2) The pricing, terms and conditions of the option scheme operate to change the economic consequences of the pricing, terms and conditions of the loan scheme because the investors cannot require repayment of the loan principal if the parent company decides to exercise the put option.

       Note: The investors would instead receive the shares in the parent company in lieu of the repayment of the loan principal.

    (3) This right to exercise the put option would cause the schemes (if they were treated as a single aggregate scheme) to no longer give rise to a debt interest in the issuer.

       Note: The schemes would no longer give rise to a debt interest because exercising the put option would mean that the amount lent to the issuer under the loan would effectively be applied for the issuing of equity interests in the parent company. That is, paragraph 974-30(1)(b) of the Act would cause paragraph 974-20(1)(c) of the Act not to be satisfied.

30 Applying the design test to the schemes

    The design test is satisfied because, having regard to the following:
      (a) the relationship between the issuer and the parent company, in that the issuer is a wholly-owned subsidiary of the parent company;
      (b) normal commercial understandings and practices;
    it would be concluded that the 2 schemes were designed to operate together to produce their combined economic effect.

       Note: That combined economic effect being a way for the parent company to convert the loan into an equity injection at the loan's maturity.

31 Conclusion

    As the interdependence test and design test are satisfied, the aggregation rule applies to treat the option scheme and the loan scheme as a single aggregate scheme.

Chapter 3—Stapling examples

Part 6—99/1 structure: no aggregation

32 Object

This example focuses on the operation of the interdependence test and the design test.

33 Explanation of facts

(1) A diagram explaining the facts for this example is as follows:
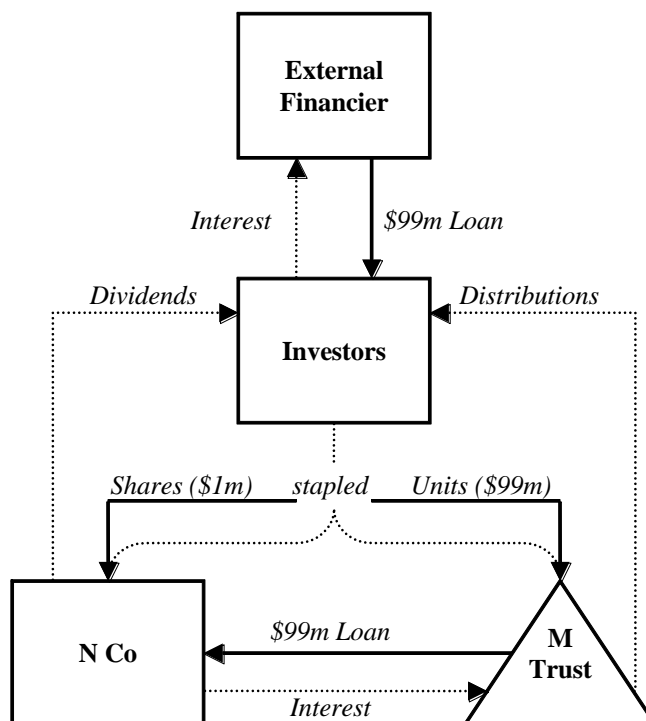
(2) Units in a trust (**M Trust**) and shares in a company (**N Co**) are stapled to one another under a stapling agreement. Under the stapling agreement:

    (a) the stapling agreement takes precedence over the deed constituting M Trust (**M Trust's deed**) and N Co's constitution; and

    (b) the units and shares can only be disposed of together.

(3) The investors borrow $99 million from an independent external financier (the **external loan**). The investors use the loan funds and $1 million of their own money to acquire the stapled securities.

(4) M Trust and N Co enter into an arrangement (the **internal loan**) under which:

    (a) M Trust lends to N Co the $99 million M Trust received from the investors; and

Section 34

    (b) financial benefits in the form of loan interest, worked out using an arm's length interest rate, are payable periodically by N Co to M Trust.

(5) The investors are entitled to demand the return of invested trust capital, or the distribution of trust income, without this being subject to:

    (a) any limitations in M Trust's deed, the stapling agreement or other instruments; or

    (b) N Co's ability to return share capital or distribute profits to its shareholders.

(6) N Co has no control over the trustee of M Trust, and no rights relating to the appointment of directors of that trustee (assuming the trustee is a body corporate).

34 Assumptions—separate schemes exist if the aggregation rule is disregarded

(1) Assume that, under Division 974 of the Act:

    (a) the external loan is a scheme (the ***external loan scheme***) that gives rise to debt interests in the investors; and

    (b) the internal loan is a separate scheme (the ***internal loan scheme***) that gives rise to a debt interest in N Co; and

    (c) the acquisition by the investors of shares in N Co (as part of the stapled securities) is a separate scheme (the ***share scheme***) that gives rise to equity interests in N Co; and

    (d) the acquisition by the investors of units in M Trust (as part of the stapled securities) is a separate scheme (the ***unit scheme***) that does not give rise to equity interests or debt interests.

(2) Disregard the aggregation rule for the purposes of these assumptions.

35 Applying the aggregation rule to the internal loan scheme and the share scheme

(1) The interdependence test is not satisfied in relation to the internal loan scheme and the share scheme because the pricing, terms and conditions of either scheme:

    (a) are not dependent on, or linked to; and

    (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of the other scheme.

(2) This is because N Co must perform its obligations under the internal loan regardless of anything to do with the shares in N Co. For example, repaying the internal loan is not legally contingent on whether dividends are payable on those shares.

