Experience Rating
Business grouping and transfers guide

March 2011

Accident Compensation Corporation
Experience Rating
Business Grouping and Transfers Guide

A guide to aid in the practical application of the business grouping and transfer rules

March 2011

Contents

1.0 Overview

1.1 Experience rating

Experience rating is a framework that modifies a business's levy rate to reflect the particular safety risk in any workplace that a business controls. This risk will be determined by examining the business's previous experience of workplace safety. The issue of allocating the cost or benefit of this experience is made more complicated when there are many businesses owned by the same owner, or an employer sells part of their business to a new owner.

The Accident Compensation (Experience Rating) Regulations 2011 (the **'Experience Rating regulations'**) therefore include rules governing the grouping of levy payers (**'grouping rules'**), and rules governing the transfer of a business from one levy payer to another (**'transfer rules'**), to determine who should be allocated the cost or benefit of a business's experience of workplace safety. The grouping rules and transfer rules are set out in regulation 18 and 19 of the Experience Rating regulations.

1.2 The purpose of this guide

The purpose of this guide is to provide the reader with an introduction to the grouping rules and transfer rules under the Experience Rating regulations.

The guide will:

- Cover the objectives of the rules;
- Clarify some common areas of confusion in the application of the rules; and
- Explain each of the rules with examples of their most common applications.

This guide provides general information only and should not be relied on as legal advice. ACC does not assume any liability or responsibility for any action taken as a result of, or reliance placed on, the information in this guide. If you are unsure about the application of the Experience Rating regulations, you should seek professional advice.

2.0 Objective of the grouping rules

2.1 Objective

The main objective of the grouping rules is to group commonly owned businesses so that experience rating is, as far as is possible, based on actual common control of the workplace. The grouping rules are designed to result in equity between businesses irrespective of their legal structure. The grouping rules determine whether business entities should be grouped together or treated separately for levying purposes.

2.2 Basis in existing rules

The grouping rules in the Experience Rating regulations are based on the existing ‘associated persons’ rules in the Income Tax Act 2007, with exceptions and modifications where appropriate. . This provides an advantage as the rules will be well known and understood by associated businesses and advisors that deal with income tax issues.

2.3 Overview of rules

In summary, the grouping rules enable ACC to group the following entities as one levy payer for experience rating purposes:

- Two companies with common voting or market value interests or common control by other means (see section 3 of this guide);
- A company and a person other than a company with common voting or market value interests (see section 4 of this guide);
- A partnership and a partner (see section 5.1 of this guide)
- Trustees of trusts with a common settlor, and a trustee and a settlor of a trust (see section 5.2 of this guide).

A tie breaker test has been introduced to determine which group an entity belongs to if it falls in multiple groups (see section 6).

The criteria for these grouping rules attempt to strike a balance between:

(1) being too narrow and not grouping businesses that have common control of workplaces; and

(2) being too wide and capturing businesses without common control of workplaces (adding unnecessary compliance costs caused by businesses having to challenge the grouping).

The grouping rules aim to minimise the situations in which businesses will be inappropriately caught by, or excluded from, the rules. However, regardless of where the balance is struck, some businesses will inevitably be inappropriately caught or excluded. The extent to which this occurs will be monitored to ensure that the grouping rules achieve the objective set out above.

2.4 Grouping: important points to note

Definition of "person"
Any reference to "person" in the context of experience rating includes any legal person, not just individuals. For example, a person may be a company, a trustee of a trust, a partnership, an individual or other entity.

Aggregation vs grouping

Aggregated persons and a group of persons is not the same thing for experience rating.

Aggregation determines whether persons are so closely related that they may influence each other in making decisions and so have to add their interests together when determining grouping.

If A is **aggregated** with B, this means that A is treated as owning any interest that B owns. For example, if A owns 30% of company X and B owns 20% of company X; and, A and B are aggregated; then, both A and B will be treated as owning 50% of company X.

This stops A from splitting his/her ownership interest with B in order to appear to control a smaller interest than A actually does.

Aggregation is considered before the grouping is considered. Just because two parties are aggregated does not itself mean they will be grouped for experience rating purposes.

