



Law Council
OF AUSTRALIA

Business Law Section

12 February 2021

Board of Taxation Secretariat
The Treasury
Langton Crescent
Parkes
CANBERRA ACT 2600

By email: cgtrollovers@taxboard.gov.au

Dear Members of the Board,

Review of CGT Roll-overs

The Taxation Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) thanks you for the opportunity to provide comments on matters raised in the Consultation Paper issued by the Board in December 2020 in connection with its review of capital gains tax (**CGT**) roll-overs.

This is the second written submission that the Business Law Section has made to the Board on this matter.

Our responses to questions in the Consultation Paper are set out below. Given our response to question 1, we have not provided responses to all of the questions asked by the Board.

We have adopted the paragraph numbering used in the Consultation Paper.

3.2 WHY A GENERAL RESTRUCTURE ROLL-OVER?

1. Do you agree with this articulation of the benefits of a comprehensive, general restructure roll-over? Please provide examples to illustrate these benefits.

We consider that it would be beneficial to state the overall objective of all restructure roll-overs in the relevant legislation and to state that the roll-over conditions are to be interpreted to give effect to that objective.

In our view, the introduction of a new general restructure roll-over - as in the case of the introduction of any new general system of taxation or tax relief (such as the tax consolidation rules or the rules for the taxation of financial arrangements) - risks the introduction of unforeseen difficulties which may take many years to resolve. We do not consider that such risks are worth running when specific solutions to specific problems that have already been identified are readily apparent. Should experience show that further individual restructure roll-overs are required, they can be added in due course.

We therefore remain of the view that the existing specific restructure roll-overs should be retained and individually modified to remove obstacles to their use where the application of the roll-over is in accordance with a general principle that CGT should not be imposed in circumstances where the restructure does not change the ultimate economic ownership of an underlying asset or business.

The amendments to the existing roll-over rules that in our view should be considered are set out in our submission dated 26 May 2020. These include extending the small business restructure roll-over in Subdivision 328-G and the small business active asset roll-over under Subdivision 152-E of the *Income Tax Assessment Act 1997* (Cth) to all businesses. See also our response to question 34 below.

Notwithstanding the views expressed above, if a general restructure roll-over is to be introduced, we would recommend that further consultation is undertaken around a number of aspects of such a roll-over including the 12-month rule (which appears unduly restrictive) and the scope of the roll-over (including the reference to business or commercial purposes).

2. Are there other advantages in addition to those discussed above?

3. Should the general restructure roll-over be expanded to incorporate the functions of any other existing restructure roll-over? If so, please explain your rationale and provide details (and examples) as to how they can be incorporated.

We have no comment on questions 2 and 3 in view of our response to question 1 above.

3.3 DESIGNING THE GENERAL RESTRUCTURE ROLL-OVER

4. Would the proposed approach outlined in Step 1 to define the relevant 'business restructure' provide greater certainty than the current regime? What other alternative approaches should the Board have regard to?

5. Does the features allowing specific CGT events to be excluded from the 'eligible restructure' give rise to any integrity concerns or other practical difficulties?

6. Do you have any suggestions relating to the roll-over election rules? Are they practical and could the requirements be further simplified? If so, how?

7. Do you agree with limiting the eligible restructure period to 12 months? If not, please explain your rationale and identify any alternate approaches.

8. How could the eligibility conditions be improved or simplified? Where your recommendation contracts or expands the eligibility of transactions for roll-over relief, please suggest how this may be balanced given the terms of the Board's review provide that any reforms should have 'a substantially similar practical effect'.

9. Where the restructure involves only publicly listed groups, what modifications should be made to further streamline the eligibility conditions? For example, where certain integrity provisions are not relevant or are commercially impractical to apply.

10. Do you consider that the adoption of a single 'push-up' cost base rule for the acquiring entity would deliver simplification advantages?

11. Does it represent a reasonable trade-off in light of the other benefits of a general roll-over?

12. If preserved, how could the existing market value 'step up' be incorporated into the general roll-over without importing excessive complexity?

13. Do you agree with the other proposed consequences for the general roll-over?

14. Are there any practical difficulties associated with these consequences? We would appreciate your submissions on potential solutions to these issues.

We have no comment on questions 4 to 14 in view of our response to question 1 above.

