Deloitte Tax Services Pty Ltd
ACN 092 223 240
Grosvenor Place
225 George Street
Sydney, NSW, 2000
Australia

Phone: +61 2 9322 7000
www.deloitte.com.au

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

By email: CGTRollovers@taxboard.gov.au

Dear Sir/Madam,

Review of CGT Roll-overs

We welcome the opportunity to take part 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 Guide dated February 2020.

Overall approach to reform

Many of the existing roll-overs available to businesses were originally enacted many years ago, and some have been re-written or substantially amended over the years. In addition, market practices have evolved over time which means that roll-overs are being applied to new types of circumstances which may not have been originally contemplated.

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 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 the responses below). 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.

As has occurred in the context of other major legislative reform[1], we believe it is also important that the ATO is involved in the design process and that administrative guidance

[1] For example in relation to the introduction of the attribution managed investment trust regime.

and rulings are published concurrently with the passage of amending legislation. Such guidance might include the ATO's approach to the application of Part IVA, including in the context of successive roll-overs, 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.

Responses to consultation questions

1. Do you agree with the policy considerations outlined in [the Consultation Guide]*? Are there any other policy considerations that should be taken into account? Why?*

While consideration of rationalisation of the existing CGT roll-overs and associated provisions into a simplified set of rules that have a substantially similar practical effect is attractive in principle, we have concerns that such an approach could result in new issues of interpretation and create uncertainties which may take many years to resolve through engagement with the ATO, Treasury or through the courts.

The current suite of roll-overs are generally well understood and should form the basis for the Review. As discussed further below, 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, which have been noted in the responses below.

3. Are there any deficiencies and limitations in the current suite of roll-overs that can be addressed by a more principles-based approach to roll-over relief?

Deloitte supports addressing a number of deficiencies and limitations in the current suite of roll-overs through legislative amendment, as outlined below. This approach best preserves the value of existing practices and authority, while ensuring consistency with the policy intentions underpinning the rules, including the principles outlined in the Consultation Guide.

We have included a summary of certain current issues with existing roll-overs together with potential solutions in **Appendix A**.

4. Can the system benefit from any additional categories of roll-overs? To what extent would any additional roll-over category encourage the active use of assets in the economy and maintain the integrity of the system generally?

There are a number of gaps in the existing suite of roll-over rules relating to business re-organisations where no change occurs in the underlying ownership of the asset concerned. Within the scope of the Review, we have included a summary of potential additional roll-overs, including the supporting rationale, in **Appendix B**.

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

7. How does the interaction of other aspects of the tax system, such as the tax consolidation regime, impact the decision to choose a roll-over? Do these interactions create favourable or unfavourable outcomes?

In the case of some CGT roll-overs, taxpayers are precluded for choosing to form a tax consolidated group following the roll-over due to significant adverse outcomes.

Generally speaking this is due to the type of roll-over and how it interacts with the operation of the allocable cost amount calculations or the availability of losses when transferred into a tax consolidated group.

For example:

i. Should a company elect to use a Division 615 roll-over and interpose a new company (where the original entity was not the head company of a tax consolidated group), step 1 of the ACA calculation may be limited to the tax cost base of the assets less liabilities of the original entity. The step 3 amount of the ACA calculation (frankable profits accruing to the joined group) is nil. In these circumstances, when you proceed to allocate the ACA across the assets of the original entity it may significantly change the existing tax cost base of the assets. This is more the case where the relevant entity has significant assets that have appreciated in value, such as land and buildings and internally generated goodwill. This issue does not arise where there is an existing tax consolidated group as there are specific provisions which allow for the Subdivision 615 roll-over to be applied without a new consolidated group being formed.

ii. Further to (i) above, Division 615 is the only roll-over that allows for a tax consolidated group to continue in existence should a new company be interposed between the existing head company of a tax consolidated group and its shareholders. It is not clear if there is any policy reason for the same not applying to other roll-overs such as Subdivision 122-A.

iii. Where the transaction involves a scrip for scrip roll-over under Subdivision 124-M and the significant and common stakeholder provisions are involved and the parties are required to make a joint election for roll-over relief, this can also preclude the formation of a tax consolidated group due to the same types of issues as noted at (i) above. The acquiring entity inherits the tax cost base of the original shareholder in the target (which is used in step 1 of the ACA calculation) and this may give rise to significant adverse tax consequences when preparing ACA calculations.