(3) As the interdependence test is not satisfied, it is not necessary to consider whether the design test is satisfied in relation to these 2 schemes.

(4) As the interdependence test is not satisfied, the aggregation rule does not apply to treat these 2 schemes as a single aggregate scheme.

36 Applying the aggregation rule to the internal loan scheme and the unit scheme

(1) The interdependence test is not satisfied in relation to the internal loan scheme and the unit scheme because the pricing, terms and conditions of either scheme:

    (a) are not dependent on, or linked to; and

    (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of the other scheme.

(2) This is because, while M Trust's return on the internal loan will fund M Trust's distributions on the units in M Trust, those distributions are not legally contingent on that return.

(3) As the interdependence test is not satisfied, it is not necessary to consider whether the design test is satisfied in relation to these 2 schemes.

(4) As the interdependence test is not satisfied, the aggregation rule does not apply to treat these 2 schemes as a single aggregate scheme.

37 Applying the aggregation rule to the external loan scheme, the share scheme and the unit scheme

(1) The interdependence test is not satisfied in relation to the external loan scheme, the share scheme and the unit scheme because the funding exception in subparagraph 974-155(2)(a)(i) of the Act will apply. While the investors' return on their shares in N Co, or their return on their units in M Trust, will fund the investors' repayment of the external loan:

    (a) those repayments are not legally contingent on those returns; and

    (b) such a contingency is not part of the terms and conditions of any of these 3 schemes.

(2) In addition, the interdependence test is not satisfied in relation to the share scheme and the unit scheme because the stapling exception in subparagraph 974-155(2)(a)(ii) of the Act will apply.

(3) The design test is not satisfied because, having regard to the following:

    (a) the independence of the external financier;

    (b) normal commercial understandings and practices;

it would not be concluded that these 3 schemes were designed to operate together to produce their combined economic effect.

(4) As neither the interdependence test nor the design test is satisfied, the aggregation rule does not apply to treat these 3 schemes as a single aggregate scheme.

EXPOSURE DRAFT

Chapter 3 Stapling examples
Part 7 Debt raised by a property trust: no aggregation
Division 1 Object, explanation of facts and assumptions

Section 38

## Part 7—Debt raised by a property trust: no aggregation

Division 1—Object, explanation of facts and assumptions

38 Object

This example focuses on the operation of the interdependence test and the design test.

39 Diagram

A diagram explaining the facts for this example is as follows:
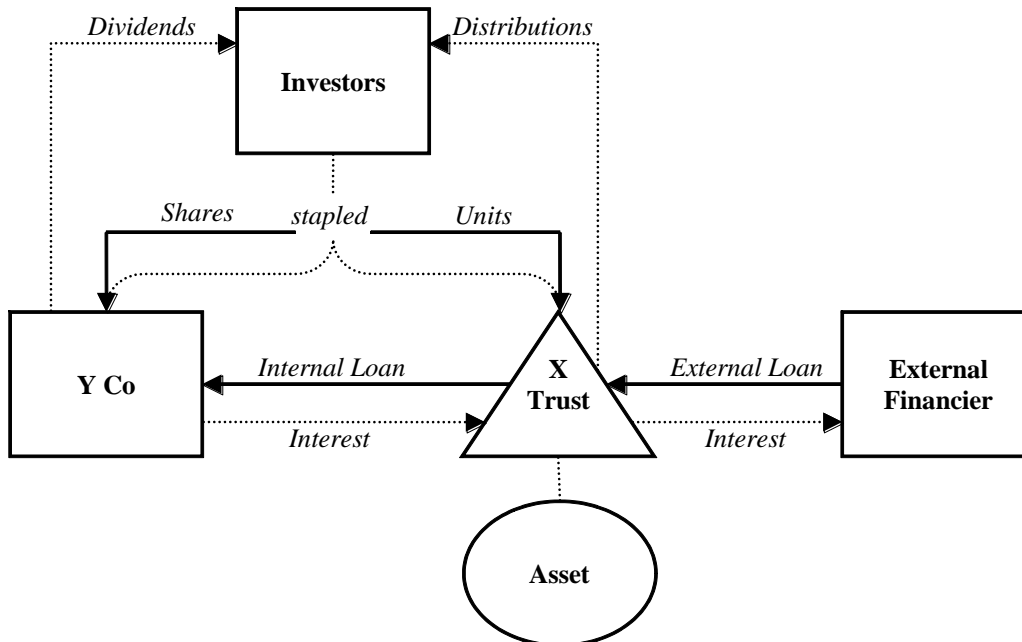
40 X Trust

(1) A property trust (*X Trust*) holds Australian commercial properties having a total market value of $500 million. Units in X Trust are listed on the Australian Securities Exchange (the *ASX*).

(2) X Trust derives rental income from leasing these properties to third parties.

(3) Under the deed constituting X trust (*X Trust's deed*), the trustee may, in its absolute discretion, distribute income or capital to some or all of X Trust's unit holders.

(4) X Trust is not taxed under Division 6C of Part III of the *Income Tax Assessment Act 1936*.

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Debt raised by a property trust: no aggregation **Part 7**
Object, explanation of facts and assumptions **Division 1**

Section 41

41 Y Co

(1) A company (**Y Co**) is an associated entity of X Trust.

(2) Y Co is responsible for managing the properties held by X Trust, and for developing those properties.

(3) X Trust pays a service fee to Y Co at a market rate for this property management and development.

(4) Y Co has no control over the trustee of X Trust, and no rights relating to the appointment of directors of that trustee (assuming the trustee is a body corporate).

