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12 February 2021

Board of Taxation Secretariat
The Treasury
Level 16, 530 Collins Street, Melbourne VIC 3000

By email: **cgtrollovers@taxboard.gov.au**

Dear Members of the Board,

Review of CGT roll-overs: Consultation Paper

CPA Australia represents the diverse interests of more than 168,000 members working in over a 100 countries and regions supported by 19 offices around the world. We make this submission on behalf of our members and in the broader public interest.

The Board of Taxation (**BoT**) **Consultation Paper** on the Review of CGT Roll-overs (**the Consultation Paper**) proposes to rationalise and simplify the existing capital gains tax (**CGT**) roll-overs and associated provisions to make them more accessible, more aligned to the commercial drivers of restructuring and to address irritants in the current system.

While we support the **BoT**'s endeavours to propose a standardised, principles-based roll-over to simplify the CGT roll-over provisions, we do not believe the general business restructure roll-over model (**GBRR**), in its current proposed form, is a suitable replacement for the identified range of existing roll-over provisions.

In response to the model presented and questions posed in the Consultation Paper, we observe that:

1. A single business roll-over covering transactions related to the multiple existing rollovers may create anomalies or complexities that exacerbate or replace existing difficulties
2. The GBRR should be introduced as a residual provision where the existing specific roll-over rules do not apply or do not achieve the correct outcome
3. Existing provisions should be retained, at least in the medium term, to maintain business and investment confidence at this difficult time. They are well understood and have been used effectively for a long time
4. Limiting the eligible restructure period to 12 months introduces an additional and potentially unreasonable time burden on eligible business restructures
5. The BoT proposed roll-over model should seek to provide relief in the range of situations where there is no change in underlying economic ownership, and not necessarily be restricted to business restructures
6. The adoption of a single push-up cost base rule for the acquiring entity would not necessarily deliver simplification advantages. Also, several of the existing roll-overs proposed to be replaced by the GBRR require the value of the assets to be transferred at market value for commercial reasons
7. Partial CGT roll-over must be available as an option, whether under the GBRR or preserved as a specific CGT roll-over outside the GBRR so that entities can be acquired with part shares and part cash
8. 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 creates a disincentive for small business to undertake restructures as a better tax outcome is achieved if they retain their existing structure
9. Imposing tax consolidation on SMEs, and to deny CGT roll-over relief for consolidatable groups, is inappropriate. The BoT has already reported on the significant problems with SMEs and the tax consolidation regime to Government

10. The proposed changes to Division 152 and the Small Business Restructure Roll-over (**SBRR**) appear to remove a substantial portion of the currently available CGT concessions for small business, while providing little compensatory relief under the GBRR.

We recommend that caution be taken so as not to replace the existing rules with a principles-based model that does not broadly retain the intended benefits of the current regime. Given the potential uncertainty, changes to the capital gains tax base and increases in compliance costs, we suggest that the existing roll-over provisions are retained until it can be demonstrated that the GBRR is an effective replacement.

Our responses to the questions raised in the discussion paper questions are in the Attachment.

If you have any queries about this submission, contact Elinor Kasapidis, Senior Manager Tax Policy, CPA Australia, on 03 9606 9666 or elinor.kasapidis@cpaaustralia.com.au.

Yours sincerely,

Dr Gary Pflugrath
Executive General Manager,
Policy and Advocacy

Consultation Questions

RATIONALISING BUSINESS RESTRUCTURE ROLL-OVERS

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

The introduction of the General Business Restructure Roll-over model (**GBBR**) seeks to rationalise the existing CGT roll-overs and associated provisions into a simplified set that should have a substantially similar practical effect to existing provisions but are easier to use and interpret.

We observe that a single provision covering transactions related to multiple existing rollovers may create anomalies or complexities that make current problems worse. We note that, while these groups of roll-over provisions have commonalities, in aggregate they cover a broad number of transaction types. Therefore, it may be too hard for a single rollover to appropriately capture all transactions across the various provisions, without adding complications of its own and creating further uncertainty.

