

12 February 2021

Board of Taxation Secretariat  
The Treasury – Melbourne Office  
Level 6, 120 Collins Street  
Melbourne VIC 3121

By email: [CGTRoll-overs@taxboard.gov.au](mailto:CGTRoll-overs@taxboard.gov.au)

Dear Sir/Madam,

## Review of CGT Roll-overs

We welcome the opportunity to take part in the review of the capital gains tax (**CGT**) roll-over rules being conducted by the Board of Taxation (**Board**).

We have provided some preliminary comments below in relation to the overall approach to reform of the CGT roll-over rules, as well as comments in response to specific consultation questions contained in the Board's Consultation Paper dated December 2020.

### **Overall approach to reform**

We support the work of the Board in considering a general roll-over for business restructuring and the aim of replacing the existing suite of transaction-based restructure roll-overs with a single, principles-based relief that provides clear and consistent outcomes.

In conjunction with the investigation of a general roll-over for business restructuring we consider that the Board should also consider reviewing the existing suite of roll-overs and making recommendations to the Government on how these roll-overs could be strengthened to provide efficiency benefits in the short term, aligned with a business led recovery from the coronavirus pandemic.

While the current suite of roll-overs are generally well understood, we would support clarification of the existing law where the current law provides anomalous outcomes, or where there are currently issues of interpretation which limit the availability of roll-overs or result in substantial risk of ATO challenge. There is also an opportunity to fill 'gaps' in the suite of roll-overs. Our submission (**June 2020 Submission**) in relation to the Board's Consultation Guide dated February 2020 provides further details in this regard and has been attached as **Appendix C**.

We believe that any new roll-over legislation or amendments to existing roll-overs (even minor amendments to address existing deficiencies) should be accompanied by a clear

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statement of policy from the government outlining the economic objectives underpinning the law and removing doubt as to existing interpretative issues (some of which have been highlighted in our June 2020 Submission). For example, the government may wish to clarify whether the application of successive roll-overs (i.e. back to back) is consistent with underlying policy objectives and whether any roll-overs are intended to be limited in application to public groups.

As has occurred in the context of other major legislative reform<sup>1</sup>, we believe it is also important that the ATO is involved in the design process and that administrative guidance and rulings are published concurrently with the passage of enacting or amending legislation. Such guidance might include the ATO's approach to the application of Part IVA, including in the context of successive roll-overs or the use of roll-overs by private groups, as informed by the government's stated policy objectives.

This type of approach will provide better alignment between the objectives of government and the advice and compliance activities of the ATO, with the benefit to business being increased certainty and reduction in compliance costs.

### ***Summary of key recommendations***

A summary of our key recommendations is provided below:

- We recommend adopting special rules for scrip for scrip transactions in recognition that a merger transaction is inherently different to an internal restructure. The merger rules should preserve the key existing features of Subdivision 124-M including the market value rule and access to rollover where an arrangement results in holding more than 80%. In particular, the market value rule avoids a double taxation outcome due to gains being reflected at both the shareholder and asset level. Furthermore, the market value rule provides a potential acquirer with a level of assurance that it will not stand to inherit capital gains of the target. In the absence of the market value rule an acquirer without access to detailed tax information (for example in an on-market takeover) would not be in a position to properly assess its exposure to 'built-in' capital gains of the target which may be reflected in lower offer consideration, reducing the attractiveness of the proposal to target shareholders.
- Partial rollover should continue to be available for merger transactions in recognition of the importance of an acquirer providing ineligible proceeds together with eligible scrip, for example cash or securities in a different entity (e.g. a stapled entity). Further consideration should be given to the economic benefits of partial rollover in other rollover scenarios.
- We consider that in designing the general roll-over (e.g. applying to demergers), rollover should equally be available in situations involving a subsequent transaction (e.g. a merger or capital raising), as this best achieves the objectives of achieving economic efficiency and value creation.
- We consider that as a general proposition there should be no separate eligibility or integrity rules for private entities, rather the rules should apply uniformly where possible, to achieve equity and reduce complexity.

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<sup>1</sup> For example in relation to the introduction of the attribution managed investment trust regime.