8. Given grandfathering of pre-CGT assets is a noted source of complexity in the CGT regime, should the pre-CGT status of assets continue to be preserved in connection with roll-overs?

The recognition of the pre-and post CGT status of CGT assets is a fundamental element of the CGT rules. Consequently, the pre-CGT status of CGT assets should continue to be preserved in respect of any roll-overs. There is no policy basis for the removal of the pre-CGT status of assets in connection with roll-overs.

More particularly we note that the application of subsection 104-230(10) (CGT event K6) is well understood in terms of the way the roll-over applies for the disposal of shares and units. Furthermore, the same level of understanding exists in the application of other roll-overs such as Subdivision 122-A (subsection 122-40(3) and subsection 122-70(3)).

Consequently, we are of the view the grandfathering of the pre-CGT assets should be preserved.

Deloitte.

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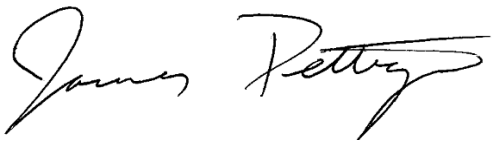
We look forward to continuing to engage with the Board in relation to the review, and the opportunity to elaborate on the matters raised in this submission in due course.

Yours sincerely



James Pettigrew
Partner

Spyros Kotsopoulos
Partner

Max Persson
Partner

Meghan Speers
Partner

Appendix A – Issues with existing roll-overs

Issue	Discussion	Potential solutions
Subdivision 124-M and Subdivision 126-G roll-overs - AMITs and CGT event E10	There is an anomaly in the current tax legislation that prevents AMITs and their unitholders from accessing the CGT roll-over provisions for common commercial restructures, including Subdivision 124-M scrip for scrip roll-over and Subdivision 126-G relating to transfer of assets between certain trusts with the same beneficiaries. In particular, these CGT roll-over provisions require 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.	We recommend the introduction of a simple technical amendment to ensure the interaction between the AMIT regime and the CGT roll-over rules operates as intended.
Subdivision 124-M and trusts – "fixed trust" requirement	Subdivision 124-M roll-over for a unit for unit exchange is restricted to "fixed trusts". Based on the relevant legislation and case law (*Colonial First State Investments Ltd v Commissioner of Taxation*), it is likely that most unit trusts are not technically "fixed trusts" absent the favourable exercise of the Commissioner's discretion. Therefore, to obtain certainty trusts would generally lodge a private binding ruling application with the Commissioner requesting the exercise of the discretion in order to be treated as a fixed trust. The ATO has issued Practical Compliance Guideline PCG 2016/16 which outlines the various factors the Commissioner will consider when deciding to exercise his discretion to treat a trust as a fixed trust. In addition, this PCG provides certain safe harbours (i.e. where the trust can manage its affairs as if it was a fixed trust). PCG 2016/16 is not however binding on the Commissioner and so a private binding ruling is necessary if certainty is required. This point is acknowledged in PCG 2016/16 where transaction parties are encouraged to seek a private binding ruling where absolute certainty is required.	Adopt a different or new definition to distinguish a unit trust from a discretionary trust, to provide additional certainty and reduce compliance costs.
Subdivision 124-M and trusts – groups of trusts	Subdivision 124-M includes a requirement that units are issued in the acquiring trust. This can be contrast with the application of Subdivision 124-M for companies which allows for a wholly owned subsidiary of the company issuing the shares to be the acquirer.	Extend Subdivision 124-M roll-over to allow a wholly owned subsidiary trust to be the acquirer.

