



Review of CGT Roll-over Aware Super Submission

Board of Taxation – Review of CGT Roll-overs
Consultation Paper - December 2020

February 2021

1. Introduction

1.1 About Aware Super

Aware Super (the new name for First State Super) has been the fund for people who serve the community since 1992. We're one of Australia's largest funds and we're continuing to grow.

We merged with VicSuper and WA Super in 2020. Aware Super manages approximately \$139 billion in savings for more than one million members located across the country. As part of this, we manage more than \$31 billion in retirement assets supporting over 67,000 people in retirement and a small defined benefit fund (\$1.1 billion). Our members – teachers, nurses, public servants and emergency services officers – work in roles that breathe life into our community and they expect us to do the same, investing in ways that do well for them, and good for all.

Aware Super is committed to investing for the long-term, being a top performing fund, and providing our members with the right advice, services and support to feel confident about their retirement.

1.2 Submission

Aware Super welcomes the Government's intention to undertake a review into Australia's system of capital gains tax (CGT) roll-overs and associated provisions.¹

Aware Super, as a large asset owner, wishes to contribute to the Board of Taxation's review of the CGT roll-overs² (Consultation Paper) to influence the policy design of future changes to the CGT roll-over provisions measures. Such measures are likely to have a real impact on the retirement outcomes for both our members and for all Australians.

Tax Relief for Mergers (Division 310 of the ITAA 1997) should remain

Aware Super was pleased to see that the temporary tax relief for merging superannuation funds (Division 310 of the *Income Tax Assessment Act 1997 (Cth)* (ITAA 1997) was made permanent from 1 July 2020.³ Tax relief for merging superannuation funds is critical for the enablement of industry consolidation and consistent with the recommendation of the Productivity Commission's report *Superannuation: Assessing Efficiency and Competitiveness*.⁴

While not specifically contemplated in the Board of Taxation's Consultation Paper, we submit that a stand-alone roll-over relief for merging superannuation funds should remain. This is

¹ Assistant Treasurer (Cth), the Hon Michael Sukkar MP, 'Board of Taxation to review CGT rollover provisions' (Media Release, 12 December 2019).

² The Board of Taxation, *Review of CGT Roll-overs*, Consultation Paper, December 2020.

³ *Treasury Laws Amendment (2020 Measures No. 1) Act 2020*.

⁴ Productivity Commission, Australian Government, *Superannuation: Assessing Efficiency and Competitiveness* (Inquiry Report No. 91, 21 December 2018), 73, 451.

because a superannuation fund merger is unique in the way it is effected and the change of legal ownership of assets for the closing fund is unlikely to fall within the scope of the proposed general business roll-over relief outlined in the Consultation Paper.

Tax Relief for Mergers (Division 310 of the ITAA 1997) should be expanded

To achieve further efficiencies and expedite industry consolidation, we submit that Division 310 of the ITAA 1997 be expanded to:

1. Preserve tax losses which may be “trapped” in investment vehicles which are “rolled over” upon a merger. Under the current law, the measures allow for roll-over of losses which have been incurred at the superannuation fund level, but do not preserve losses which have been incurred in an Australian unit trust. Such losses are at risk of being extinguished on a merger for a closing fund.
2. Enable additional types of mergers, e.g. sub-plans merging into a larger superannuation fund.
3. Allow for the investment structures to be rationalised at the time of or following a merger to realise structural efficiencies. We acknowledge that reorganisations may fall within the scope of the proposed general business restructure.

Asset lock-in in a superannuation fund context

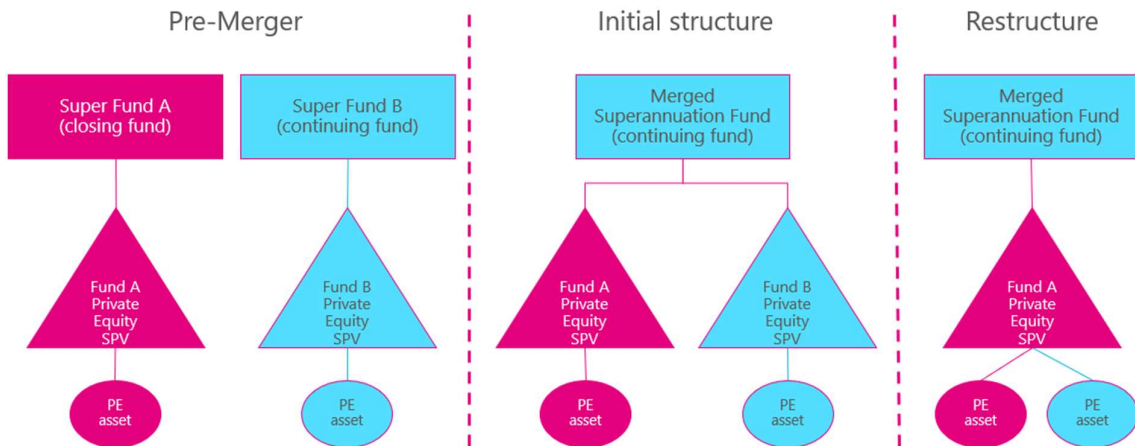
The Consultation Paper acknowledges that a fundamental design feature of CGT is its realisation basis for bringing capital gains into the Australian tax net.