- To improve the certainty in application of the general rollover we have made a number of recommendations, and included high level drafting suggestions in **Appendix B**, including:
  - removing the “restructure scheme” requirement and the requirement that CGT events be “under” the restructure.
  - replacing the concept of “restructure” and an ability to exclude specific CGT events, with a defined term “continuity period” being a period during which the underlying ownership of the original assets has been maintained.
  - we recommend not imposing a time limitation under the general rollover, other than in the case where it provides more certainty regarding the exclusion of subsequent capital raising transactions where this would otherwise cause the general rollover to be unavailable (noting our view that a subsequent capital raising transaction should not preclude rollover).
- Consistent eligibility rules provide considerable simplification benefits. It is important that these benefits are not eroded by embedding general and specific anti-avoidance measures within the rules, while maintaining integrity through eligibility criteria that are clear in application. We therefore recommend removing the dominant commercial purpose test within the general rollover model, noting the potential overlap with the general anti-avoidance rules in Part IVA and not including a new value shifting rule, noting the potential overlap with existing direct and indirect value shifting rules.
- We recommend retaining an ability to preserve the pre-CGT status of replacement assets under the existing roll-overs, with taxpayers allowed to irrevocably elect to convert to post-CGT asset with a market value cost base. Requiring pre-CGT assets to become post-CGT assets under the general rollover achieves the opposite of what is intended by entrenching inefficient “lock in” of assets.
- To further promoted economic efficiency we consider that non-discretionary trusts, including AMITs, should be eligible to access the general rollover. This should include rollover more generally for the transfer of assets between wholly owned, as trusts are generally not able to form a tax consolidated group. That is, the general rollover should be available in respect of assets that are not ownership interests where the replacement assets are units in a trust in situations where the original asset was held by a trust or individual.

We would welcome the opportunity to provide additional submissions in relation to detailed drafting considerations in respect of the above.

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Yours sincerely



Max Persson  
Partner



Spyros Kotsopoulos  
Partner



James Pettigrew  
Partner

**Appendix A - Responses to consultation questions**

Consultation question	Discussion	Recommendation
<p>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.</p>	<p>The following rollovers are not covered and could potentially be incorporated:</p> <ul style="list-style-type: none"> <li>• Subdivision 124-Q (Top hatting)</li> <li>• Subdivision 126-G (Transfers between certain trusts).</li> </ul> <p>As these rollovers also involve CGT events under a restructure without changes to ultimate ownership it seems appropriate to include these rollovers in the general rollover rules. Further comments on each category of rollover are provided below, including the rationale for including these types of rollovers under the general rollover model.</p> <p><u>Subdivision 124-Q Top hatting</u></p> <p>Subdivision 124-Q was introduced in 2007 in order to provide relief for investors in a stapled group, such as an Australian listed property trust, where there has been a restructure involving the interposition of a unit trust between the investors and the stapled entities (referred to as 'top-hatting').</p> <p>As noted in the Consultation Guide, the policy rationale for that provision was:</p> <p style="text-align: center;"><i>To enhance the international competitiveness of Australian property trusts and facilitate their expansion into offshore markets. Stapled groups have become increasingly dependent on the acquisition of overseas assets in order to increase their competitive position.</i></p>	<p>We recommend considering Subdivision 124-Q and Subdivision 126-G type rollovers in the general rollover model.</p> <p>In addition, general rollover should be available for the transfer of assets between wholly owned trusts as trusts are not able to form a tax consolidated group.</p>

Consultation question	Discussion	Recommendation
	<p>The state and territory governments subsequently introduced stamp duty relief to facilitate top-hatting restructures. However, in April 2011 the ATO issued Tax Determination TD 2011/7 which introduced significant risk in reliance on Subdivision 124-Q roll-over, such that very few groups have actually implemented top-hatting restructures, even though such restructuring may promote economic efficiencies and simplification, including administrative and compliance savings for investors.</p> <p>TD 2011/7 formalised the ATO’s view that a unit trust that is interposed between investors and the stapled entities (typically a company and one or more trusts) would be deemed a trading trust if the trustee of the unit trust later gains control (or the ability to control), either directly or indirectly, of operations of an entity that are in respect of a trading business. That is, an interposed trust would become subject to tax in a similar way to a company where the subsidiary company established a new subsidiary carrying on a trading business. This imposes an unacceptable ongoing restriction on normal business operations where Subdivision 124-Q roll-over has been applied in respect of a restructure.</p> <p>The interpretation in TD 2011/7 has resulted in very few groups undertaking ‘top-hatting’ restructures. The design of the general rollover model offers an opportunity to clarify the policy intention in relation to Subdivision 124-Q and to incorporate this into the model.</p> <p><u>Subdivision 126-G Transfers of assets between certain trusts</u></p> <p>There is an anomaly in the current tax legislation that prevents AMITs and their unitholders from accessing Subdivision 126-G rollover relating to transfer of assets</p>	

Consultation question	Discussion	Recommendation
	<p>between certain trusts with the same beneficiaries. In particular, Subdivision 126-G requires that CGT event E4 is capable of applying to all of the units and interests in the trust (this rule is to prevent discretionary trusts from accessing the roll-overs). However, while CGT event E4 continues to apply for unit trusts and managed investment trusts (MITs), the equivalent CGT provision for AMITs is CGT event E10. As such, the references to CGT event E4 in the CGT roll-over provisions need to be updated to also include CGT event E10. Based on our previous discussions with Treasury and the ATO, we understand that this is an anomaly in the current legislation that arose due to the lack of required consequential amendments when the AMIT rules were introduced and that there was no policy intention to prevent AMITs and their unitholders from accessing the CGT roll-over provisions. This issue could be addressed by including Subdivision 126-G type rollovers under the general rollover model.</p> <p><b>Transfers between wholly owned trusts</b></p> <p>In addition, there is an opportunity to introduce rollover more generally for the transfer of assets between wholly owned trusts. As trusts are generally not able to form a tax consolidated group, wholly owned group roll-over should be available.</p> <p>In turn, the transfer of assets between wholly owned entities where the head entity is a superannuation fund, should also be available. This could be post-merger or undertaken as part of a superannuation fund’s portfolio management.</p> <p>Roll-over is justified on economic efficiency grounds for business reorganisations involving asset ownership</p>	