Issue	Discussion	Potential solutions
Division 125 and Division 615 – Interpretation of 'nothing else' requirement	The ATO's interpretation of the breadth of the term 'under the restructuring' and the 'nothing else' requirement (refer Draft Tax Determination TD 2019/D1) in the context of Division 125 roll-over relief for demergers limits the operation of Division 125 to make it more restrictive than was the case based on how the roll-over had previously been interpreted by the ATO. The appropriate scope of Division 125 should be considered as part of the Review together with legislative amendments that may be required to ensure that Division 125 operates as intended. To qualify for Division 125 demerger relief a number of requirements must be met. One of those requirements is that, 'under the restructuring', the holders of original interests in the head entity must receive new interests in the demerged entity and 'nothing else'. Hence, a demerger will generally not qualify if the shareholders in the head entity receive cash, shares (other than shares in the demerged entity) or other consideration under the demerger. In TD 2019/D1 the ATO takes a broad view of what constitutes an event 'under the restructuring' and a strict view on what will breach the 'nothing else' requirement, with the result that many transactions that involve a demerger followed by a sale of the shares in the head company of the demerger group will not benefit from Division 125 roll-over relief for the demerger, even where the demerger is not dependent on the sale transaction being approved by shareholders. While the ATO had not previously issued a public ruling of general application dealing with these aspects of Division 125, the interpretation in TD 2019/D1 suggests a divergence from its practice in a number of previous transactions. One concern which potentially arises in these cases where the application of Subdivision 124-M roll-over is in issue for a follow-on transaction involving a sale of the head entity is whether there is a suggestion in the ATO's approach that sequential roll-overs for the same shareholders are invariably unavailable in these cases due to the "nothing else" rule in Division 125. In the particular context of Division 125 and Subdivision 124-M, there is nothing evident on the face of either regime to suggest a fundamental prohibition on the application of each in succession, nor should this in our view be implied simply because of the presence of the nothing else rule in Division 125. We would also submit that if there are concerns about the combined effect of these roll-overs in particular cases, this should be addressed under Part IVA, rather than by seeking to advance the "nothing else" rule as a general integrity rule.	The Review should consider whether the restrictions resulting from the ATO's interpretation in TD 2019/D1 are consistent with the policy objectives of Division 125 and Division 615, and consider legislative amendments that would clarify the scope of these roll-overs where this is required to meet the underlying policy objectives.

Issue	Discussion	Potential solutions
	A more particular concern arising from the more recent ATO approach evident in TD 2019/D1 and also seemingly in the recent case of transactions involving the AMA Group Limited (AMA) is the suggestion that the "nothing else" rule in Division 125 can be breached where a demerger is followed by a scrip transaction involving the head entity even where the demerger transaction is not conditional on the subsequent scrip transaction. To comprehend the scrip transaction in these cases as something that happens "under" a restructuring of the demerger group (including the distribution of interests in the demerged entity) would seem to apply a mere temporal requirement to identify those transactions that happen under the restructuring and may then offend the "nothing else" requirement. The natural question then is what is the temporal requirement? When so contrasted, an approach that anchors to legal conditionality of the demerger on the scrip transaction would seem to better promote certainty. We are also aware of other cases involving the potential application of demerger relief where the ATO has indicated that a particular benefit obtained by shareholders of the head entity following the distribution under the demerger breaches the "nothing else" rule because the action which results in the benefit happens "under the restructuring" referred to in the definition of a demerger happening to a demerger group. One example is the demerged entity undertaking a rights issue at a discount shortly after the distribution of shares in the demerged entity. It has been suggested 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. It has 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. 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 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.	