42 The stapling agreement

(1) The shares in Y Co are stapled to the units in X Trust under a stapling agreement.

(2) Under the stapling agreement:
   (a) the stapling agreement takes precedence over X Trust's deed and Y Co's constitution; and
   (b) X Trust must not consolidate, subdivide, buy-back, cancel or otherwise reorganise its units unless there is a corresponding transaction with the shares in Y Co; and
   (c) Y Co must not consolidate, subdivide, buy-back, cancel or otherwise reorganise its shares unless there is a corresponding transaction with the units in X Trust.

(3) The stapling agreement and X Trust's deed are subject to the ASX's listing rules (within the meaning of Chapter 7 of the *Corporations Act 2001*).

43 Offer of stapled securities

(1) The stapled securities are listed on the ASX and offered to investors by way of a prospectus.

(2) Funds totalling $50 million are raised on the issue of stapled securities.

(3) These funds are allocated to Y Co and X Trust having regard to the overall value of the 2 entities. As a result, $30 million is allocated to X Trust and $20 million to Y Co.

44 The external loan

X Trust and an independent third party (the **external financier**) enter into arrangements (the **external loan**) under which:
   (a) the external financier lends an additional $50 million to X Trust; and
   (b) this principal of $50 million is repayable at the end of 9 years; and
   (c) financial benefits in the form of loan interest accrue during that 9-year loan period and are payable by X Trust to the external financier at the end of that period.

EXPOSURE DRAFT

Chapter 3 Stapling examples
Part 7 Debt raised by a property trust: no aggregation
Division 1 Object, explanation of facts and assumptions

Section 45

45 The internal loan

X Trust and Y Co enter into an arrangement (the *internal loan*) under which:

  (a) X Trust lends $80 million to Y Co; and

  (b) this principal of $80 million:

     (i) is made up of the $30 million raised on the issue of the stapled securities and the $50 million raised from the external loan; and

     (ii) is repayable at the end of 9 years; and

  (c) financial benefits in the form of loan interest accrue, at a mark up on the interest rate on the external loan, during that 9-year loan period and are payable by Y Co to X Trust at the end of that period.

46 Assumptions—separate schemes exist if the aggregation rule is disregarded

(1) Assume that, under Division 974 of the Act:

  (a) the issuing of the shares in Y Co (as part of the stapled securities) is a scheme (the *share scheme*) that gives rise to equity interests in Y Co; and

  (b) the issuing of the units in X Trust (as part of the stapled securities) is a separate scheme (the *unit scheme*) that does not give rise to equity interests or debt interests; and

  (c) the external loan is a separate scheme (the *external loan scheme*) that gives rise to a debt interest in X Trust; and

  (d) the internal loan is a separate scheme (the *internal loan scheme*) that gives rise to a debt interest in Y Co.

(2) Disregard the aggregation rule for the purposes of these assumptions.

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Debt raised by a property trust: no aggregation **Part 7**
Applying the aggregation rule to the schemes **Division 2**

Section 47

Division 2—Applying the aggregation rule to the schemes

47 Applying the interdependence test to the internal loan scheme, the unit scheme and the share scheme

(1) The interdependence test is not satisfied in relation to the internal loan scheme, the unit scheme and the share scheme because the pricing, terms and conditions of one or more of these schemes:

    (a) are not dependent on, or linked to; and

    (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of any of the other schemes.

Unit scheme and the share scheme

(2) This is the case for the unit scheme and the share scheme because:

    (a) the stapling exception in subparagraph 974-155(2)(a)(ii) of the Act will apply; and

    (b) Y Co does not control the trustee of X Trust (unlike the example in Part 9).

Internal loan scheme and the share scheme

(3) This is the case for the internal loan scheme and the share scheme because Y Co must perform its obligations under the internal loan regardless of anything to do with the shares in Y Co (for example, repaying the internal loan is not legally contingent on whether dividends are paid on those shares).

Internal loan scheme and the unit scheme

(4) This is the case for the internal loan scheme and the unit scheme because:

    (a) the power of X Trust's trustee to return capital is exercisable in respect of X Trust's funds remaining after repaying X Trust's liabilities, including the external loan; and

    (b) unlike the example in Part 9, X Trust's trustee can return invested capital to X Trust's unit holders independently of any actions of Y Co.

48 Applying the interdependence test to the 4 schemes

(1) The interdependence test is not satisfied in relation to the external loan scheme, the internal loan scheme, the unit scheme and the share scheme because the pricing, terms and conditions of one or more of these schemes:

    (a) are not dependent on, or linked to; and

    (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of any of the other schemes.

(2) This is because X Trust must perform its obligations under the external loan regardless of:

    (a) anything to do with the units in X Trust; and

    (b) whether Y Co meets its obligations under the internal loan; and

(c) anything in the stapling agreement.

49 Applying the design test to these combinations of the schemes

(1) The design test is not satisfied in relation to either of these combinations of the schemes:

(a) the internal loan scheme, the unit scheme and the share scheme; or

(b) the external loan scheme, the internal loan scheme, the unit scheme and the share scheme.

(2) This is because, having regard to:

(a) the absence of any evidence that either of these combinations of the schemes was entered into or carried out in a holistic way, with each component scheme being part of a unified whole; and

(b) the commercial manner in which the schemes were entered into; and

(c) normal commercial understandings and practices; and

(d) in the case of the combination of schemes referred to in paragraph (1)(b)— the independence of the external financier;

it would not be concluded that either of the combinations of schemes was designed to operate together to produce their combined economic effect.