Consultation question	Discussion	Recommendation
	<p>changes where no change occurs in the underlying ownership of the asset or where the underlying assets against which the taxpayer has a claim do not change.</p>	
<p>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?</p>	<p>The approach of relying on the meaning of the term "restructure" seems to import some of the same types of interpretational issues as those that currently exist in relation to the meaning of the word "restructure" in Division 125. For example, the time at which a "restructure" ends will be important if any CGT events relating to changes in ownership that do not qualify as a "merger scrip for scrip case" are seen as part of the "restructure", as such CGT events need to be specifically excluded by the taxpayer in order to qualify for the general restructure roll-over in respect of other CGT events occurring as part of the business restructure.</p> <p>Identifying which CGT events occur "under" a restructure also involves potential interpretational uncertainty including the <i>prima facie</i> start time for the proposed 12 month limitation on the eligible restructure period.</p> <p>Similarly, as a capital raising <u>does not</u> give rise to a CGT event there are <i>prima facie</i> issues where a business restructure is seen to include a subsequent capital raising (such that rollover is not available for any other CGT events occurring as part of the business restructure). This is evident from Example 2 on page 22 of the Consultation Paper.</p> <p>For a post demerger capital raising the model then provides an exception to the maintenance of ultimate economic ownership rule which requires that "integrity requirements are satisfied and the entity is a public entity". Our response to Question 18 deals with this more specifically.</p>	<p>We recommend replacing the concept of "restructure", and an ability to exclude specific CGT events, with a defined term "continuity period" being a period during which the underlying ownership of the original assets has been maintained. A shorter continuity period could exist within a longer potential continuity period - taxpayers could choose the continuity period (evidenced through the preparation of tax returns) provided that the underlying ownership of the original assets has been maintained throughout this period. CGT events within the chosen continuity period may be eligible for rollover.</p> <p>Adopting a defined continuity period and providing flexibility to choose the start and end of this period removes the issues that can otherwise arise and provides greater certainty for taxpayers in applying the rules.</p> <p>Refer to our high level drafting suggestions in <b>Appendix B</b>.</p> <p>As the suggested approach would allow subsequent capital raising transactions, if this was seen to create integrity concerns then this could be dealt with separately, however, as discussion in the responses to Question 18, in our view there is no real basis for suggesting that a subsequent capital raising should result in a deny of rollover for earlier events.</p>

Consultation question	Discussion	Recommendation
	<p>There are also questions as to the start of the restructure, which determines whether a CGT event can be “under” the restructure (as the restructure starts when the first CGT event occurs, this could give rise to circularity).</p>	
<p>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?</p>	<p>Identifying the potential scope of a business restructure and then seeking to specifically excluding particular CGT events to identify an “eligible restructure” gives rise to unnecessary uncertainty and interpretational issues.</p>	<p>As noted above, we recommend replacing the concept of “business restructure” and an ability to exclude specific CGT events with a defined term “continuity period” being a period during which the underlying ownership of the original assets has been maintained (with no need to exclude specific CGT events).</p> <p>Refer to our high level drafting suggestions in <b>Appendix B</b>.</p>
<p>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?</p>	<p><b>Dominant purpose test</b></p> <p>The additional integrity measure requiring a restructuring to be carried out for a dominant commercial purpose introduced significant uncertainty and would result in a need to obtain a ruling from the ATO in many cases (including in any public market transactions) reducing market efficiency and resulting in costs and delays in undertaken restructure transactions. The income tax legislation contains general anti-avoidance rules and a larger number of specific anti-avoidance rules that would apply to restructure transactions and transactions undertaken before or after the restructure.</p> <p><b>Original asset restrictions – business asset</b></p> <p>Paragraph 2(a)(ii) refers to a “business asset”. Clarification as to what types of assets are included in this definition should be added to ensure that assets that generate “passive” income can be included (for example investments in listed entities or commercial real estate).</p>	<p><b>Dominant purpose test</b></p> <p>We recommend remove the paragraph 1(e) dominant purpose test. The requirement that the “dominant purpose of the restructure is a commercial purpose” is going to mean that rulings will often be required, certainly for all public transactions, in order to obtain sufficient certainty that rollover is available. There also seems to be substantial overlap with Part IVA.</p> <p>Refer to our high level drafting suggestions in <b>Appendix B</b>.</p> <p><b>Original asset restrictions – business asset</b></p> <p>We recommend clarifying the scope of the term “business asset” to avoid imposing new limitations on the types of CGT assets that may be transferred under the general rollover. The rationale for any</p>