Issue	Discussion	Potential solutions
	Division 615 roll-over (interposing a company above a company or trust) also has a 'nothing else' requirement (as do a number of other roll-overs, as discussed below). The ATO recently confirmed the application of successive Division 615 roll-overs in a class ruling issued on the restructure of the Ardent Leisure stapled group (CR 2019/15). This case involved successive acquisitions by a new head company of interests held by Ardent stapled security holders in the existing sister company and trust in the Ardent Leisure stapled group. Both roll-over regimes in Division 615 for top-hatting a company above another company or a trust refer to security holders exchanging their existing securities for shares in the top-hat company **(and nothing else)** "under" a scheme for reorganizing the affairs of the company or trust, as applicable. The application of successive Division 615 roll-overs in this case, as validated in CR 2019/15, can seemingly only be reconciled with the more recent approach of the ATO to deny successive Division 125 and Subdivision 124-M roll-overs on the basis that Division 615 (in s.615-5) refers to security holders exchanging existing interests for shares under a scheme for the reorganization of **the** relevant company or **the** trust. On a narrow interpretation, this allowed attention to be confined in the case of each scheme under the Ardent reorganization to steps under the company scheme or the trust scheme, but not both. The fundamental basis of this approach must be, in the case of the reorganization of the existing Ardent company, that any steps associated with the trust scheme could not fall within a scheme for reorganizing the affairs of a company. Division 125 does not allow for such a narrow interpretation as it refers instead to a restructuring of a **demerger group** (not just a single entity within that group) – the demerger group includes the head entity and it is this entity that is the subject of the subsequent scrip transaction in the cases currently under discussion. There is then a greater opportunity to conflate the demerger distribution and the scrip transaction involving the head entity to treat them as being part of the one "restructuring" of the demerger group. The outcome in the case of the Ardent reorganization where there were successive company and trust schemes that were clearly contemplated to be part of the same overall reorganization highlights the potential inequity; in both this case and for shareholders subject to demerger and scrip transactions involving a head entity of a demerger group, exchanging shareholders	

Issue	Discussion	Potential solutions
	remain with the same indirect economic interest in assets via intermediary entities before and after the relevant transactions. In both cases, it could be argued that under the relevant reorganization/restructuring, exchanging shareholders get something beyond the immediate benefit of the shares that are the immediate consideration for shares exchanged by them. Why should roll-over be allowed in one case and not in the other? We consider that Division 125 roll-over (and Division 615 roll-over) should equally be available in situations involving a subsequent transaction, as this best achieves the objectives of achieving economic efficiency and value creation. And we submit that this objective can be achieved by targeted legislative amendments rather than a more widespread attempt to codify all roll-overs under principles-based drafting.	
Subdivision 124-Q roll-over relief and top hatting	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'). As noted in the Consultation Guide, the policy rationale for that provision was: *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.* 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. 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	We believe that the Board of Taxation should recommend clarification of Subdivision 124-Q, allowing this provision to operate as intended and within the scope of the original policy rationale behind the provision.

Issue	Discussion	Potential solutions
	an unacceptable ongoing restriction on normal business operations where Subdivision 124-Q roll-over has been applied in respect of a restructure. The interpretation in TD 2011/7 has resulted in very few groups undertaking 'top-hatting' restructures.	
"Back to Back" roll-overs- Successive roll-overs in 'corporatisation' restructures	In some transactions a number of CGT roll-overs are implemented successively. Generally speaking a typical successive roll-over case is where a Subdivision 122-A or 122-B roll-over is used first to move a business into a company, and then an unrelated party takes over (or acquires a significant interest in) the business via a scrip for scrip roll-over under Subdivision 124-M. The use of successive roll-overs occurs because a "one step" roll-over is not available where you seek to merge different businesses which may have different forms. The decision to merge businesses of corporate and non-corporate entities (e.g. sole traders, partnerships, discretionary trust and unit trusts,) is generally attributable to commercial considerations. The ATO's proposed 'nothing else' approach in TD 2019/D1 which argues that the technical conditions of a roll-over may not be met where a restructure contemplates antecedent or subsequent steps to the roll-over (discussed in detail above), reflects a concern that the roll-overs are being used in a manner inconsistent with the underlying policy of each roll-over in isolation. The roll-overs in Division 615, Subdivisions 124-E, 124-F, 124-I and 124-Q have a 'nothing else' requirement. Subdivisions 122-A and 122-B do not use the phrase 'nothing else' but they similarly require the consideration provided to the original asset holder under the roll-over, must 'only' be shares in the recipient company. These roll-overs should not be "undone" by reason of a subsequent transaction whereby parties use scrip for scrip roll-overs allowed for under Subdivision 124-M (which was introduced to allow for the merger of various corporates and trusts). There is no reason why all taxpayers (irrespective of size and type) cannot avail themselves of successive roll-overs unless there is a mischief which gives rise to a significant permanent tax advantage. For example there is no policy reason why an owner of a company should be able to claim scrip for scrip roll-over relief, but an owner of a similar business who just happens to own that business as a sole trader, or in a unit trust or partnership should be denied the ability to use two recognised and accepted roll-overs to achieve the same result when it is allowed for	Access to roll-overs is generally easier for a corporate group, and the initial choice of entity for a business should not impact on the promotion of economic efficiency through, for example, a scrip for scrip takeover otherwise eligible for Subdivision 124-M roll-over. CGT roll-overs have been added in an ad hoc manner without clear statements regarding the interaction between the various roll-overs. We would therefore suggest that the policy be clarified, with consultation undertaken to identify any mischief associated with successive roll-overs that is not already addressed with the roll-over rules themselves. To the extent that it can be established that there is no inherent mischief in the application