We believe that a GBRR should, if introduced, operate as a residual provision where the existing specific roll-over rules do not apply or do not achieve the correct outcome. This is because the existing roll-overs are well understood and have been tested and used effectively for a long time.

Furthermore, Australians and Australian businesses continue to be negatively impacted by COVID-19. Given the uncertain outlook and Australia's exposure to global economic and financial impacts, we urge reforms to be carefully considered to ensure they do not introduce uncertainty and instability into the business and investment market. We believe this may occur with the GBRR in its current form.

Therefore, we recommend that existing provisions be retained, at least in the medium term, to maintain business and investment confidence at this difficult time. This will also provide the government with the opportunity and time to properly evaluate the impact and outcomes of any new roll-over provisions.

We also do not believe there is an urgent need to replace or discard the existing CGT roll-over provisions until the GBBR has been introduced and proven to work as intended in practice. Only when the intended benefits have clearly manifested, consideration could then be given to repealing the existing provisions and/or including additional roll-over provisions that are currently out of scope.

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

No comment at this stage.

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.

Given the challenges of consolidating the provisions identified in Chapter 3 and 5 of the Consultation Paper and our comments in this submission, these issues should be addressed before considering the inclusion of other roll-over provisions. If the GBRR proceeds, a reasonable period of time should be allowed to review its effectiveness before considering further incorporation.

DESIGNING THE GENERAL BUSINESS 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?

The GBRR reflects a fundamental shift in the approach to roll-overs and we are concerned that the principles based GBRR, which would replace the distinctly separate existing CGT roll-over provisions, introduces a different form of uncertainty and may negatively affect restructures that are enabled by the existing provisions.

We consider that the existing roll-over regime provides greater certainty and clarity in respect of what is legislatively required compared to what is proposed in the GBRR.

The current CGT roll-over provisions are intentionally designed for particular circumstances where the taxpayer must establish that each transaction fits within the legislative parameters to qualify for the roll-over relief. Using the demerger example in Figure 1 of the Consultation Paper[1], the current legislation does not prescribe the mechanism to achieve a demerger relief but instead requires a restructuring to clearly satisfy certain requirements to qualify. The demerger is kept deliberately vague at a conceptual level, while the elements required to access the roll-over are relatively well-defined.

With the principles based GBRR, we note that interpretative clarity will be required from the judiciary and the ATO[2] of what constitutes a business restructure and commercial purposes, and the types of restructures that are ineligible. There may also be

[1] The Board of Taxation 2020, *Consultation Paper*, Review of CGT Rollovers, pp. 26-27

[2] For example, Law Companion Rulings, Practical Compliance Guidelines and private binding rulings

difficulties in determining with certainty which transactions form part of the eligible GBRR and the potential impact of the cost base push-up.

This situation reflects the tension between principles-based and prescriptive models. While restructures may be less likely to be constrained by a strict ATO interpretation of the current provisions, the dependence on the judiciary and ATO to interpret important elements of the GBRR introduces a different form of uncertainty and complexity.

Given the established expertise in and application of the existing CGT provisions, this potential uncertainty could be mitigated by ensuring a consistent treatment of transactions between the existing and proposed roll-over regimes. This would be in accordance with the Terms of Reference. The Consultation Paper states:

- "*the ability to exclude specific CGT events allows taxpayers who would otherwise be eligible for roll-over relief under the current system to continue to receive relief under the general model*"[3], and
- that making the GBRR available to all businesses would address the back-to-back roll-over issues that "*create additional uncertainty as to whether tax relief is available, either because it would cause the failure of a technical roll-over requirement or because it would enliven the general anti-avoidance rule.*"[4]

It is our view that any new provisions must incorporate these design elements and that any Exposure Draft legislation is tested against a range of scenarios to ensure that such outcomes are guaranteed. Alternatively, we recommend that the existing provisions are retained until assurance can be given that the GBRR achieves these goals.