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	<p><b>Replacement asset restrictions</b></p> <p>Under paragraph 2(b)(iii) where the rollover asset is not an ownership interest the replacement asset must be shares in a company. This is not an appropriate restriction where the asset was previously held directly by an individual or by a trust (i.e. where CGT discount was available) – in this case it should be possible to transfer to a new trust.</p> <p><b>Clarification of CGT event “under” a restructure</b></p> <p>Paragraph 4 sets out that “In determining whether a CGT event is “under” an eligible restructure take into account “commercial understanding” of the eligible restructure.” It seems as though this is intended to clarify the meaning of the term “restructure”. As highlighted above, using the term “restructure” (even with the clarify comments regarding “commercial understanding”) as a critical feature of the rollover criteria imports uncertainty, which can be addressed by adopting a concept of a continuity period by reference to a period during which ultimate ownership is maintained.</p> <p><b>Capital raising</b></p> <p>With reference to paragraph 6(c)(ii)2., a capital raising would likely arise after the CGT event, but may still be part of the restructure. The exclusion assumes that the capital raising occurs “at the time of the CGT event”. If there is to be a specific rule for capital raisings (refer comments on Question 18), it should refer to a capital raising as part of the restructure.</p>	<p>existing limitations which are to be adopted should also be considered.</p> <p><b>Replacement asset restrictions</b></p> <p>We recommend providing for units in a unit trust as a replacement asset where the original asset is either an ownership interest or a “business asset” directly held by an individual or a unit trust (other than a trust that is a member of a consolidated group).</p> <p><b>Clarification of CGT event under a restructure</b></p> <p>As discussed above, we would recommend removing any separate requirement that a CGT event occur under a restructure, by defining a continuity period by reference to a period during which ultimate ownership is maintained, and providing that all CGT event occurring during the chosen continuity period may be eligible for rollover.</p> <p>Refer to our high level drafting suggestions in <b>Appendix B.</b></p> <p><b>Capital raising</b></p> <p>We recommend that there should be no restriction on the ability to raise capital following the continuity period, as discussed in relation to Questions 18.</p>

Consultation question	Discussion	Recommendation
	<p><b>Primacy of specific rollovers</b></p> <p>General roll-over should only be precluded where the conditions for a specific rollover are <u>satisfied</u>. Under the model (paragraph 8(a)) relief would not be available under the general roll-over where a specific roll-over provision applies to a transaction or arrangement, but its conditions are not satisfied. It is not clear how a roll over can “apply” if its conditions are not satisfied, to align with the existing rollover ordering rules and to provide certainty the general rollover should be availability unless the conditions for a specific rollover are actually satisfied.</p>	<p><b>Primacy of specific rollovers</b></p> <p>General rollover should be available unless the conditions of a specific rollover are actually satisfied to support certainty in the application of the general rollover (i.e. to avoid the risks associated with interpretational issues as to whether a particular specific rollover could be seen to “apply” even where all the requirements of the relevant specific rollover are not satisfied).</p> <p>Refer to our high level drafting suggestions in <b>Appendix B.</b></p>
<p>7. Do you agree with limiting the eligible restructure period to 12 months? If not, please explain your rationale and identify any alternate approaches.</p>	<p>As noted above, we recommend replacing the concept of “business restructure” and an ability to exclude specific CGT events with a defined term “continuity period” being a period during which the underlying ownership of the original assets has been maintained (with no need to exclude specific CGT events).</p> <p>This approach has the advantage of not imposing a 12 month limitation on any eligible restructure, and there may be multiple continuity periods occurring over what may arguably be seen as a single restructure. Such an approach enhances the flexibility and certainty of the general rollover.</p> <p>If the view was taken that a capital raising transaction would ordinarily be part of a “restructure” (which we do not see as being supported under the current rules), then a limitation on the restructure period could be seen to provide certainty that a subsequent capital raising would not be included. Whether 12 months is appropriate in this case would depend on the start time of the restructure and may create arbitrary differences in outcomes (e.g. a demerged entity under a restructure</p>	<p>We recommend not imposing a time limitation under the general rollover, other than in the case where it provides more certainty regarding the exclusion of subsequent capital raising transactions where this would otherwise cause the general rollover to be unavailable (refer to our comments regarding Question 18 below).</p> <p>Refer to our high level drafting suggestions in <b>Appendix B.</b></p>