Issue	Discussion	Potential solutions
	in the Tax Act. Many start-ups may adopt a less sophisticated structure and then evolve to a new structure as their affairs become more complicated. They may need to introduce more capital or the existing owners may look to introduce a new 'partner'.	of successive roll-overs, a statement by the government to this effect would promote certainty. 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 amending legislation. Such guidance might include the ATO's approach to the application of Part IVA, including in the context of successive roll-overs, as informed by the government's stated policy objectives.
Marriage breakdown roll-overs	In *Ellison v Sandini* consideration was given as to whether the roll-over applied where the asset was transferred between entities. The case confirmed that CGT roll-over relief will only be available where assets are transferred from an entity to the former spouse in their own capacity. The CGT roll-over will not be available if assets are transferred to related entities. Furthermore, we note that whilst Division 126 provides CGT roll-over relief for the transfer of assets from companies and trusts to former spouses, the roll-over does not eliminate all tax implications of the transaction. Where an asset(s) is transferred out of a private company under family law arrangements, it will generally satisfy the definition of a payment (for Division 7A purposes) and hence can trigger a deemed dividend. Unlike a 'standard' deemed dividend, the dividend may be frankable if made under family law proceedings. However, any tax paid by the application of Division 7A to the asset being transferred to the spouse does not form part their cost base.	We recommend the marriage breakdown roll-over extended to assets transferred between entities (being companies or trusts). In this respect the relevant spouses are essentially put in the same position pre-marriage breakdown. Corresponding adjustments should also be made to adjusting the cost base of the shares (or

Issue	Discussion	Potential solutions
	Some consideration should be given to increasing the tax cost base of the asset for the spouse for tax already paid.	units) in the relevant transferor and transferee company (or trust). Where the relevant entity is a discretionary trust then some allowance should be made for the asset to be transferred to a trust with substantially similar objects as the original trust.
Small business restructure roll-over relief – Subdivision 328-G	To be eligible for the small business restructure roll-over relief the transaction must not result in a change in the ultimate economic ownership of transferred assets. In the case of a transfer of business assets from an individual to a discretionary trust, this condition will only be satisfied if, before or after the transaction takes effect, the asset is included in the property of a non-fixed trust that is a family trust and every individual that comprises the family group was the same before and just after the transfer has taken place (subsections 328-440(a)-(c) of the ITAA 1997). The implication of the above is that roll-over relief is only available when the business assets are transferred directly to or from the discretionary trust. Roll-over relief is otherwise not available where business assets are transferred to a company wholly-owned by the discretionary trust (i.e., there is limited ability for the trust to indirectly hold the business assets notwithstanding it still becomes the ultimate economic owner of the assets).	We recommend that section 328-440 of the ITAA 1997 is widened to include the concept of a non-fixed trust that is a family trust having indirect ownership of the relevant asset and still satisfying the ultimate economic ownership condition.
Division 615 – Choice requirements	To apply roll-over relief under Division 615, the interposed entity is required to make a choice under section 615-30 within certain timeframes (being either 2 months or 28 days after the completion time, see subsection 615-30(3)). This section also states that the tax return of the interposed entity is sufficient evidence of the choice (see subsection 615-30(4)). The legislative provisions do not align with how and when you evidence the choices required under Division 615 - the interposed company will not readily disclose the roll-over as part of the return nor does the lodgment due date align with the timeframe for the choice.	Clarify the appropriate method to evidence the choice being made by the interposed entity.