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

Some complex business restructures, such as mergers and acquisitions, use multiple steps across different stages which include establishing and closing entities, and the transfer or replacement of assets. This means these stages could form part of an overall eligible business restructure roll-over but may not satisfy the roll-over conditions when each step is considered in isolation.

In practice, it will be challenging to determine whether or which of these stages should be included or excluded as part of an overarching business restructure in order to attract CGT roll-over relief. The dependence on judicial and ATO interpretation also introduces uncertainty and time pressures, and may negatively impact the viability of transactions, especially if the existing provisions are repealed.

The existing provisions are clear about which steps are included under the roll-over and tax advisors can navigate roll-overs to ensure that restructures are undertaken with tax certainty. The GBRR introduces uncertainty as tax outcomes will be more dependent on the facts and circumstances of each case and the judicial and ATO interpretation, rather than an established statute-based process that is well understood.

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?

As with the current regime, the election to choose roll-over relief should be optional under the GBRR.

The amount of CGT disregarded for some roll-overs is currently reported at Item 8 of the Capital Gains Tax Schedule and we believe this reporting should be maintained. This will provide information to government on the uptake and cost to revenue of the GBRR.

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

We do not agree with limiting the eligible restructure period to 12 months as this introduces an additional and potentially unreasonable time burden on eligible business restructures. This 12-month limitation does not exist in the current regime and should not be included in the proposed model.

In many business restructures, there are multiple steps undertaken in a series of stages. Where these steps are found to form part of an overall business restructure roll-over, it would be impractical, or impossible at times, to divide them into separate roll-over schemes to fit within a twelve-month bright line test.

Timeframes may also be affected by the need to obtain interpretive certainty which may be contingent on ATO advice (e.g. private binding rulings) or the outcome of cases before the courts.

[3] The Board of Taxation 2020, *Consultation Paper*, Review of CGT Rollovers, p. 21

[4] The Board of Taxation 2020, *Consultation Paper*, Review of CGT Rollovers, p. 49

Furthermore, COVID-19 has adversely impacted some business transactions and it is taking longer to co-ordinate and arrange business reorganisations. Any time limitation should be sufficiently flexible to accommodate a broad range of circumstances and external factors so as not to impede otherwise commercially viable transactions.

ELIGIBILITY RULES

8. How could the eligibility conditions be improved or simplified? Where your recommendation contracts or expands the eligibility 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'.

It is not clear if Step 1 of the GBRR would limit access to roll-overs to exclude non-business and passive investment restructures. It is our view that roll-overs should not just be available to business restructures only but to also consider a broader range of transactions. Examples include:

- a discretionary family trust seeking to interpose a company between it and its portfolio of shareholdings[5], and
- the roll-over of member superannuation benefits from one self-managed superannuation fund (**SMSF**) to another (see Example 1).

We recommend that the BoT roll-over model provides relief in such situations where there is no change in underlying economic ownership.

Example 1: Transfer of member benefits between SMSFs where there is no change in underlying economic ownership
Two parents and their two daughters are members of their own SMSF, ABC Super Fund. The fund's investments comprise:

- cash $250,000
- listed securities $4.5 million
- properties $1.5 million

The parents are in pension mode in receipt of an account-based pension from their SMSF, funded from the dividends and imputation credits of their listed securities portfolio.

The two daughters have indicated that they wish to have their own separate SMSF, in order to expand and pursue their SMSF investment strategy of using limited recourse borrowing arrangement for pursuing capital growth with their retirement goals. This goal differs from the existing passive SMSF investment strategy adopted by ABC Super Fund, as Mum and Dad have indicated their preference to maintain the share portfolio for cash dividends and imputation credits to meet their retirement cashflow needs.

To accommodate the desires of their children, the parents have decided to transfer their pension balances from ABC Super Fund to their new SMSF, M&D Super Fund.