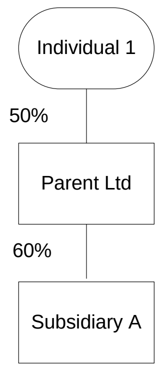
Grouping applies where there is likely to be common control of multiple workplaces by a person.

If A and B are **grouped** (taking into account owners' and their associates' interests) this means that there is a person who holds an interest in both A and B which is large enough to allow them to have control over both workplaces. As a result, A and B will have their experience considered jointly and have their levies modified accordingly.

This stops a person with common control of multiple businesses from separating poor performing businesses from those that are performing well to manipulate their levy payments.

Look-through rule
When determining a person's ultimate interest you must "look through" their immediate ownership interest to see if they hold an indirect ownership interest in another entity.
For example:

Indirect Interests/Look-Through



- Individual 1 has a 50% direct interest in Parent Ltd
- Individual 1 has a 30% indirect interest in Subsidiary A (50% * 60% = 30%)

All relevant tests must be applied
All relevant grouping tests must be applied to a number of persons to determine the largest group or multiple groups (i.e. if one test does not apply another test may apply). If there are conflicts resulting from multiple groups, then the tie-breaker test should be applied to resolve this conflict.

3.0 Grouping: Two companies

Rule
If levy payers are companies that are associated persons under section YB2 of the Income Tax Act 2007, ACC may group the companies together (as one levy payer) for experience rating purposes.

Application

Two (or more) companies may be grouped if there is a group of persons whose total voting interests in each company are 50% or more. A person's voting interest in a company is the percentage of the total shareholder decision-making rights of the company carried by shares or options held by the person.

Two companies may also be grouped if:

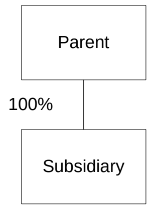
- A market value circumstance exists for either company and a group of persons exists whose total market value interests in each company are 50% or more; or

- A group of persons exists who control both companies by any other means.

Further information and definitions relating to the above rules is set out in subpart YC of the Income Tax Act 2007, and the definitions in section YA 1 of that Act.

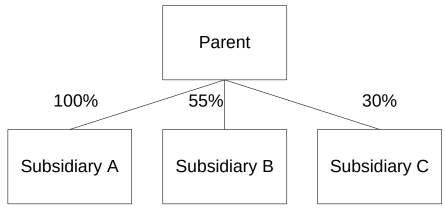
Examples:

Two Companies: Parent/Subsidiary



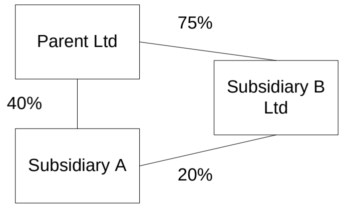
Parent and Subsidiary are a group

Two Companies: "Sister Companies"



- Parent and Subsidiary A and B are a group under the two companies test
- Subsidiary C is not in the group with Parent or Subsidiary A or B

Two Companies: Indirect Interests/Look-Through

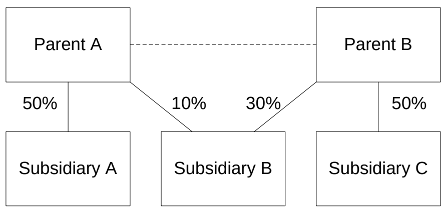


Parent Ltd and Subsidiary A and Subsidiary B Ltd are a group
The total Parent Ltd interest in Subsidiary A is 55%

- Parent Ltd has a 40% direct interest in Subsidiary A
- Parent Ltd also has a 15% indirect interest in Subsidiary A when it traces its interest through Subsidiary B Ltd (75% * 20% = 15%)

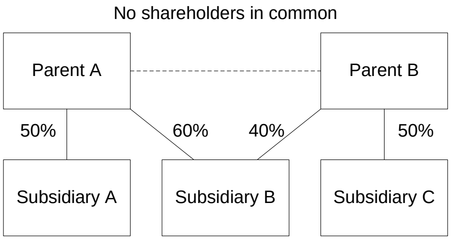
Two Companies: No Significant Interests

No shareholders in common



- Parent A and Subsidiary A are one group
- Parent B and Subsidiary C are another group
- Subsidiary B is not in either group

Two Companies: One Significant Interest



- Parent A, Subsidiary A and Subsidiary B are one group
- Parent B and Subsidiary C are another group

4.0 Grouping: Company and non-company

Rule
If levy payers are companies and persons other than companies that are associated persons under section YB3 of the Income Tax Act 2007, ACC may group the companies and persons together (as one levy payer) for experience rating purposes.