As highlighted in the Consultation Paper, the current design of the CGT regime may operate as an incentive for businesses to continue to hold onto assets longer than they may wish to. The Consultation Paper notes that roll-over relief was introduced to address the detrimental impact of the lock-in effect on efficient business activity by allowing the deferral of capital gains in certain situations.

Superannuation funds typically hold investments for a long time-horizon as the funds require exposure to certain asset classes. As such, over time, the preference of holding structures may change due to various reasons such as product offerings, regulatory change, operational requirements etc. In addition, some investments may be acquired in an existing structure which had been established by a prior owner.

The ability to restructure investment holding structures may achieve greater operational and cost efficiencies. For example, reducing the number of entities in an investment structure may provide cost savings such as audit, tax and other regulatory costs.

In the context of a superannuation fund merger, it may be appropriate to rationalise investment structures to eliminate duplicate structures in a particular asset class, e.g. private equity. This would enable maximum operational efficiencies which may reduce costs and drive investment returns for members.



In the absence of roll-over relief such as the proposed general business roll-over, taking cash out of an investment to pay CGT for a restructure may be an inefficient use of resources particularly given the same ultimate owners continue to have exposure to those assets. Furthermore, where assets are illiquid, a restructure would cause unnecessary asset sales to pay CGT. Accordingly, the lock-in effect may encourage the industry to accept inefficient structures due to the lack of roll-over relief available, which ultimately lowers returns to members.

General business restructure roll-over – outcomes approach

The Consultation Paper outlines that the aim of the general roll-over is to adopt an outcomes approach, whereby the focus would look to the substantial effect of arrangements, rather than the precise legal steps undertaken to achieve that effect and not having to follow prescriptive and complex technical requirements.

Superannuation funds invest both domestically and offshore. As such, a restructure may involve multiple jurisdictions, and require consideration of both the domestic and foreign tax implications of completing any restructure. An overly prescriptive roll-over rule may give rise to significant offshore tax burdens, such as offshore stamp duty, which may otherwise act as a deterrent to any potential restructure. Accordingly, we support a roll-over which provides flexibility in the way the roll-over is effected to enable the roll-over to satisfy roll-over relief measures potentially available in other jurisdictions.

In addition, the Demonstration of Model requires determination of whether there is a change in the ultimate economic ownership of an asset. In the context of superannuation funds, economic ownership should not need to be traced through the fund to the individual members as portability and choice of fund are key features of superannuation.

12-month rule

The Consultation Paper notes that the Board of Taxation is considering a 12-month rule for the completion of the restructure scheme which qualifies for general roll-over relief.

We submit that this rule be limited to the relevant restructure scheme and not applied to the taxpayer more broadly. In the context of superannuation funds, with multiple and evolving structures due to the nature of constant acquisitions, such a rule may prevent additional or

concurrent roll-overs being effected if the application of the eligible restructure period has a wide reach of restructures. Extensions to the 12-month window may be required from time to time and that regulation should allow for this on application for specific cases.

While the Consultation Paper is silent on the interaction of the 12-month rule with Division 310 of the ITAA 1997 (Loss relief for merging superannuation funds), we submit that the time period under a super fund merger is not linked or restricted by the 12-month rule.

Treatment of Attribution Managed Investment Trusts (AMITs)

The Consultation Paper acknowledges that there are concerns that AMITs have limited access to existing business restructure roll-overs.

Superannuation funds are often significant investors in AMITs. The concerns which we have raised in respect of asset lock-in can equally apply in the context of AMITs. We support the Board's position that consideration should be given to extending existing policy to enable AMITs access to the General business restructure roll-over.