Tax consequences
Under existing tax provisions, there is no CGT roll-over relief for roll-over of a member's superannuation balances from one SMSF to another. At present, Division 310 of the *Income Tax Assessment Act 1997* provides CGT roll-over relief for transfers from SMSF to APRA regulated funds or from one APRA regulated funds to another but not for transfers between SMSFs.

The parents will have to commute (exchange) their pensions for a lump sum and crystallise a CGT liability to effect a roll-over to their new SMSF.

This means the parents will have to sell down their listed securities portfolio and crystallise a CGT liability in order to transfer their member benefits as a lump sum from ABC Super Fund to M&D Super Fund. This is an inappropriate outcome when there is no change in underlying economic ownership. That is, they are merely transferring their pension balances from their existing SMSF to their new SMSF.

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.

The cost base push-up under GBRR will result in different cost base outcomes for the acquirer using shares as consideration for the rolled over asset when compared with cash consideration. This is the reason that transfer at market value is used in the current regime and the GBRR does not appear to address this issue.

[5] This is often undertaken to ensure the franking credits from the dividends reside at the company level, and to avoid issues associated with accessing franking credits on franked dividends distributed directly through the trust. A company, unlike beneficiaries for a discretionary trust, will not have the problem of proving a fixed interest (that is, a vested and defeasible interest in the corpus of a trust) in order to not have franking credits denied.

CONSEQUENCES OF ROLL-OVER

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

For the majority of roll-overs proposed to be replaced by the GBRR, the existing roll-over provisions require the value of the assets to be transferred at market value[6]. As noted by the Consultation Paper, not including a market value step up would result in double taxation - once at the acquiring entity level and then again at the shareholder level.

By pushing the cost base of the underlying assets in the entity up to the shares under the GBBR, the acquiring entity obtains a cost base in the target entity's shares which is the original acquisition price of the target entity's rolled-over assets. This means that the acquiring entity's cost base for issuing shares in return for assets in the target entity will result in a lower cost base than under existing provisions.

Further, with other market value substitution roll-overs, such as Subdivision 126-B and Subdivision 122-A, the use of market value is a natural consequence of the roll-over rather than a step up. The roll-over requirements do not mandate that the issued shares are transferred at market value; the use of market value is instead a result of the normal cost base rules in that the cost base of the shares issued by the recipient entity as consideration for the rolled asset is the acquisition price (i.e. the market value of the rolled-over asset).

Therefore, we do not support the view that the adoption of a single push-up cost base rule for the acquiring entity would necessarily deliver simplification advantages.

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

Based on our comments in response to question 10, we do not agree that changing from market value to a cost base push-up rule is a reasonable trade-off because double taxation arises when using a cost base push-up as noted in the Consultation Paper.

Furthermore, referring to the comments made on page 32 of the Consultation Paper regarding the scrip-for-scrip rules, the significant and common stakeholder provisions under Subdivision 124-M require comparing the 'significant' or 'common' stakes in the original and replacement entity just before and after the arrangement. They are measures to ensure that the Subdivision 124-M roll-over is not inappropriately used to step up the cost base to market value.

We also note that the single push-up model cost base rule[7] does not contain the consequence required for demergers under Division 125 of the current regime. That is, the first element of the cost base (and reduced cost base) of each post-19 September 1985 interest in the demerged entity is a proportion of the sum of the cost base of the post-CGT original interests, just before the demerger, based on market value (s 125-80(2)) or cost base under the proposed business restructure roll-over. This essentially requires the total cost base of all interests held in the head entity to be 'spread' across both interests in the head entity and new interests in the demerged entity[8].

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

We are of the view that, where appropriate, the significant and common stakeholder provisions under Subdivision 124-M noted above could be incorporated into the general roll-over for incorporating market value step up. As an alternative, one could apply the restructure rule contained in section 124-784A which basically looks at the market value of the takeover entity compared to the acquired entity. Given it is a 20:80 ratio, it is aimed at replicating the common stakeholder test in a widely held context.

PROVISIONAL COST BASE MODEL

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

No comment at this stage.