Consultation question	Discussion	Recommendation
	<p>with a longer assembly phase could undertake a capital raising sooner following the demerger than a demerged entity with a shorter assembly phase).</p> <p>Refer above in response to Question 5 in relation to defining a "continuity period" and also our comments at Question 18 below in relation to capital raising transactions.</p>	
<p>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'.</p>	<p>Refer to the responses to Questions 5 and 6.</p> <p>Our recommendation regarding the ability to undertake a demerger followed by a capital raising do not expand the eligibility of transactions unless it is considered that a demerger followed by a capital raising is currently not permitted under Division 125 (which is not our view, refer to the response to Question 18 below).</p>	
<p>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.</p>	<p>In our view there should be no separate rules for listed entities, rather the rules should apply uniformly to achieve equity and reduce complexity.</p>	

Consultation question	Discussion	Recommendation
<p>10. Do you consider that the adoption of a single 'push-up' cost base rule for the acquiring entity would deliver simplification advantages?</p>	<p>A single "push-up" cost base rule should deliver simplification advantages. It will be important to draft the "push-up" cost base rules with sufficient clarity.</p> <p>We note that the Consultation Paper makes reference to a Division 615 approach. If the "push-up" cost base rules in Division 615 were to be adopted, further clarity on the treatment of liabilities, including future deductible liabilities, should be provided (i.e. to exclude future deductible liabilities from the calculation of cost base).</p> <p>Alternatively the "push-up" cost base rules could be based on Division 711, with some modifications - for example a deemed cost base should be available for assets that gave rise to assessable income (e.g. service receivables) that would otherwise have no tax cost base.</p>	<p>Potentially these rules could be modelled on Division 615 or Division 711, however there are a number of issues that should be considered further in each case.</p>
<p>11. Does it represent a reasonable trade-off in light of the other benefits of a general roll-over?</p>	<p>The potentially simplification benefits of a single rollover regime for mergers and restructures are considered to be outweighed by the practical and substantial issues that arise with this approach, including:</p> <ul style="list-style-type: none"> <li>• Removing the merger rollover in transactions resulting in an increase in ownership from less than 80% to more than 80%</li> <li>• Removing the market value cost base rules in a merger transaction (subject to significant stakeholder, common stake and restructure rules)</li> <li>• Potentially removing partial rollover.</li> </ul> <p>Providing for rollover for a merger transaction resulting in an increase in ownership from less than 80% to more than 80% has been a feature of Subdivision 124-M since it was originally introduced in 1999 and the rationale for the rollover not changed, as set out in the Explanatory</p>	<p>We recommend adopting special rules for scrip for scrip transactions in recognition that a merger transaction is inherently different to a restructure. The merger rules should preserve the existing features of Subdivision 124-M including the market value rule and access to rollover where an arrangement results in holding more than 80%.</p> <p>Partial rollover should continue to be available for merger transactions in recognition of the importance of an acquirer providing ineligible proceeds together with eligible scrip, for example cash or securities in a different entity (e.g. where a trust is acquired by a stapled trust and company the acquirer would offer units in the acquiring trust as eligible scrip as well as shares in the company being ineligible proceeds).</p>

Consultation question	Discussion	Recommendation
	<p>Memorandum to <i>New Business Tax System (Capital Gains Tax) Bill 1999</i>:</p> <p><i>2.3 The existing CGT provisions are an impediment to corporate acquisition activity in Australia. Acquiring an interest in an entity may crystallise a capital gain in the hands of the existing equity holder. Entities seeking to acquire interests often find it necessary to pay a premium to compensate the equity holder for the potential CGT liability. Also, the offer may have to include cash so that the equity holder has funds to pay its tax.</i></p> <p>...</p> <p><i>2.5 The roll-over will enhance the functioning of, and value creation by, the corporate sector in Australia.</i></p> <p>For example, a substantial shareholder (say 25%) acquiring the remaining 75% of the shares in a company in a scrip for scrip transaction can currently qualify for rollover but rollover would not be available under the proposed rules as there is an acquisition of less than 80% of the shares. There does not seem to be a compelling reason for denial of rollover in this scenario.</p> <p>Comments regarding partial rollover are included in the response to Question .</p>	
<p>12. If preserved, how could the existing market value 'step up' be incorporated into the general roll-over without importing excessive complexity?</p>	<p>As noted above, we consider that special rules should apply for merger transactions. The market value step up rules would be contained in the rules specific to merger transactions and could be modelled on the existing rules (including existing integrity measures).</p>	

Consultation question	Discussion	Recommendation
14. Are there any practical difficulties associated with these consequences? We would appreciate your submissions on potential solutions to these issues.	Refer to the response to Question 10.	
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?	<p>Refer to the response to Question 11.</p> <p>Partial rollover should continue to be available for merger transactions, as discussed above. On this basis there is no expansion of the existing rollover concessions.</p> <p>Further consideration should be given to the economic benefits of partial rollover in other rollover scenarios.</p>	
b. Please provide examples of transactions which would not occur without partial roll-over?	Cash and scrip transactions or transactions involving both eligible and ineligible proceeds are common, and rollover should continue to be available for eligible scrip.	
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	It is not clear how the concept of a replacement asset would apply in a Subdivision 126-B type transfer, for example (but not limited to) transactions involving sister entities, as there may be cash or debt as consideration for the transfer. It is also not clear how a discharge of liabilities as consideration for an acquisition, as currently provided by paragraph 122-20(1)(b), would fit within the	