Example: Normal commercial understandings and practices would treat the internal loan scheme, the unit scheme and the share scheme as separate schemes because the internal loan was only one of X Trust's many assets. So, returns of trust capital would reflect X Trust's entire net asset position, not just the value of the internal loan.

50 Conclusion

As neither the interdependence test nor the design test is satisfied, the aggregation rule does not apply to treat either of these combinations of the schemes as a single aggregate scheme:

(a) the internal loan scheme, the unit scheme and the share scheme; or

(b) the external loan scheme, the internal loan scheme, the unit scheme and the share scheme.

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Debt raised by a property trust: no aggregation **Part 7**
Effect of changes to the facts **Division 3**

Section 51

Division 3—Effect of changes to the facts

51 Changes to the facts that would not cause the aggregation rule to apply

(1) The aggregation rule still would not apply to the internal loan scheme, the unit scheme and the share scheme if the capital funding were instead by way of a capital distribution on the shares in Y Co that:

    (a) is compulsorily applied as an additional capital contribution to the units in X Trust held by shareholders of those shares; and

    (b) subject to the approval of each of those shareholders.

(2) The interdependence test would not be satisfied in relation to these 3 schemes because the pricing, terms and conditions of one or more of the schemes:

    (a) would not be dependent on, or linked to; and

    (b) would not operate to change the economic consequences of;

the pricing, terms and conditions of any of the other schemes.

(3) As the interdependence test would not be satisfied, it is not necessary to consider whether the design test would be satisfied in relation to these 3 schemes.

(4) As the interdependence test would not be satisfied, the aggregation rule would not apply to treat these 3 schemes as a single aggregate scheme.

EXPOSURE DRAFT

Chapter 3 Stapling examples
Part 8 Trust and company staple: no aggregation
Division 1 Object, explanation of facts and assumptions

Section 52

Part 8—Trust and company staple: no aggregation

Division 1—Object, explanation of facts and assumptions

52 Object

This example focuses on the operation of the interdependence test and the design test.

53 Diagram

A diagram explaining the facts for this example is as follows:
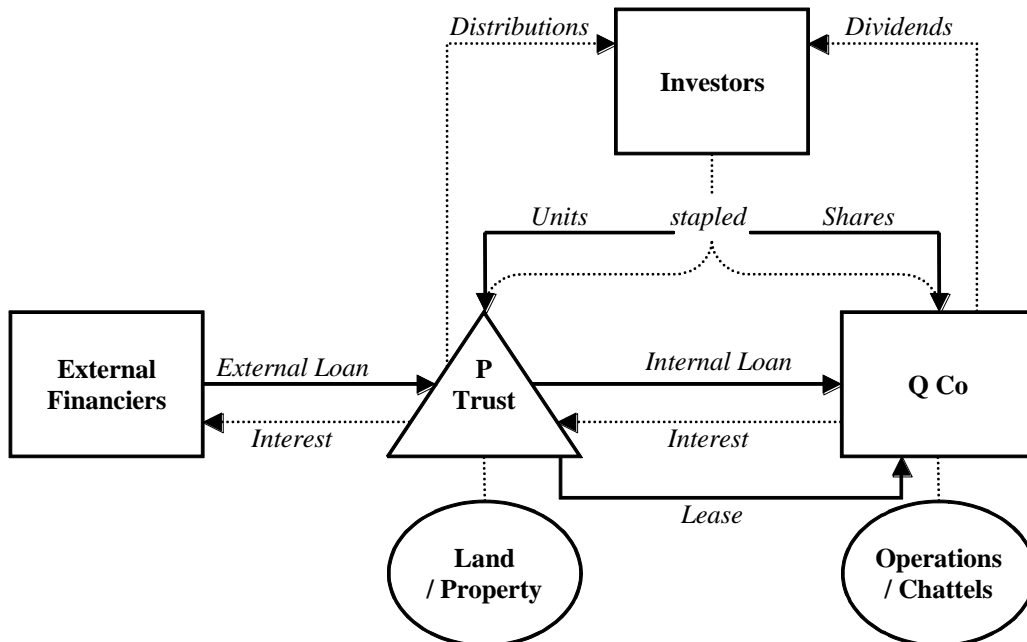
Note 1: This example is based on project financed single-project economic infrastructure ownership models that can apply to assets such as toll roads, ports, airports and electricity generation assets.

Note 2: Shares in P Trust's trustee company could also be included in the stapled securities, but this is not done in this example for simplicity.

54 P Trust and Q Co

(1) A unit trust (*P Trust*), that is not a public trading trust, holds real property (with affixed improvements).

(2) A company (*Q Co*) is formed to perform a number of operations.

Note: Q Co's operations need not be limited to the arrangement to which this Division relates.

(3) Q Co has no control over the trustee of P Trust, and no rights relating to the appointment of directors of that trustee (assuming the trustee is a body corporate).

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Trust and company staple: no aggregation **Part 8**
Object, explanation of facts and assumptions **Division 1**

Section 55

55 The stapling agreement

(1) The shares in Q Co are stapled to the units in P Trust under a stapling agreement.

(2) Under the stapling agreement:

(a) the stapling agreement takes precedence over the deed constituting P Trust and Q Co's constitution; and

(b) P Trust must not consolidate, subdivide, buy-back, cancel or otherwise reorganise any units unless there is a corresponding transaction with the shares in Q Co; and

(c) Q Co must not consolidate, subdivide, buy-back, cancel or otherwise reorganise its shares unless there is a corresponding transaction with the units in P Trust.