Application

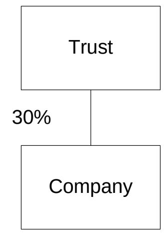
A company and a person other than a company (for example, an individual, trust or partnership) may be grouped if the person has a voting interest in the company of 25% or more.

A company and a person other than a company may also be grouped if a market value circumstance exists for the company and the person has a market value interest in the company of 25% or more.

Further information and definitions relating to the above rules is set out in subpart YC of the Income Tax Act 2007, and the definitions in section YA 1 of that Act.

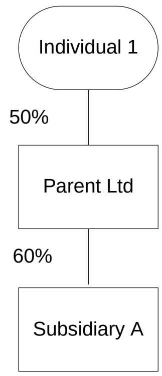
Examples:

Trust/Company



Company and Trust are a group under non-company/ company 25% or more test

Individual: Indirect Interests/Look Through



Parent Limited, Subsidiary A and Individual 1 are a group

- Individual 1 has a 50% direct interest in Parent Ltd
- Individual 1 has a 30% indirect interest in Subsidiary A (50% * 60% = 30%)

5.0 Grouping: Non-companies

5.1 Partnerships

Rule

If levy payers are partnerships and partners in the partnerships that are associated persons under section YB12 of the Income Tax Act 2007, ACC may group the partnerships and partners together (as one levy payer) for experience rating purposes.

Application

General partnerships

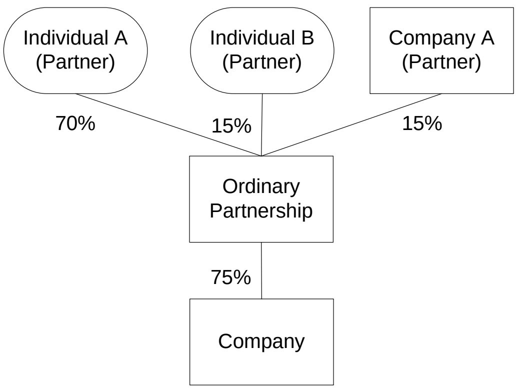
A partnership and a partner in the partnership may be grouped.

Limited partnerships

A limited partnership and a limited partner may be grouped if the limited partner has a partnership share of 25% or more in a right, obligation, or other property, status or thing of the limited partnership.

Examples:

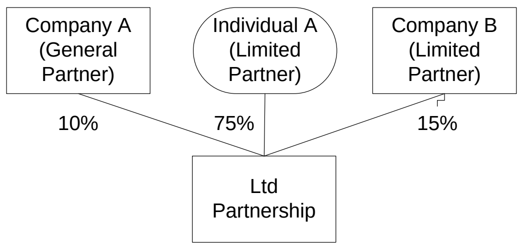
Partnership/Partner



- Individual A and Partnership and Company are one group.
- Individual B and Partnership are another group.
- Company A and Partnership are another group.

[Under the current rules the individual partners are not associated with each other – the proposed tie breaker test would extend to situations such as this to determine which group Partnership is in.]

Ltd Partnership/General Partner



- Company A and Ltd Partnership are one group.
- Individual A and Ltd Partnership are another group.
- Company B and Ltd Partnership are not a group.

[Under the current rules the individual partners are not associated with each other – the proposed tie breaker test would extend to situations such as this to determine which group Ltd Partnership is in.]

5.2 Trusts

Rules

If levy payers are trustees of trusts that are associated persons under section YB7 of the Income Tax Act 2007, ACC may group the trustees together (as one levy payer) for experience rating purposes.