Issue	Discussion	Potential solutions
Subdivision 152-E	There appears to be a lack of awareness regarding the application of the provisions where a discretionary trust taxpayer varies its pattern of distributions following application of the roll-over in respect of a disposal of shares or units in a trust. In this respect, an unrelated, bona fide change in distributions may trigger a capital gain under CGT event J2 where the significant stakeholder and CGT concession stakeholder provisions are not satisfied during the replacement asset period.	Allow variations to distribution patterns following the initial capital gain without jeopardizing the concessional CGT treatment for the relevant original CGT concessional stakeholder.
Subdivision 124-M – single arrangement	Pursuant to subdivision 124-M the arrangement must allow **all the owners** of voting shares **in the original entity** to participate in the scrip for scrip arrangement (subsection 124-780(2)(b)). Consider a circumstance where: • The target company is owned by an individual shareholder and a company shareholder. • The acquiring company wishes to purchase directly and indirectly 100% of the shares in the target company as follows: (a) 100% of the shares in the company shareholder (i.e. indirect acquisition of 100% of the shares held in the target company by the company shareholder); and (b) 100% of the shares held directly by the individual shareholder in the target company. In such circumstance, scrip for scrip roll-over is not available unless we action the transaction as a stepped acquisition (i.e. acquire 100% of the shares in the company shareholder first and then the individual shareholder's shares). This stepped acquisition involves two roll-overs in order for the grouping provision to work properly.	We recommend the introduction of a simple technical amendment to extend the operation of subdivision 124-M.
Interaction between 'look-through' scrip earnout rights and Subdivision 124-M	The interaction between look-through scrip earnout rights (i.e. a look-through earnout for which scrip will be provided if certain conditions are satisfied) and Subdivision 124-M is not currently clear. The key question that arises is whether a look-through scrip earnout arrangement, as part of a transaction, is a 'single arrangement' for the purposes of Subdivision 124-M. That is, whether the look-through scrip earnout arrangement itself should be disregarded for the purposes of determining what constitutes a replacement interest.	Amendments to the scrip for scrip roll-over provisions and/or look-though earnout provisions are necessary to ensure that the look-through approach is embedded in relevant legislation.

Issue	Discussion	Potential solutions
	To the extent the look-though scrip earnout arrangement is disregarded, it would be arguable that the scrip received as part of a single arrangement *pursuant to* the look-through earnout arrangement is a replacement interest and does not constitute 'ineligible proceeds'. However, if the look-through scrip earnout arrangement itself is not disregarded, then a technical risk arises that a right to be issued shares subject to certain conditions which may never be satisfied constitutes ineligible proceeds, and as such, scrip for scrip roll-over may not be available with respect to any shares received pursuant to the look-through earnout scrip arrangement. In this regard, section 118-560 states that a capital gain or capital loss relating to the creation of a look-through earnout right is disregarded. Put differently, the look-through earnout right itself is not disregarded. Furthermore, ATO Interpretative Decision 2002/100 (which pre-dates the introduction of the CGT look-through provisions) provides that ineligible proceeds include additional cash payable and "a right to be issued shares that cannot be ascertained until a future date." In this regard, it appears that scrip issued subsequently under a look-through scrip earnout arrangement would be considered ineligible proceeds and as such only partial roll-over may be available under section 124-790 (i.e. no relief would be available to the extent that the capital proceeds from the sale includes look-through earnout scrip). We submit that the better view is that full relief should be available (to the extent all remaining conditions are satisfied). We note that an income tax anomaly does not arise where scrip for scrip roll-over is available for shares issued pursuant to look-through scrip earnout arrangements. To the contrary, where scrip for scrip roll-over is not available with respect to such arrangements, the taxpayer may crystalise a gain with respect to scrip for which no cash consideration is received.	
Subdivision 124-M – incorrect market valuation of the target company for which scrip has been issued	Subdivision 124-M does not contemplate scenarios where an incorrect number of shares have been issued in the (ultimate holding) acquiring company. This, for example, could occur where a market valuation of the target company is later varied due to a completion accounts adjustment mechanism and shares (based on the previous market valuation of the target company) have already been issued in the (ultimate holding) acquiring company to the relevant shareholders of the target company.	Clarification to be provided by the ATO that in such circumstances CGT even C2 is not applicable as the additional shares issued in error are void ab initio.