56 The external loan

P Trust, Q Co and the trustee for a syndicate of independent external financiers enter into arrangements (the ***external loan***) under which:

(a) the external financiers lend $60 million to P Trust; and

(b) financial benefits in the form of loan interest, worked out using an arm's length interest rate, are payable periodically by P Trust to the external financiers; and

(c) Q Co agrees not to pay dividends, or to do so only in accordance with the external loan; and

(d) Q Co guarantees the performance of P Trust to the external financiers by Q Co providing the security and guarantees required to support its obligations to P Trust under the lease and internal loan referred to in section 57; and

(e) the trustee for the syndicate holds the following security to support P Trust:

(i) unit and share mortgages over the units in the P Trust and the shares in Q Co;

(ii) a fixed and floating charge over all P Trust's assets and Q Co's assets.

Note 1:   This means P Trust is funded by:
(a) its units issued as part of the stapled securities; and
(b) the $60 million under the external loan.

Note 2:   For paragraph (c), the external loan could, for example, permit paying dividends out of available post-debt service cash flows.

57 The real property lease and internal loan

(1) P Trust and Q Co enter into a lease agreement (the ***real property lease***) under which P Trust leases its real property to Q Co for an arm's length rental amount.

(2) P Trust and Q Co enter into a loan agreement (the ***internal loan***) under which:

(a) P Trust lends $20 million to Q Co; and

(b) this principal of $20 million is repayable at the end of 9 years; and

(c) financial benefits in the form of loan interest, at a rate of 8% per annum, accrue during that 9-year loan period and are payable by Q Co to P Trust at the end of that period.

Note: This means P Trust has 2 investments:

(a)   the real property it has leased to Q Co; and

(b)   the internal loan.

58   Assumptions—separate schemes exist if the aggregation rule is disregarded

(1)   Assume that, under Division 974 of the Act:

(a)   the issuing of the shares in Q Co (as part of the stapled securities) is a scheme (the ***share scheme***) that gives rise to equity interests in Q Co; and

(b)   the issuing of the units in P Trust (as part of the stapled securities) is a separate scheme (the ***unit scheme***) that does not give rise to equity interests or debt interests; and

(c)   the external loan is a separate scheme (the ***external loan scheme***) that gives rise to a debt interest in P Trust; and

(d)   the internal loan is a separate scheme (the ***internal loan scheme***) that gives rise to a debt interest in Q Co; and

(e)   the real property lease is a separate scheme (the ***lease scheme***) that does not give rise to equity interests or debt interests.

(2)   Disregard the aggregation rule for the purposes of these assumptions.

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Trust and company staple: no aggregation **Part 8**
Applying the aggregation rule to the schemes **Division 2**

Section 59

Division 2—Applying the aggregation rule to the schemes

59 Applying the interdependence test to the internal loan scheme, the unit scheme, the share scheme and the lease scheme

(1) The interdependence test is not satisfied in relation to the internal loan scheme, the unit scheme, the share scheme and the lease scheme because the pricing, terms and conditions of one or more of these schemes:

   (a) are not dependent on, or linked to; and

   (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of any of the other schemes.

Unit scheme and the share scheme

(2) This is the case for the unit scheme and the share scheme because:

   (a) the stapling exception in subparagraph 974-155(2)(a)(ii) of the Act will apply; and

   (b) Q Co does not control the trustee of P Trust (unlike the example in Part 9).

Internal loan scheme and the share scheme

(3) This is the case for the internal loan scheme and the share scheme because Q Co must perform its obligations under the internal loan regardless of anything to do with the shares in Q Co (for example, repaying the internal loan is not legally contingent on whether dividends are payable on those shares).

   Note: The agreement referred to in paragraph 56(c) about not paying dividends is part of the external loan scheme, not the internal loan scheme.

Internal loan scheme and the unit scheme

(4) This is the case for the internal loan scheme and the unit scheme because the funding exception in subparagraph 974-155(2)(a)(i) of the Act will apply. While P Trust's return on the internal loan will fund P Trust's distributions on the units in P Trust:

   (a) those distributions are not legally contingent on that return; and

   (b) such a contingency is not part of the terms and conditions of either the internal loan scheme or the unit scheme.

Internal loan scheme and the lease scheme

(5) This is the case for the internal loan scheme and the lease scheme because Q Co must perform its obligations under the internal loan regardless of anything to do with the real property lease (for example, repaying the internal loan is not legally contingent on whether payments are made under the lease).

60 Applying the interdependence test to the external loan scheme and the unit scheme

(1) The interdependence test is not satisfied in relation to the external loan scheme and the unit scheme because the pricing, terms and conditions of either of these schemes:

    (a) are not dependent on, or linked to; and

    (b) do not operate to change the economic consequences of;

the pricing, terms and conditions of the other scheme.

(2) This is because P Trust must perform its obligations under the external loan regardless of:

    (a) anything to do with the units in P Trust; and

    (b) whether Q Co meets its obligations under the internal loan; and

    (c) anything in the stapling agreement.

61 Applying the interdependence and design tests to the external loan scheme and the internal loan scheme

(1) The interdependence test is not satisfied in relation to the external loan scheme and the internal loan scheme for the reasons set out in subsections (2) and (3).

(2) The pricing, terms and conditions of the external loan scheme:

    (a) are dependent on, or linked to; and

    (b) operate to change the economic consequences of;

the pricing, terms and conditions of the internal loan scheme because commitments given by Q Co under the external loan are necessary for P Trust's ability to source funds to on-lend to Q Co under the internal loan.