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<p>categories? Please include examples to illustrate your answer where possible.</p>	<p>model. The concept of replacement asset would therefore need to be broad enough to cover these types of consideration.</p>	
<p>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?</p>	<p>Consistent eligibility rules provide considerable simplification benefits. It is important that these benefits are not eroded by embedding specific anti-avoidance measures within the rules. Specific anti-avoidance measures increase complexity and the risk that restructuring transactions that do not give rise to avoidance issues are nevertheless ineligible for rollover due to a specific anti-avoidance rule. Specific anti-avoidance rules also introduce additional issues of interpretation which can operate to limit the availability of rollovers over time as we have (arguably) seen with the existing rollover provisions in Division 125 and Subdivision 126-Q.</p>	
<p>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?</p>	<p>We are aware of the ATO's views in relation to a demerged entity undertaking a rights issue at a discount shortly after the distribution of shares in the demerged entity and the suggesting by the ATO in such cases that the action resulting in the subsequent benefit happens "under the restructuring", despite the action which results in the benefit being no part of the distribution of interests in the demerged entity. The Consultation Paper seems to accept this as the current position.</p> <p>It has however been argued for taxpayers that the distribution of interests in the demerged entity defines the boundaries of what happens "under the restructuring" which constitutes the demerger happening to the demerger group.</p> <p>The ATO position has been that the concept of restructuring is broad and effectively reserves to the ATO a discretion to survey all events around the distribution of</p>	<p>We consider that there should be no restrictions under the general rollover regime relating to capital raisings.</p>

Consultation question	Discussion	Recommendation
	<p>interests in the demerged subsidiary to determine if they breach the “nothing else” rule. It has been suggested by the ATO that this wide reading of the concept of “under the restructuring” is consistent with legislative intent and is intended to protect the integrity of the roll-over. From the perspective of taxpayers, the authority for this in either the legislation or the explanatory materials is not immediately apparent. With reference to the comment from the <i>Review of Business Taxation</i> “that a demerger leaves the ultimate owners in the same economic position as they were before the restructure”, we would suggest that a stronger statement of policy should be identified before reaching the view that post demerger capital raisings are intended to preclude rollover.</p> <p>We consider that in designing the general roll-over (e.g. applying to demergers), rollover should equally be available in situations involving a subsequent transaction (e.g. a capital raising), as this best achieves the objectives of achieving economic efficiency and value creation. Many of the policy reasons supporting this view have been identified in Section 5.1 of the Consultation Paper.</p>	
<p>19. In what circumstances do capital raisings give rise to integrity concerns such as inappropriate value shifting? How could these concerns be addressed?</p>	<p>It is considered that the existing value shifting rules adequately deal with integrity concerns to do with value shifting and it is not appropriate to introduce further value shifting rules in the context of designing a general rollover regime.</p>	
<p>20. Should the cost base of replacement interests be adjusted to reflect any dilutionary effect of a capital raising?</p>	<p>There should be no cost base adjustments for “value shifting” under the general rollover rules. The existing value shifting rules adequately deal with integrity concerns to do with value shifting.</p>	

Consultation question	Discussion	Recommendation
	<p>In particular where an existing shareholding is diluted due to a discounted capital raising the existing shareholder has suffered a loss which should not be negated by any value shifting rules unless there is a relevant "controller" or "active participant".</p>	
<p>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?</p>	<p>Refer to the comments in the response to Question 18.</p>	<p>We consider that there should be no restrictions under the general rollover regime relating to capital raisings.</p>
<p>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?</p>	<p>Whilst it may be considered there is a valid revenue argument to "refresh" pre-CGT assets on replacement asset rollovers as post-CGT assets such a change is likely to achieve the opposite of what was intended by increasing inefficiency as "lock in" will be more entrenched.</p> <p>The CGT rules were introduced such that the relevant taxpayer's entitlement to continuing pre-CGT treatment is preserved and where possible certain roll-overs were introduced to continue this approach.</p> <p>In relation to the comment about pre-CGT shares not being eligible for scrip for scrip roll-over relief we note there is reference to the replacement shares being post CGT shares having a market value cost base. In this respect we note CGT event K6 already provides for a potential adjustment to the market value cost base of the shares where K6 arises.</p> <p>In our view the principled framework of the rules always intended to preserve the pre-CGT treatment of assets acquired prior to September 1985. Furthermore the current protections in the relevant CGT roll-overs</p>	<p>We recommend preserving the pre-CGT status of replacement assets under the existing roll-overs with taxpayers allowed to irrevocably elect to convert to post-CGT asset market value cost base.</p>