15. Currently, partial roll-over is a feature of Subdivision 124-M and to a limited extent in Subdivisions 122- A and 122-B but not Divisions 125, 615 and Subdivision 126-B.

We support the concept of amending the roll-overs in Divisions 125, 615 and Subdivision 126-B to allow for partial roll-overs. We consider that this issue should be addressed in the context of the specific roll-overs rather than as an aspect of a general restructure roll-over.

a. Given that introducing partial roll-over to the general model will increase its complexity, to what extent (if any) should partial roll-over be available under the general model?

b. Please provide examples of transactions which would not occur without partial roll-over?

16. Paragraphs 1(d) and 5 of the Model Demonstration provides a definition for original and replacement assets. Are there any difficulties with classifying assets into these two categories? Please include examples to illustrate your answer where possible.

17. It is important that the benefits of the preliminary roll-over model are also well understood. Compared to the current suite of roll-overs, what are the key simplifying features that would provide the most value in a general restructure roll-over? What other features of the preliminary roll-over model provide important benefits?

We have no comment on questions 16 and 17 in view of our response to question 1 above.

5.1 BROAD POLICY ISSUES

18. What constraints should be put in place on the availability of roll-over where a capital raising has occurred? Should any subset of transactions be excluded from these constraints, for example, public companies that are subject to strict regulatory control?

In our view, there should be no such constraints. The question of possible non-compliance by a particular group or type of taxpayer should not be allowed to influence the scope of a tax relief measure which is based on economic principle.

19. In what circumstances do capital raisings give rise to integrity concerns such as inappropriate value shifting? How could these concerns be addressed?

20. Should the cost base of replacement interests be adjusted to reflect any dilutionary effect of a capital raising?

21. Are there scenarios apart from demergers where it would be appropriate for roll-over to be available for a reorganisation that includes a capital raising component?

The issues raised in questions 19 to 21 can readily be addressed in the context of each existing specific roll-over but in our view would be very difficult to address in the context of a general restructure roll-over.

22. Are any ongoing impacts of COVID-19 expected to change the nature of future capital market and demerger transactions?

We cannot foresee any such impacts.

23. Would you support a general rule that assets received by way of replacement for pre-CGT assets will be taken to be post-CGT assets with a market cost base? Why? Why not?

We would not support the introduction of such a rule as it would cut across the general policy of restructure roll-overs which is, fundamentally, to ensure that the restructure does not alter the incidence of taxation in relation to underlying assets. In our view, such a rule would militate against the objective of ensuring that business investment is permitted to take its most efficient form.

24. Can you suggest ways for dealing with pre-CGT assets under the general roll-over that that would provide maximum simplicity?

25. Would extending general roll-over to trusts that satisfy CGT event E4 or E10 make relief practically available to AMITs? What additional obstacles, if any, would prevent relief being accessed?

26. For what types of arrangements would AMITs contemplate using general roll-over?

27. Would giving AMITs access to general roll-over be inconsistent with the requirement for an irrevocable decision to enter the AMIT regime? How could this concern be addressed?

28. What implementation issues should be taken into account in extending relief in this way?

29. Are there any integrity issues that the Board should have regard to in extending this treatment to merger and takeover transactions?

30. What integrity issues or practical difficulties should the Board give further consideration to in removing the like-for-like requirement?

31. What implementation issues should be taken into account in extending relief in this way?

32. Are there any integrity issues that the Board should have regard to in extending this treatment to merger and takeover transactions?

33. Would there to be demand from the small business sector to use the general business roll-over given the availability of alternative methods of reducing or eliminating tax liabilities?

We have no comment on questions 24 to 33 in view of our response to question 1 above.

34. Would you support reforms to establish more clearly defined functions for Division 152 and the SBRR?

We commented in our initial submission that in our view the small business restructure roll-over in Subdivision 328-G and the small business active asset roll-over under Subdivision 152-E should not be limited to small business entities. We are unaware of any economic policy basis for the current limitation of access to these roll-overs.

We remain committed to discussing this matter with the Board.

If you have any questions please contact the Chair of the Taxation Committee, Angela Lee at angela.lee@vicbar.com.au.

Yours sincerely,

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive style with a large, stylized 'G' and 'R'.

Greg Rodgers
Chair, Business Law Section