Note 1:   The most relevant of these commitments is the agreement referred to in paragraph 56(c) about not paying dividends.

Note 2:   These commitments are more than a mere taking of security, and would not fall within the exception in subparagraph 974-155(2)(a)(iv) of the Act.

(3) However, this dependence, link or operation would not cause the schemes (if they were treated as a single aggregate scheme) to change whether Division 974 of the Act treats an interest as a debt interest or an equity interest.

Note: The single scheme would continue to give rise to debt interests in P Trust and Q Co.

(4) The design test is not satisfied in relation to the external loan scheme and the internal loan scheme because, having regard to the following:

    (a) the independence of the external financiers;

    (b) the commercial manner in which the schemes were entered into;

    (c) normal commercial understandings and practices;

it would not be concluded that the schemes were designed to operate together to produce their combined economic effect.

(5) In applying the design test to these schemes, normal commercial understandings and practices outweigh the common involvement of the parties to the schemes.

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Trust and company staple: no aggregation **Part 8**
Applying the aggregation rule to the schemes **Division 2**

Section 62

62 Conclusion

As neither the interdependence test nor the design test is satisfied, the aggregation rule does not apply to treat any combination of these 5 schemes as a single aggregate scheme.

EXPOSURE DRAFT

Chapter 3 Stapling examples
Part 9 Finance trust and company staple: aggregation
Division 1 Object, explanation of facts and assumptions

Section 63

Part 9—Finance trust and company staple: aggregation

Division 1—Object, explanation of facts and assumptions

63 Object

This example focuses on the operation of the interdependence test and the design test.

64 Diagram

A diagram explaining the facts for this example is as follows:
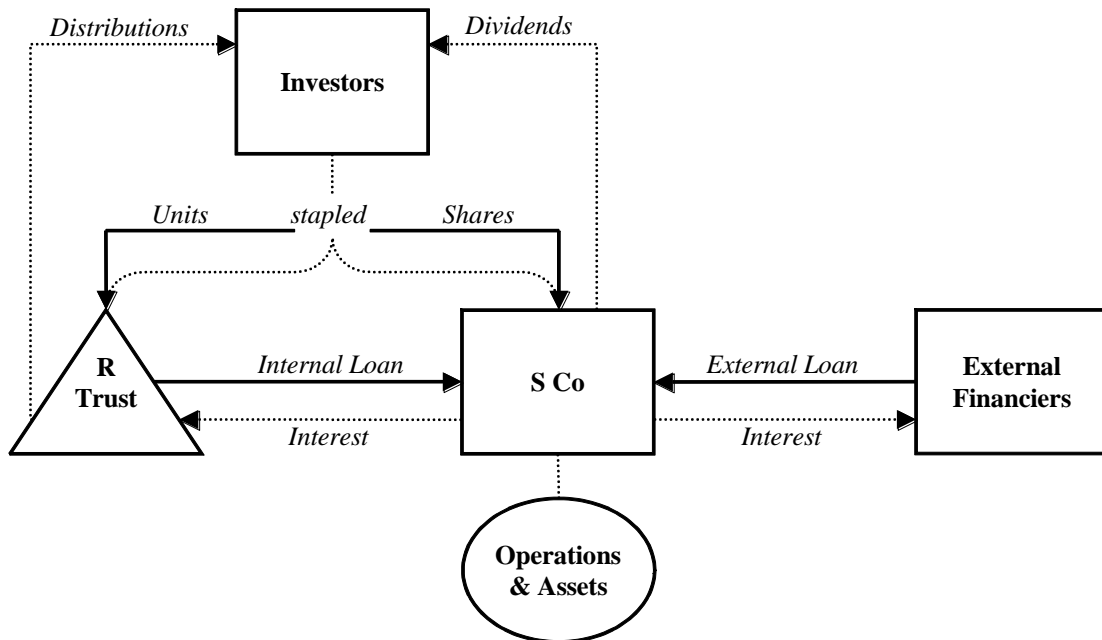
65 R Trust and S Co

(1) A unit trust (**R Trust**), that is not a public trading trust, is formed solely to provide finance to a company (**S Co**).

(2) S Co is to acquire, hold and operate for the long term certain substantial physical assets.

(3) S Co is to be financed mostly with external debt on arm's length terms.

(4) External financiers are prepared to provide this finance if:
  (a) shareholders in S Co commit an amount of permanent capital as a buffer for losses; and
  (b) shareholders in S Co are not able to insist on the repayment of their investment, even in a case where this is subordinate to other rights; and
  (c) further external borrowing is limited.

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Finance trust and company staple: aggregation **Part 9**
Object, explanation of facts and assumptions **Division 1**

Section 66

66 The stapling agreement

(1) The shares in S Co are stapled to the units in R Trust under a stapling agreement.

Stapling agreement takes precedence

(2) The stapling agreement is to take precedence over the deed constituting R trust (**R Trust's deed**) and S Co's constitution.

> Note: This could be achieved by amending that deed or constitution to be consistent with the stapling agreement.

Provisions about the trustee of R Trust etc.

(3) Under the stapling agreement:

(a) the unit holders in R Trust are not permitted to replace the trustee of R Trust; and

(b) that trustee is to be a company (**Trustee Co**) that:

(i) has nominal capital; and

(ii) is to be wholly owned by a professional trustee company; and

(c) S Co has the right to nominate 2 of the 3 directors of Trustee Co; and

(d) if the professional trustee company no longer wants to wholly own Trustee Co, it must give S Co the option of acquiring the shares in Trustee Co; and

(e) R Trust's only asset is to be a loan to S Co (see section 68).