Consultation question	Discussion	Recommendation
	<p>currently available to taxpayers are sufficient to ensure the integrity of the tax system.</p> <p>Proposing to replace the current rules such that assets received as the replacement of pre-CGT assets become post assets would, more than likely, cause taxpayers to not restructure and use the roll-over.</p> <p>For example if Subdivision 122-A roll-over relief is claimed, the status of any pre-CGT asset (an asset acquired before 20 September 1985) is preserved. If you were to replace his roll-over in the manner described it will be unlikely many taxpayers would proceed.</p>	
<p>24. Can you suggest ways for dealing with pre-CGT assets under the general roll-over that that would provide maximum simplicity?</p>	<p>In our view, taxpayers are willing to put up with complexity to retain the benefit of the pre-CGT status. The general roll-over should allow for preservation of the pre-CGT status of the asset but be quite consistent (and explicit) across various typical transactions. In this way the general purpose roll-over is "fit for purpose".</p>	<p>Please refer to our comments at 23 above.</p>
<p>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?</p>	<p>Yes.</p>	
<p>26. For what types of arrangements would AMITs contemplate using general roll-over?</p>	<p>The types of arrangements would include transactions that are covered by existing rollover rules, but where rollover is currently not available for AMITs or trusts, for example:</p>	<p>We recommend that these rollover parity issues be addressed as part of any general rollover regime to remove impediments to restructuring transactions or mergers involving trusts.</p>

Consultation question	Discussion	Recommendation
	<ul style="list-style-type: none"> <li>• Transfers of assets within wholly owned groups involving trusts and/or companies (e.g. Subdivision 126-B for transfers between companies and Subdivision 126-G for transfers between fixed trusts that are not AMITs)</li> <li>• Scrip for scrip rollover involving a downstream trust entity as the acquirer (Subdivision 124-M for companies)</li> <li>• Interposing a trust (Division 615 for the interposition of a company)</li> </ul>	
<p>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?</p>	<p>No. The trust remains an AMIT. The model currently provides that assets that are not ownership interests can only be exchanged for shares. If this were expanded to allow transfers of assets between trusts then a requirement that the acquirer also be an AMIT could be introduced.</p>	
<p>28. What implementation issues should be taken into account in extending relief in this way? [trading stock or on revenue account]</p>	<p>If consideration was given to extending the relief to assets such as trading stock or assets held on revenue account some consideration needs to be given as to whether the replacement asset could be considered to be held on capital account or should be characterised by reference to the tax treatment of the original asset.</p>	
<p>30. What integrity issues or practical difficulties should the Board give further consideration to in removing the like-for-like requirement?</p>	<p>The ability to access CGT discount for assets previously held by a company might be seen as an integrity concern. As discussed in our response to Question 6, limiting the situation where the replacement asset can be units in a unit trust to situations involving an original asset being an ownership interest, a "business asset" held by a trust or a "business asset" held by an individual should address this concern.</p>	
<p>31. Should the policy surrounding the application of</p>	<p>There are existing wholly owned groups of companies that did not elect to form a tax consolidated group during the</p>	<p>We recommend providing transitional support for existing consolidatable groups to enter the</p>

Consultation question	Discussion	Recommendation
<p>business restructure roll-over relief to arrangements involving consolidatable groups be revisited? On what grounds?</p>	<p>2002 – 2004 transitional period (which provided for groups to “stick” with existing tax values). If such groups were to elect to form a tax consolidated group today there may be significant adverse tax consequences. In particular the resetting of tax bases will often result in the skewing of tax base to capital assets such as internally generated goodwill or other intangibles (that have a high market value but no existing tax base), and away from revenue assets, such as trading stock, depreciating assets or foreign currency cash and receivables, with the result that the group suffers a higher tax liability in the short term, with relief only available on a future sale of the business.</p> <p>To allow rollover for asset transfers within a consolidatable corporate groups may however re-introduce a range of integrity concerns that were sought to be addressed through the tax consolidation regime, for example loss duplication.</p> <p>We would suggest providing for a “stick” choice in all formation cases or alternatively that a period (e.g. 24 month) is provided for existing consolidatable groups to elect to form a tax consolidated group with the ability to “stick” with existing tax bases.</p> <p>As the loss transfer rules have been repealed there would not be a need for transitional available fraction rules, as was the case during the original transitional period.</p>	<p>consolidation regime, to achieve economic efficiency benefits without re-introducing potential integrity issues.</p>
<p>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?</p>	<p>Refer to the response to Question 31.</p>	

Consultation question	Discussion	Recommendation
<p>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?</p>	<p>The small business sector does not always have the means to engage advisers to provide advice on complex matters and which may be complex to interpret and implement, or to make appropriate judgements in situations involving highlights a great deal of uncertainty in the application of the rules. The small business taxpayer would likely default to the simplest roll-over to preserve their CGT treatment unless there are perceived adverse tax consequences (both immediate or future) that flow from the manner in which the roll-over operates.</p>	<p>We would recommend the small business sector have flexibility as to which roll-over mechanism they would adopt.</p>