If levy payers are trustees of trusts and settlors of the trusts that are associated persons under section YB8 of the Income Tax Act 2007, ACC may group the trustees and settlors together (as one levy payer) for experience rating purposes.

The meaning of 'settlor' is set out in sections YB 10 and HC 27 of the Income Tax Act 2007.

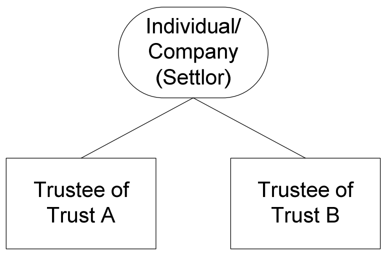
Application

Trusts may be grouped with other parties by the following means:

(a) A trustee of a trust and a trustee of another trust may be grouped if the same person is a settlor of both trusts.

Examples:

Trust: Common Settlor

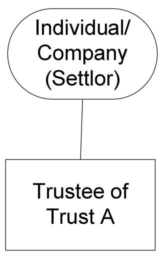


- The trustees of Trusts A and B and the Settlor are a group

(b) A trustee of a trust and a settlor of the trust may be grouped. (This rule does not apply if the trust is a charitable trust).

Examples:

Trust: Trustee and Settlor



- The trustee of Trust A and the Settlor are a group

6.0 Grouping: Tripartite test

Rule

If levy payers are persons who are associated persons under section YB14 of the Income Tax Act 2007, ACC may group the persons together (as one levy payer) for experience rating purposes.

Application

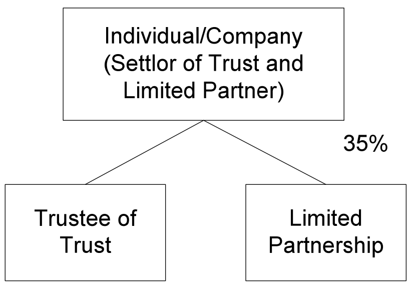
Two persons/entities (Person A and Person B) may be considered to be grouped if:

- Person B is grouped with a third person (Person C) under any one of the other grouping rules; and
- Person C is grouped with Person A under any one of the other grouping rules (excluding the grouping rule under which Person B is grouped with Person C).

The above test does not apply if person B is grouped with person C under the two company test (see section 3 of this guide), and person C is grouped with person A under the company/non-company test (see section 4).

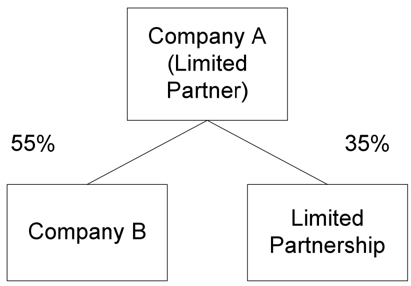
Examples:

Tripartite: Group



- The trustee of the Trust, the Limited Partnership and the Individual/Company are a group via the tripartite test.

Tripartite: No group/tie breaker



- Prima facie, one group is the Company A and Limited Partnership and another group is the Company A and Company B. The tie breaker test will be required to determine which group the Company is in.

The tripartite test does not apply as one of the associations is under the two company test, and the other is under the company/non-company (partnerships) test.

7.0 Grouping: multi-employer tax returns

Rule

If a levy payer submits tax returns that cover the levy payer's employees and the employees of another levy payer as if they were the levy payer's employees, ACC may group the levy payers together (as one levy payer) for experience rating purposes.

Application

This rule covers the situation where one member of a business group may return a single wage schedule covering all the employees of different entities in the group. In this situation, regardless of ownership or control considerations, ACC may group all the employers together for experience rating purposes.