Provisions about the stapled securities

(4) Under the stapling agreement:

(a) Trustee Co must not consolidate, subdivide, cancel, buy back or redeem units in R Trust, or otherwise reorganise R Trust's capital, unless:

(i) there is a corresponding transaction with the shares in S Co; and

(ii) the same ratio of units to shares is maintained; and

(b) S Co must not consolidate, subdivide, cancel, buy back or redeem shares in S Co, or otherwise reorganise its capital, unless:

(i) there is a corresponding transaction with the units in R Trust; and

(ii) the same ratio of units to shares is maintained; and

(c) despite any law or R Trust's deed, Trustee Co:

(i) must not exercise its powers only in the interests of R Trust's unit holders; and

(ii) must have regard to the interests of the S Co's shareholders; and

(d) R Trust's unit holders are to have no right, in any circumstances, to insist on a distribution (including in a winding up), a return of capital or the redemption of their units; and

(e) S Co's shareholders are to have no right, in any circumstances, to insist on a distribution (including in a winding up), a return of capital or the redemption of their shares; and

(f) subject to paragraphs (a), (c) and (d), Trustee Co may, in its absolute discretion, do any or all of the following:

(i) distribute capital, or income, to R Trust's unit holders;

> > (ii) redeem any or all of the units held by any or all of R Trust's unit holders; and
>
> (g) subject to paragraphs (b) and (e), S Co may, in its absolute discretion, do any or all of the following:
>
> > (i) distribute capital, or income, to its shareholders;
> >
> > (ii) redeem any or all of its shares held by its shareholders.

Note 1: Paragraph (c) overrides a trustee's normal fiduciary duty to act only in the interests of the unit holders of the trust.

Example: Trustee Co must not call up and distribute capital if to do so would harm the interests of the investors in their capacity as S Co shareholders.

Note 2: The apparent breadth of paragraphs (f) and (g) is significantly reduced in practice (see subsections 69(2) and 72(2)).

67 The external loan

S Co and the trustee for a syndicate of independent external financiers enter into arrangements (the *external loan*) under which:

(a) the external financiers lend funds to S Co; and

(b) this loan principal has tranches repayable at maturity dates of 5 years and 7 years; and

(c) financial benefits in the form of loan interest, worked out using an arm's length interest rate, are payable periodically by S Co to the external financiers; and

(d) a limit is specified for the maximum amount that S Co may borrow from any other external lenders (other than R Trust); and

(e) the trustee for the syndicate (the *security trustee*) holds the following security in S Co:

> (i) a share mortgage over the shares in S Co;
>
> (ii) a fixed and floating charge over all of S Co's assets.

68 The internal loan and subordination deed

(1) S Co and Trustee Co enter into a loan agreement (the *internal loan*) under which:

(a) R Trust lends to S Co the funds that R Trust raises from the issuing of the stapled securities; and

(b) this loan principal is repayable at the end of 9 years; and

(c) financial benefits in the form of loan interest, worked out using an arm's length interest rate, are payable by S Co to R Trust at the end of that 9-year period.

Note 1: Most of the value of the stapled securities was attributed to the units in R Trust.

Note 2: This internal loan is R Trust's only asset.

(2) The security trustee, S Co and Trustee Co enter into a deed (the *subordination deed*) under which Trustee Co agrees to defer, until a particular date, making any claim against S Co for the repayment of the internal loan if:

(a) debt is outstanding under the external loan; and

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Finance trust and company staple: aggregation **Part 9**
Object, explanation of facts and assumptions **Division 1**

Section 69

(b) the security trustee has not consented to the claim.

(3) There is no expectation that, upon repayment of the internal loan, R Trust will be wound up and the trust capital distributed to R Trust's unit holders.

69 Result and combined effect of these arrangements

(1) S Co uses the funds lent to it under the external loan and internal loan to acquire the intended assets. S Co derives third party revenues from the operations it conducts using the assets.

(2) The combined effect of the arrangements referred to in sections 66 to 68 is that:

(a) R Trust's unit holders are unable to require Trustee Co to enforce its rights against S Co (in relation to the internal loan), and are unable to insist on the distribution of the funds lent under the internal loan; and

(b) S Co is able to control Trustee Co in that S Co is able to control the use of the internal loan funds, and when and to what extent it repays those funds.

This effect is accepted by the external financiers and ratings agencies as meeting their requirements.

70 Assumptions—separate schemes exist if the aggregation rule is disregarded

(1) Assume that, under Division 974 of the Act:

(a) the issuing of the shares in S Co (as part of the stapled securities) is a scheme (the *share scheme*) that gives rise to equity interests in S Co; and

(b) the issuing of the units in R Trust (as part of the stapled securities) is a separate scheme (the *unit scheme*) that does not give rise to equity interests or debt interests; and

(c) the external loan is a separate scheme (the *external loan scheme*) that gives rise to a debt interest in S Co; and

(d) the internal loan is a separate scheme (the *internal loan scheme*) that gives rise to a debt interest in S Co.

(2) Disregard the aggregation rule for the purposes of these assumptions.

Division 2—Applying the aggregation rule to the schemes

71 Applying the aggregation rule to the external loan scheme and the internal loan scheme

(1) The subordination deed means the pricing, terms and conditions of the external loan scheme are linked to, or operate to change the economic consequences of, the pricing, terms and conditions of the internal loan scheme.