## Appendix B – High level drafting suggestions

A ~~scheme restructure~~ is an **eligible restructure** if:

- ~~(a) the restructure is under a restructure scheme (whether explicit or objectively inferred from the circumstances); and~~
- ~~(b) the restructure starts there is a period (the **continuity period**) that starts at an identifiable time (the **start time**) and ends at an identifiable time (the **end time**) that is no later than 12 months after the start time; and~~
- (c) a CGT event ~~under the restructure~~ happens at the start time; and
- (d) ~~under the restructure~~, one or more assets (the **original assets**) that are held just before the start time are exchanged for one or more assets (the **replacement assets** in respect of the original assets) that are held at the end time; and
- ~~(e) the dominant purpose of the restructure is a commercial purpose; and~~
- ~~(f) in accordance with the restructure~~, each entity that held an original asset just before the start time holds one or more replacement assets in respect of that original asset at the end time; and
- (g) the asset requirements in paragraph 2 are satisfied.

2 The asset requirements are satisfied if:

- (a) each original asset, just before the start time:
  - (i) is a CGT asset; and
  - (ii) is an ownership interest or business asset; and
- (b) each replacement asset, at the end time:
  - (i) is a CGT asset; and
  - (ii) unless subparagraph (iii) **or (iv)** applies—is an ownership interest in a company or unit trust; and
  - (iii) if the eligible restructure involves the disposal of ~~assets that are not ownership interests or if ownership interest~~ and the ownership interests disposed of make up less than 80% of the ownership interests in the relevant entity—is an ownership interest in a company;
  - (iv) if the eligible restructure involves the disposal of assets that are not ownership interests and those assets are held by a company —is an ownership interest in a company;**
- (c) the market value of each original asset just before the start time is substantially the same as the market value or capital proceeds where partial roll-over of the replacement asset or replacement assets in respect of that original asset at the end time.

3 CGT events are “under” an eligible restructure only if each of those events happens at or after the start time and before or at the end time.

~~4 In determining whether a CGT event is “under” an eligible restructure take into account “commercial understanding” of the eligible restructure.~~

5 For the purposes of paragraph 1(d), an original asset may be (or be part of) a replacement asset (or part of a replacement asset).

Note: Under a demerger eligible restructure, a replacement asset may be an original asset.

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## Overview of requirements for roll-over

6 The roll-over is available for a CGT event if all the following requirements are satisfied:

(a) the CGT event happens under an eligible restructure, in respect of a CGT asset;

(b) every entity that is affected by the CGT event makes a choice for the roll-over to apply to the CGT event;

(c) either:

(i) ~~in comparing the start time and the end time during the continuity period~~, the ultimate economic ownership of either the original asset, or underlying assets representing the original asset (where the original asset is a membership interest), is maintained; or

(ii) if the asset is an ownership interest in an entity:

~~1. at the time of the CGT event the criteria for a merger scrip for scrip case are satisfied in respect of the entity; or~~

~~2. at the time of the CGT event, a change to ultimate economic ownership arises as a result of a capital raising and integrity requirements are satisfied and the entity is a public entity;~~

(d) the requirement in paragraph 8 is satisfied.

7 For the purposes of paragraph 6(c)(i):

(a) disregard ownership interests covered by employee share schemes and adjusting instrument rules analogous to those in existing section 125-75 of the *Income Tax Assessment Act 1997*; and

(b) disregard ownership interests that are shares held by entities if:

(i) those entities together hold no more than 5 shares in the relevant entity; and

(ii) the market value of those shares expressed as a percentage of the market value of all the shares in the relevant entity is such that it is reasonable to treat the remaining shareholders as owning all the shares in the relevant entity.

8 The requirement in this paragraph is satisfied unless any of the following apply:

(a) another roll-over applies in respect of the CGT event;

(b) if the replacement asset(s) is/are not taxable Australian property just after the end time—

the [final recipient] is a foreign resident, or a trustee of a trust that is a foreign trust for CGT purposes;

(c) the final recipient is a tax exempt entity;

(d) any capital gain from disposing replacement interests would be disregarded (except because of a roll-over);

(e) the CGT event results from a transfer between a member of a consolidatable group, except if the restructure results in:

(i) the transfer of a CGT asset from a trust or partnership to a company; or

(ii) the interposition (100%) of a holding company.

## Consequences of roll-over

9 If the roll-over is available for a CGT event, disregard a capital gain or capital loss from the event.

10 If the roll-over is available for one or more CGT events:

(a) work out the cost base of a replacement asset in respect of one or more original assets by reasonably attributing to it the cost base of the original asset just before the start time; and

(b) work out the cost base of an original asset by:

(i) in the case of an ownership interest—applying a method analogous to that in section 124-784B of the *Income Tax Assessment Act 1997*; or

(ii) in the case of a business asset—attributing to it its cost base just before the start time

***Appendix C – June 2020 Submission***