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

No comment at this stage.

[6] Specifically, Subdivisions 122-A, 122-B, 124-M, 124-N, 126-B and Division 615

[7] The Board of Taxation 2020, *Consultation Paper*, Review of CGT Rollovers, pp. 40-43

[8] Refer **to ATO ID 2005/134** for more information.

PARTIAL ROLL-OVER

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.

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?

Partial CGT roll-over must be available as an option, whether under the GBRR or preserved as a specific CGT roll-over outside the GBRR so that entities can be acquired with part shares and part cash. It is very common for scrip-for-scrip roll-overs to involve part cash as consideration because shareholders from the target entity seek both shares and cash from the acquiring entity. The absence of a partial roll-over may prevent certain transactions from proceeding.

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

An example of a part share part cash scrip-for-scrip roll-over which would not have occurred without partial roll-over is the 2001 **Wesfarmers scrip-for-scrip offer in Howard Smith**.

DEMONSTRATION OF MODEL

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.

No comment at this stage.

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?

At present, we find that the greatest uncertainty is in relation to the treatment of back-to-back rollovers. We seek that any new simplified regime would help resolve this issue.

The key simplifying features of the GBRR which we believe would provide the most value are:

- the likelihood of being able to apply the general restructure roll-over in situations where business reorganisations do not satisfy the criteria of any of the existing roll-overs under the current regime
- the removal of the like-for-like requirement in scrip-for-scrip rollovers
- providing more certainty to undertake back-to-back roll-overs, and
- the potential extension of the general roll-over to attribution managed investment trusts (AMITs).

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?

No comment at this stage.

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

No comment at this stage.

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

No comment at this stage.

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?

No comment at this stage.

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

No comment at this stage.

TREATMENT OF PRE-CGT ASSETS

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 do not 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. A rule specifying that any assets received in exchange for pre-CGT assets will be taken to be post-CGT assets with a cost base equal to their market value at the time of the restructure will introduce compliance costs, particularly for unlisted entities, associated with obtaining market valuations from qualified valuers.

It also unfairly expands the tax base and triggers tax liability for bringing pre-CGT assets into the capital gains tax base, creating a disincentive for small business to undertake restructures as a better tax outcome is achieved if they retain their existing structure. For example, roll-overs under Subdivision 122-A and Subdivision 122-B, which are shown in Example 2.

Example 2: Internal restructure – contrast between Subdivision 122-A and GBBR outcomes for pre-CGT assets
Maximus operates a successful combat sport business, which he commenced in 1980. Maximus has decided to transfer the business to a company. The company Gladiator Pty Ltd was incorporated and all assets of the business were transferred across to the company, including:

- Goodwill (cost base of nil and market value of $500,000)
- Business premises (acquired in 1995 with a cost base of $200,000 and a market value of $450,000)
- Plant and equipment (Written down value $60,000 and market value of $40,000); and
- Trading stock (cost value $65,000, market value of $75,000)

Assuming the conditions for Subdivision 122-A roll-over are met, then Subdivision 122-A applies in preference to the other CGT provisions.

Tax Consequences

Transferor – Maximus
Any capital gain Maximus makes upon disposal of the business to the company will be disregarded. Note that this only has a practical effect in relation to the capital gain upon transfer of business premises, as the capital gain on transfer of goodwill (pre-CGT), plant and equipment (section 118-24) and trading stock (section 118-25) will be disregarded in any event.

As some of the assets being transferred are post-CGT and some are pre-CGT, Maximus' shares in the company will partly be treated as pre-CGT and partly post-CGT. The percentage of the shares which will be treated as post-CGT is to be calculated as follows:

$$= \frac{\text{Total market value of business premises, plant and equipment and trading stock}}{\text{Total market value of all assets}}$$

$$= \frac{\$450{,}000 + \$40{,}000 + \$75{,}000}{\$1{,}065{,}000}$$
$$= 0.53$$

It follows that 53% of XYZ's shares will be post-CGT, and 47% will be pre-CGT. It also means 47% of the shares which are currently exempt from CGT under the existing rule on roll-over would instead be post-CGT assets subject to CGT under GBRR.