8.0 Tie-breaker rules

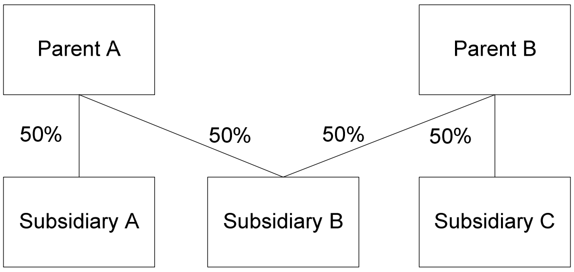
Rule

If ACC's application of the grouping rules results in a levy payer being in two or more groups, ACC must decide the group in which to put the levy payer, having regard to:

- which group has the greatest influence over the levy payer's workplace safety; and
- which group exerts the greatest management or other control over the levy payer's workplace.

Examples:

Two Companies: Tie Breaker



- Parent A and Subsidiary A and Subsidiary B are a group under the "Two Companies Test", and Parent B and Subsidiary B and Subsidiary C are another group under the "Two Companies Test".
- The tie-breaker test will determine which group Subsidiary B is in (i.e. with Parent A and Subsidiary A or with Parent B and with Subsidiary C).

9.0 Anti Avoidance

9.1 Anti-avoidance provision

The Experience Rating regulations include an anti-avoidance provision, which provides that:

- ACC may disregard an arrangement made for the purpose, or that has the effect, of avoiding being placed in a group, or in a particular group, under the grouping rules in regulation 18 of the Experience Rating regulations.
- ACC may disregard an arrangement made for the purpose, or that has the effect, of avoiding the application of the claims transfer rules set out in regulation 19 of the Experience Rating regulations.

In this context, 'arrangement' has the meaning given to it by section YA1 of the Income Tax Act 2007, which is "an agreement, contract, plan, or understanding, whether enforceable or unenforceable, including all steps and transactions by which it is carried into effect".

10.0 Objective of the transfer rules

10.1 Objective

Business transfer rules are required where business activities transfer to new owners (other than through the sale of a legal entity). The objective of these rules is to ensure that the claims experience of a workplace remains associated with the same workplace despite transfer of ownership or structural change.

10.2 Overview of rules

The key business transfer rules are:

- Re-attribution of experience to another business where the business that is transferred (or part transferred) is capable of separate operation (see section 11.1 of this guide);
- An amalgamation will cause the experience rating of the amalgamating companies to be attributed to the resulting/surviving company (see section 11.2 of this guide);
- A business that ceases to perform a particular activity, will retain the historical payroll and claims experience for experience rating purposes (see section 11.3 of this guide);

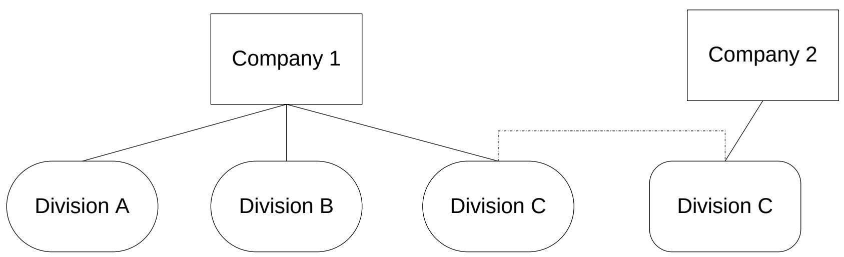
11.0 Key transfer rules

11.1 Re-attribution of experience to another business

If a levy payer transfers part or all of its business as a going concern, ACC must attribute the information about the levy payer's liable earnings and qualifying claims to the transferee.

Examples:

Business Transfer: Going Concern



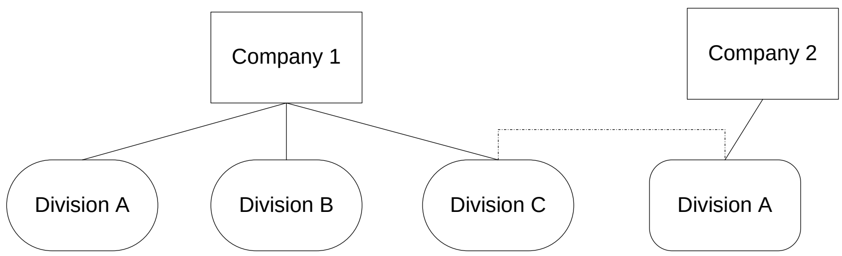
Fact: Company 1 operates 3 divisions (that are not separate legal entities) with employees in each division. Each division runs an activity that is capable of separate operation with the employees and assets allocated to each division.