(2) However, this link or operation happens merely because the subordination deed makes the obligation to pay financial benefits under the internal loan subordinate to the similar obligation under the external loan. The subordination deed does not make either obligation contingent on the other. This means the subordination exception in subparagraph 974-155(2)(a)(iii) of the Act will apply.

> Note: In other words, the subordination deed only has the effect of placing the external loan at the head of the queue should there be a shortfall of assets to meet S Co's obligations.

(3) The subordination deed would also not cause the schemes (if they were treated as a single aggregate scheme) to no longer give rise to debt interests in S Co.

(4) As the interdependence test is not satisfied, it is not necessary to consider whether the design test is satisfied in relation to these 2 schemes.

(5) As the interdependence test is not satisfied, the aggregation rule does not apply to treat the external loan scheme and the internal loan scheme as a single aggregate scheme.

72 Applying the interdependence test to the share scheme, the unit scheme and the internal loan scheme

(1) The interdependence test is satisfied in relation to the share scheme, the unit scheme and the internal loan scheme for the reasons set out in subsections (2) and (3).

The link or changed economic operation exists

(2) The pricing, terms and conditions of the share scheme and unit scheme are linked to, and operate to change the economic consequences of, the pricing, terms and conditions of the internal loan scheme because:

   (a) S Co has control over the management and ownership of Trustee Co (see subsection 66(3)); and

   (b) Trustee Co must exercise its powers by having regard to the interests of S Co's shareholders, rather than only the interests of R Trust's unit holders (see paragraph 66(4)(c)); and

   (c) if S Co were to default under the internal loan, Trustee Co cannot make any claim against S Co without the consent of the external financiers (see subsection 68(2)); and

   (d) R Trust's unit holders cannot insist on:

      (i) a distribution or return of capital; or

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Finance trust and company staple: aggregation **Part 9**
Applying the aggregation rule to the schemes **Division 2**

Section 73

    (ii) the redemption of their units;

unless a corresponding reorganisation of capital occurs for S Co (see paragraphs 66(4)(a) and (d)); and

(e) Trustee Co is not permitted to deal with R Trust's capital unless there is a corresponding transaction with the shares in S Co (see paragraph 66(4)(a)); and

(f) the internal loan is the entire asset base of R Trust and the only source from which any distribution of capital to unit holders could be made; and

(g) there is no expectation that, upon repayment of the internal loan, R Trust will be wound up and the trust capital distributed to its unit holders (see subsection 68(3)).

> Note: These factors mean there is no effective obligation on S Co to repay the internal loan. It is up to S Co to decide if, when and to what extent it repays the internal loan, and whatever it decides cannot be challenged.

Effect of that link or changed economic operation

(3) These factors in subsection (2) would cause these schemes (if they were treated as a single aggregate scheme) to no longer give rise to a debt interest in S Co because any obligation on S Co to repay the internal loan funds is, for all practical purposes, at S Co's discretion.

> Note: The internal loan scheme would no longer give rise to a debt interest because S Co does not have an effectively non-contingent obligation under that loan to provide financial benefit benefits (see paragraph 974-20(1)(c) and section 974-135 of the Act).

73 Applying the design test to the share scheme, the unit scheme and the internal loan scheme

(1) The design test is satisfied because, having regard to normal commercial understandings and practices, it would be concluded that the share scheme, the unit scheme and the internal loan scheme were designed to operate together to produce their combined economic effect.

> Note: That combined economic effect being a way to raise finance for S Co in a way that in practice gives it a discretion to repay the internal loan, even though the internal loan has a 9-year term.

(2) In particular, according to normal commercial understandings and practices:

(a) the schemes form an integrated package to raise finance for S Co, and were entered into and carried out in a holistic way, with each being part of a unified whole; and

(b) the external financiers and ratings agencies accept that the combined economic effect of the schemes is to give rise to an equity interest in S Co rather than a debt interest; and

(c) the external financiers have limited S Co's ability to borrow from other external lenders, and have only agreed to provide the external loan because of the restrictions on Trustee Co's ability to enforce the internal loan.

Section 74

74 Conclusion

As the interdependence test and design test are satisfied, the aggregation rule applies to treat the share scheme, the unit scheme and the internal loan scheme as a single aggregate scheme.

Note: This prevents S Co from achieving indirectly what it could not achieve directly.

EXPOSURE DRAFT

Stapling examples **Chapter 3**
Finance trust and company staple: aggregation **Part 9**
Effect of changes to the facts **Division 3**

Section 75

Division 3—Effect of changes to the facts

75 Changes to the facts that would cause the aggregation rule not to apply

(1) The conclusion in section 74 would change if enough of the factors in subsection 72(2) were changed so that:

    (a) S Co becomes subject to an effective obligation to repay the internal loan; and

    (b) funds are available to be returned to R Trust's unit holders as a distribution in the event of a winding up or as a return of capital.

(2) For example, if R Trust were to operate only during the 9-year period of the internal loan, and after which the loan would be repaid and funds distributed to R Trust's unit holders, then:

    (a) Trustee Co's powers would become discretionary at the end of that 9-year period, because then the repaid money under the internal loan could be distributed to R Trust's unit holders; and

    (b) the inability of R Trust's unit holders to require earlier redemption would not alter the economic effects of the internal loan; and

    (c) the pricing, terms and conditions creating interdependency with the shares in S Co would be temporary and not alter the effectively non-contingent character of the internal loan; and

    (d) the units in R Trust would not necessarily be seen as one security with the shares in S Co (as R Trust would be temporary).