Transferee – Gladiator Pty Ltd
The consequence for Gladiator Pty Ltd choosing Subdivision 122-A roll-over relief are as follows:

- Goodwill will continue to be a pre-CGT asset in the company's hands
- The first element of the company's cost base for the business premises will be $200,000, being Maximus' cost base;
- The company will continue to depreciate the plant and equipment using the same method and effective life as Maximus was using; and
- The company will be taken to have acquired the trading stock for its market value of $75,000.

Alternatively, if the GBRR is adopted, the goodwill will be a post-CGT asset with a cost base equal to its market value of $500,000.

In addition, when dealing with pre-CGT shares and units, there most likely would be a need to consider the extremely complex application of CGT event K6 each time. This is because it would be unlikely that the proposed general rule would allow for full market value cost base as this would avoid the unrealised/embedded K6 gain in the share or unit.

For example, if a pre-CGT share has a market value of $100 and the sale of it would result in a $70 capital gain under CGT event K6, it would be too generous to allow the gain to be disregarded on roll-over with a $100 cost base as consideration in the replacement share. It would be more appropriate to allow a $30 cost base such that the $70 unrealised gain is preserved and deferred rather than eliminated on roll-over. Subsection 124-800(2) already performs this for scrip-for-scrip roll-overs (i.e. it would reduce the cost base in the replacement entity by $70 in this example). However, we recognise that if this rule was incorporated into all business restructures (e.g. a simple interposition of a holding company), it would greatly increase the need to perform a costly CGT event K6 analysis each time a pre-CGT share or unit is involved in a roll-over.

We also highlight the potential application of Division 149 where the pre-CGT assets are owned by a company or unit trust. Division 149 is an existing tax provision which deals with entities that have pre-CGT assets. The provision deals with the status of pre-CGT assets where there has been a change in ownership of the entity. The Division applies where a company or unit trust that holds pre-CGT assets has a change in more than 50% of the underlying beneficial interests and consequently the pre-CGT assets are changed into post-CGT assets. At the time this test is breached, the pre-CGT assets held by the company are deemed to become post-CGT assets at market value.

Where the pre-CGT assets are owned by an individual, those assets will ultimately become subject to the CGT regime on the death of that individual, although a market value cost base uplift arises at the date of death.

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

Based on our comments above at Question 23, we are of the view that CGT event K6 and Division 149 adequately deal with the integrity issue in relation to pre-CGT assets.

Therefore, we believe that it would be more appropriate to consider the design of CGT event K6 and Division 149 to address the issue of pre-CGT assets rather than introducing a general rule.

Furthermore, we consider that any policy shift in relation to the grandfathering of pre-CGT assets should instead be the subject of a broader CGT review rather than changes being inconsistently introduced, starting with the GBRR.

TREATMENT OF ATTRIBUTION MANAGED INVESTMENT TRUSTS

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?

No comment at this stage.

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

No comment at this stage.

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?

No comment at this stage.

RECONCILING DIVISION 615 INCOME TAX RELIEF WITH THE GENERAL MODEL

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

No comment at this stage.

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

No comment at this stage.

REMOVAL OF LIKE-FOR-LIKE REQUIREMENT IN THE GENERAL ROLL-OVER

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

No comment at this stage.

INTERACTION WITH THE CONSOLIDATION REGIME

31. Should the policy surrounding the application of business restructure roll-over relief to arrangements involving consolidatable groups be revisited? On what grounds?

The policy of excluding consolidatable groups from accessing CGT-rollover is not acceptable. The majority of groups that have not consolidated are small and medium entities (**SMEs**) due to the inappropriate outcomes that occur for SMEs when consolidating (see Example 3). The BoT has previously made recommendations[9] to address the issues in relation to the consolidation regime for SMEs, with which the Government has not yet proceeded[10].