Company 1 sells Division C as a going concern to Company 2. All assets and employees are transferred with the division and the activity is carried on continuously through the sale.

- The experience relevant to Division C is transferred from Company 1 to Company 2 at the time of the sale

Examples:

Business Transfer: No Going Concern



Fact: Company 1 operates 3 divisions (that are not separate legal entities) with employees in each division. Each division runs an activity that is capable of separate operation with the employees and assets allocated to each division.

Company 1 ceases to operate Division C. Most employees are reallocated within Company 1 however 5 employees of Division C are offered jobs with Company 2. They take jobs and begin operating a similar activity in Division A of Company 2. No assets are transferred with the 5 employees and the activity of Division C has ceased before the sale.

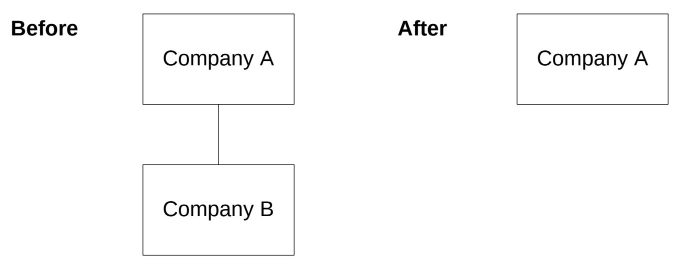
- No experience relevant to Division C is transferred from Company 1 to Company 2.
- The experience of Division C will remain with Company 1.

11.2 Amalgamations

Businesses can effectively transfer from one legal entity to another through an amalgamation. An amalgamation under the Companies Act 1993 will cause the experience rating of the amalgamating companies to be attributed to the resulting/surviving company. If levy papers amalgamate, ACC must attribute the information about a levy payer's liable earnings and qualifying claims to the amalgamated levy payer.

Example:

Business Transfers: Amalgamation



Fact: Company A and Company B will amalgamate. The surviving company will be Company A.

- All experience of Company A and Company B before the amalgamation will be attributed to the surviving Company A after the amalgamation.

11.3 Ceased activities and de-grouping

If a levy payer ceases to carry out an activity for which all or part of a levy was paid, ACC must attribute information about the levy payer's liable earnings and qualifying claims to the levy payer. This means that if a business ceases to perform a particular activity, in whole or part, the historical payroll and claims experience will remain with that business for experience rating purposes and will be included in that business's experience rating assessment to the extent that, and for as long as, they are relevant in terms of the experience rating formula.

If a levy payer leaves a group of levy payers, ACC must attribute information about the levy payer's liable earnings and qualifying claims to the levy payer. This means that if a business leaves a group of levy payers and continues to operate, then that entity's historical payroll and claims experience will go with the leaving entity.

If a levy payer that is part of a group ceases to operate, ACC must attribute information about the levy payer's liable earnings and qualifying claims to the group. This means that if a business that is part of a group of levy payers ceases to operate, the historical payroll and claims experience will stay with the group.

An example of this situation is where a company has a number of subsidiaries. One of these is loss-making, so the parent decides to close it down. Under this rule, the claims stay with the group, and do not "disappear".

12.0 Provision of information

ACC may require a levy payer to-

(a) provide the information the ACC needs to apply regulation 18 or 19 of the Experience Rating regulations to the levy payer; or

(b) confirm or deny the correctness of information that ACC holds about the levy payer and proposes to use to apply the grouping or transfer rules (under regulation 18 or 19) to the levy payer.

ACC may specify the form in which, and period within which, the levy payer must respond to the requirement.

In the event that a levy payer fails to supply information as requested by ACC, or to supply it within the specified timeframe, ACC may use the information it holds about the levy payer to apply regulation 18 or 19 of the Experience Rating regulations to the levy payer.

PREVENTION. CARE. RECOVERY.

Te Kaporeihana Āwhina Hunga Whara

www.acc.co.nz

0800 222 728

ACC5823 March 2011