Issue	Discussion	Potential solutions
in the (ultimate holding) acquiring company	E.g. $10 worth of shares have been issued in the (ultimate holding) acquiring company based on a market valuation of the target company of $10. However, due to completion accounts adjustments, it is later realised that the market value of the target company is only $8. In this situation, $2 worth of shares have been issued to the shareholders of the target company in error. In this regard, the transaction parties may wish to cancel/redeem $2 worth of shares as the vendors (i.e. shareholders of the target company) were not entitled to these shares. Put differently, the additional shares issued in error should be considered void ab initio. However, a technical risk arises that CGT event C2 could apply to such cancelation and a capital gain realised by the vendors (as they are likely to have minimal cost base compared to the market value of such shares). This clearly cannot be the intended outcome as the vendors were not entitled to the $2 worth of shares to being with.	
Division 310	Division 310 is deficient in a number of structural ways and does not allow for the broad range of mergers and operational requirements of mergers. Some of these limitations include: - efficient tax transfer of assets from SMSFs to large superannuation funds - efficient tax transfer from sub-plans within large superannuation funds to other large superannuation funds - the time period restrictions within Division 310 are difficult considering the complexity of superannuation fund mergers - not allowing for broader entity issues such as loss transfers within trusts not allowing for asset holding reorganisations.	Deloitte supports the submission by the Association of Superannuation Funds of Australia (**ASFA**) to the Board dated 5 June 2020 and refers the Board to that submission for the detail regarding each of these matters.

Deloitte.

Appendix B – Additional roll-overs

Roll-over	Description	Rationale
Trust interposition	Interposition of a trust above a trust or company (scrip for scrip roll-over can achieve this for a trust but not for a company) – that is effectively extending Division 615 roll-over to trust interpositions.	As for Division 615, i.e. to extend relief for asset ownership changes as part of a business reorganisation when there is no change to the underlying economic ownership.
Company interposition above a trust and company	Interposition of a company above a trust and company – that is effectively extending Division 615 roll-over to combined company and trust interpositions. Extending the roll-over to cover this situation removes the need for 'back to back' Division 615 roll-overs which could achieve the same result (refer to the discussion regarding CR 2019/15 above).	As for Division 615 (refer above).
Transfers between wholly owned trusts	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 – for example through expanding Subdivision 126-B to apply to domestic and foreign trusts. 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 funds portfolio management.	As for Subdivision 126-B, i.e. roll-over is justified on economic efficiency grounds for business reorganisations involving asset ownership 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.
Transfers between a wholly owned trust and company	Transfer of assets from a company to a trust (or vice versa) by expansion of Subdivision 126-B to apply to domestic and foreign trusts.	As for Subdivision 126-B (refer above).
Asset merger roll over relief	As recommended by the Board in the *Report introducing an asset merger roll over relief* dated February 2017, an optional roll-over which defers tax liability for the disposal of a company's interests in assets in a merger with interests in assets of another company and for asset for scrip mergers between companies.	As set out in the Board's report, such relief would promote the "policy objectives of stimulating jobs and growth by generating economic activity. It will facilitate combinations and mergers of active business assets that may not otherwise occur in the absence of roll-over relief. It will also unlock synergistic value for both companies and the potential for growth resulting in more profitable and viable Australian businesses."

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