At present, there is a tax flaw between the interaction of Subdivision 122-A and tax consolidation. That is, after a Subdivision 122-A rollover, it is often not advisable to form a tax consolidated group for many smaller business groups, as by doing so it could result in capital gain event L3 derived by the head company on consolidation.

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[9] The Board of Taxation (2013), **Post Implementation Review of certain aspects of the Consolidation Regime - A Report to the Assistant Treasurer**

[10] The Hon David Bradbury MP (2013). *Response to recommendations 6.1 to 6.3*, **Government response to recommendations contained in Board of Taxation Reports - Post Implementation Review of certain aspects of the Consolidation Regime – a Report to the Assistant Treasurer (2012 Report)** [Media release], 14 May

Example 3: Tax consolidation after Subdivision 122-A roll-over triggering L3 gain and loss of future tax deductions
Australian Wild Pets Pty Ltd is owned by Bindi, a single individual shareholder. There is one $1 share issued as capital.

The balance sheet of the company is as follows:

Assets	**$**
Cash	200,000
Trading Stock	600,000
Trade Debtors	300,000
Plant (written down value)	300,000
Total Assets	**1,400,000**
Liabilities	
Trade Creditors	100,000
Bank Loan	200,000
Total Liabilities	**300,000**
Equity	
Retained Profits	1,099,999
Capital	1

Bindi has decided to interpose a new holding company (Hold Co) on top of her existing company for asset protection without triggering a tax liability. She then rolled her share in Australian Wild Pets into the new head company using Subdivision 122-A.

Bindi then elected to form a tax consolidated group between Hold Co and Australian Wild Pets and paid a dividend of $1,099,999 from Wild Pets to Hold Co, in order to take advantage of intra-company dividends being ignored for tax purposes under a tax consolidated group.

In working out the tax values of Australian Wild Pets' assets when Bindi elected to form a consolidated group, the allocable cost amount (**ACA**) push-down calculation is as follows:

Step 1 – Cost base of member interests ($1)
On rolling her Australia Wild Pets $1 share into Hold Co using Subdivision 122-A, the original cost base of the share is $1, and this amount becomes the cost base of the share in Australia Wild Pets now owned by Hold Co.

Step 2 – Liabilities of Wild Pets ($300,000)

Step 3 – Post-acquisition undistributed fully frankable profits ($nil)
This relates to undistributed profit after the formation of the consolidated group, not the retained profits of Australian Wild Pets.

Steps 4 – 7 are irrelevant in Bindi's case

The ACA amount is therefore $300,001.

The next step is for Hold Co to allocate (push down) the ACA against the retained cost base assets of Australian Wild Pets, they are:

Cash	$200,000
Trade Debtors	$300,000
Total	$500,000

As the total of retained cost base assets of $500,000 is greater than the ACA of $300,001 by $199,999, Hold Co:

- triggers a capital gain for this amount under CGT event L3, and
- as the ACA has been used up already on push down, the written down value of plant is nil and opening value of trading stock is also nil, resulting in a total loss of $900,000 in future tax deductions.

Given such adverse and anomalous tax results, there are many smaller wholly owned company groups that are consolidatable, but not tax consolidated. It would seem to be grossly unfair for them to be denied accessing CGT roll-over, and to continue to be unable to move their assets freely intra-group without triggering a tax liability, which is the case since the introduction of tax consolidation regime back on 1 July 2002, and the repeal of Subdivision 126-B roll-over to wholly owned domestic company groups.

It is therefore inappropriate to impose consolidation on SMEs where the BoT has already reported on the significant problems with the consolidation regime to Government. Our support for this aspect of the GBRR is contingent on the Government rectifying the consolidation regime interaction with SMEs, so that assets can be freely transferred within a wholly owned domestic company group when they chose not to tax consolidate.

32. Would allowing relief for asset transfers between members of a wholly owned group give rise to integrity issues and, if so, how could they be addressed?

