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Board of Taxation Secretariat
The Treasury
Langton Crescent
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By Email: cgtrollovers@taxboard.gov.au

Dear Secretariat

SUBMISSION ON DECEMBER 2020 CONSULTATION PAPER ON CGT ROLL-OVERS

Cleary Hoare Solicitors welcomes the opportunity to provide submissions on the December 2020 Consultation Paper "Review of CGT Roll-Overs" ("the Paper").

Cleary Hoare Solicitors works predominantly with private businesses throughout Australia. Our submissions focus on the Paper's section on the small business sector and in particular, the Paper's statement on what the authors believe a more coherent model for the small business sector to be:

1. Confining the operation of Division 152 to arm's length disposals and replacement of assets;
2. Establishing the SBRR (Small Business Restructure Rollover) as an exclusive code for restructures by small business entities; and
3. Making the proposed general roll-over available to only those entities that are ineligible for SBRR.

It is our view that each of these point would have a detrimental effect on the small business sector and will address each in turn.

Confining the operation of Division 152 to arm's length disposals and replacement of assets

No explanation is given for the rationale to limit the access to the Small Business CGT Concessions contained within Division 152 to only arm's length disposals and replacement of assets and it is not supported by Cleary Hoare Solicitors.

Presumably the authors consider there is some mischief in non-arm's length disposals where Division 152 is used to deal with the resulting capital gain. However such a proposal fails to grasp the

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commercial and practical realities of small businesses, nor the policy principles of Division 152.

The rules in Division 152 contain a "hard cliff" cut-off. If taxpayers fail both of the \$2m turnover test and the \$6m net asset test or any of the other basic conditions, access to the Division 152 concessions is no longer available.

For example, if a taxpayers net asset position is \$5,999,999.00 under the rules they will qualify (assuming other conditions are met), however if it is \$2.00 more they will not be able to qualify and the concessions will be lost. Bearing this in mind, a properly advised client ought to consider what you would call an internal restructure to utilise the concessions while available.

4. To put this into context and the inequitable outcomes, a simplified example may assist:
 - 4.1 Franks Pty Ltd as trustee for the Ten Trust operates a small business for the Frank family which they started from scratch. Assuming no other relevant assets, the market value of the business is approaching \$5.5m (with the turnover threshold already exceeded). Advisors to the Frank family suggest that the business be transferred to a company Ten Pty Ltd owned by George Frank for \$5.5m, with the Division 152 concessions used to reduce the resulting capital gain incurred. In rough terms, the resulting gain would be approximately \$375,000 if the Division 115 discount capital gain, the Small Business 50% and two lots of Small Business Retirement exemption were used. Unfortunately one year later George Frank passes away unexpectedly, and as the main business driver the family have no choice but to sell the business, which is now valued at \$6.2m and a sale proceeds at that price. As they exceed the maximum net asset value test, no further access to Division 152 is available to the Frank family on the sale, and they pay capital gains tax on the difference between \$6.2m and \$5.5m, resulting on the overall taxable gain on the internal restructure and the subsequent sale to be \$1.075m.
 - 4.2 Consider the alternative where the taxpayer would not have access to Division 152 due to the new arm's length transaction requirement. As soon as they exceeded the two thresholds, they would have no access to the small business concessions and on the death of George and subsequent sale, they would be liable to taxation on the entire \$6.2m, or \$3.1m if they utilise the Division 115 discount capital gain.
 - 4.3 This is clearly a disparate and inequitable outcome.

As earlier mentioned, it is not purely tax outcomes that would be impacted by such a change, but also commercial and practical ones. Consider the following two simplified examples:

5. Reflex Pty Ltd – Restructure to Facilitate Entry:
 - 5.1 Reflex Pty Ltd is a small business operated in a company, with Peter Chan holding all of the shares. Peter and Felicity Spring have reached an agreement where Felicity will take up 10% of the shares in Reflex Pty Ltd. However, after advice from her advisors, Felicity does not want to take up shares in Reflex Pty Ltd because:
 - 5.1.1 She is concerned about the history of the company and any past claims that may arise from events before she became a shareholder;
 - 5.1.2 She is concerned about things like unpaid tax debts or amended assessments which may only become apparent after she is a shareholder; and

- 5.1.3 Reflex Pty Ltd commenced the business, and it has a relatively low cost base. Felicity is concerned she will be disadvantaged on any future sale by this fact.
- 5.2 To reduce the risks identified by Felicity, they decide to sell the business to a new company, with the shares held 90% by Peter and 10% by Felicity, and Reflex Pty Ltd / Peter deals with the resulting capital gain using Division 152. This will achieve all commercial objectives.
- 6. Lollymasters Pty Ltd & Lollylegends Pty Ltd – Estate and Succession Planning
 - 6.1 Lollymasters Pty Ltd operates a wholesale confectionary business, and Lollylegends Pty Ltd operates a retail confectionary business. All shares in both companies are held by Wendy Rowland. Wendy has three children – Greg, Moira and Allan. Since adulthood, Greg has always worked in the Lollymasters business and Moira in the Lollylegends business, both of which are valued at around \$2m. Allan has never worked in any of the businesses and is mostly estranged from Wendy.
 - 6.2 Wendy is attending to her estate plan. To take into account the work that Greg and Moira have done, often at under market wages, Wendy would like to give the shares in the respective companies to Greg and Moira, and the remainder of her estate be split three ways between Greg, Moira and Allan.
 - 6.3 Wendy's advisor rightly points out that if she does this by Will, as Allan will be receiving less of a share of her estate, there is a risk he may challenge the estate to receive a larger share, which could include the shares in the companies.
 - 6.4 To limit the potential of a Will dispute and the impact that would have on the businesses, Wendy decides to transfer the shares now to Greg and Moira, and deals with the gain on transfer using Division 152.

These are just two examples of which there are many variations we can think of, but if both are no longer able to access Division 152 due to the "non arm's length" requirements there will be serious practical and commercial detriment to clients.

Establishing the SBRR as an exclusive code for restructures by small business entities

Aside from being discriminatory against small business entities, the imposition of the SBRR as an exclusive code for restructures should not be implemented without changes to the SBRR conditions for eligibility - specifically the "genuine restructure" and "same underlying economic ownership" conditions.

The drafting of these conditions in their current format fail to provide any certainty to the taxpayer as to whether they meet the conditions, and they should be re-written or removed entirely. The lack of certainty results in taxpayers either choosing to not implement the SBRR or rely on ATO private ruling applications, which adds to the length of time, cost and complexity to implement the roll-over.

Making the proposed general roll-over available to only entities that are ineligible for SBRR

Our understanding of the general roll-over proposed in the Paper is that it ensures that where, for example, a series of rollovers are used, the taxpayer will have certainty of the outcome as a roll-over for CGT purposes being applied to the whole transaction.



The SBRR does not provide such certainty or apply to a series of rollovers, and it would be inappropriate in our view from a fairness perspective to only make it available to entities that are not small business entities.

Yours faithfully

A handwritten signature in black ink that reads "Adrian Bailey".

Adrian Bailey
Cleary Hoare Solicitors