Allowing relief for asset transfers between members of a wholly owned Australian company group may give rise to integrity issues, such as intra-group loss asset transfers. To address such integrity concerns, the application of the current integrity measures in connection with loss asset transfers such as capital loss deferral or the prohibition on the transfer of loss assets between members of a wholly owned group could be considered. The integrity concerns were dealt with via cost base adjustment rules - together with the 165-CC and 165-CD rules and the value shifting rules - noting that they are very complex and have high costs of compliance.

THE GENERAL BUSINESS ROLL-OVER AND THE SMALL BUSINESS SECTOR

33. Would there 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 believe that there would be demand from the small business sector to use the general business roll-over. For example, in order to access the small business CGT concessions under Division 152, certain basic conditions must be satisfied and some of the concessions have additional specific conditions.

The small business restructure roll-over (**SBRR**) under Subdivision 328G relies on there being a "genuine restructure of an ongoing business" which is not defined in the tax legislation and is difficult to establish with certainty. The ATO adopts a strict interpretation of this requirement, based on the facts and circumstances surrounding the transaction. In **LCR 2016/3** *Small Business Restructure Roll-over: genuine restructure of an ongoing business and related matters*, the ATO sets out its view that succession planning is not considered a genuine restructure of an ongoing business, rather, it is facilitating an inter-generational transfer of wealth instead.

The BoT made a number of recommendations in relation to the small business CGT concessions in its **Review of Small Business Tax Concessions** (**the Review**) which, if progressed, may also increase demand for the GBRR. We note the potential changes to Division 152 arising from the Review and this Consultation Paper are significant and may materially change the capital gains tax base in relation to small business.

Therefore, there is both capacity and scope to provide an additional CGT roll-over options for small business with the introduction of the GBRR. This would be particularly useful where the GBRR is not restricted to business roll-overs.

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

We support tax reforms to establish more clearly defined functions for Division 152 and the small business restructure roll-over (**SBRR**) to the extent that these reforms significantly improve the co-ordination between the various CGT tax concessions available to small businesses.

However, we do not support the proposed restrictions:

- confining the operations of Division 152 to arm's length disposals and replacement of assets only
- establishing SBRR as an exclusive code for business restructures by small business entities
- making the proposed general roll-over available to only those entities that are ineligible for SBRR (that is entities with aggregated turnover of $10 million and over), and
- restricting the ability for a small business that opts to use the general business roll-over to combine it with other concessions.

The reason is that, under the current regime, there is freedom of choice and flexibility for small businesses and their owners to make use of existing concessions concurrently or in sequence as part of an overarching commercial arrangement.

For example, the small business restructure roll-over may provide more optimal outcomes for certain assets by deferring any capital gain, while the small business CGT concessions may be used for other assets, as the gain may be disregarded in full. As such, they are separate tax provisions designed to achieve different commercial goals and their availability should not be restricted by the introduction of the GBRR

We are concerned that the proposed changes may ultimately remove a substantial portion of the currently available roll-over relief for small business while providing little compensatory relief under the GBRR. Therefore, we believe that the existing availability of roll-over relief should not be removed or curtailed through the introduction of the GBRR or limitations on Division 152. The SBRR should be retained until it can be demonstrated that the changes have a "substantially similar practical effect"[11] for small business.

[11] The Board of Taxation 2020, *Terms of Reference*, **Review of CGT Rollovers**, viewed 8 February 2021

Accordingly:

- the GBRR must be made available to all small business entities, and not just those above $10 million in aggregated turnover
- SBRR must not be an exclusive code for small business restructures, as it is not designed to achieve or cover the same commercial outcomes that Division 152 or GBRR can provide
- GBRR must not restrict the ability for a small business to use it in combination with other tax concessions, as businesses plan and make use of these existing concessions concurrently, or in sequence, as part of an overarching commercial arrangement, and
- Division 152 must not be confined to arm's length disposals and replacement of assets only, as it is the only provision that provides for business owners to disregard their CGT gain, including the sale of their business on retirement.