Tricks, traps and tantalising opportunities: new Subdiv 328-G explained

by Matthew Burgess, CTA, Director, View Legal

Abstract: Following the federal government's jobs and small business package introduced during the 2015-16 federal Budget, Subdiv 328-G was crafted to "provide greater flexibility for small business owners to change their legal structure". Compared with the traditional roll-over relief, the scope and restructuring possibilities provided for by the provisions represent a significant liberalisation of historical rules and is set to make them a "one-stop shop" for small business restructures. The new roll-overs cover a range of potential transferor-transferee combinations, making them the likely starting point for most small businesses wanting to access tax-effective restructuring. This article explores a number of specific restructuring opportunities — for example, trust cloning, trust splitting, transferring non-CGT assets and exiting trusts with "heritage" issues — that are available under the new rules. This article also explores the fundamental issues in relation to how to satisfy the provisions in any factual scenario.

Introduction

The roll-over provisions under Subdiv 328-G of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) are available for transactions on or after 1 July 2016. The rules significantly increase the flexibility to restructure small businesses.

The roll-overs cover a "range of potential transferor-transferee combinations",[1] making them the likely starting point for most small businesses wanting to access tax effective restructuring.

Unlike other CGT roll-overs, the provisions allow direct roll-over of non-CGT assets such as trading stock, depreciating assets and revenue assets. The provisions do not provide any relief in relation to related transaction costs such as GST or stamp duty.

The provisions are arguably simpler than most other CGT roll-overs. Importantly, the scope for tailored and strategic restructuring solutions seems significant, with opportunities such as:

(1) trust cloning;

(2) trust splitting;

(3) transferring non-CGT assets, without needing to access cumbersome roll-overs such as "double shuffles"; and

(4) exiting trusts with "heritage" issues (such as proximate vesting dates or with limited variation powers).

Eligibility

The concessions are available to small business entities, being individuals, companies or trusts. A small business entity is required to satisfy the Subdiv 328-C ITAA97 $2m turnover test.[2]

The concessions are also available, whether or not consideration is provided, to:[3]

(1) affiliates of small business entities;

(2) an entity connected to a small business entity; or

(3) partners of a partnership that is a small business entity.

In order for the roll-over to apply, the following criteria must also be met:[4]

(1) the CGT asset must be an active asset;

(2) an election must be made to apply the roll-over;

(3) the transferor and transferee must be Australian residents;

(4) the transactions must not have the effect of changing the "ultimate economic ownership"; and

(5) the transferee cannot be an exempt entity (for example, a superannuation fund).

An asset will be active if it satisfies the definition under s 152-40 ITAA97. Broadly, this definition captures all assets used in a business. Significantly, company loans to shareholders and unpaid present entitlements are not active assets and cannot be transferred under the provisions.

In summary, the flexible nature of the provisions means that the types of roll-overs contemplated by the new rules include transfers between:[5]

(1) individuals (including partnerships) and trusts;

(2) individuals (including partnerships) and companies;

(3) trusts;

(4) companies (including companies with shares held by trustees); and

(5) trusts and companies.

Ultimate economic ownership

The roll-over requires that the individual, or individual's interests in the assets, remain in proportion after being transferred.[6] Tracking economic ownership when using the provisions to transfer assets from an individual to a company, or from company to company is relatively easy.

Ultimate economic ownership and discretionary trusts

Given the nature of a discretionary trust, where beneficiaries do not have a direct interest in the trust assets[7] (merely a right to due administration of the trust),[8] the provisions specify the manner in which ultimate economic ownership in trusts is determined.

The provisions provide a "safety net" test[9] that allows access to roll-over relief if a trust made (or makes) a family trust election (FTE).[10] Where such an election is made, despite what might otherwise be provided for in the trust instrument, the election will effectively limit the range of potential beneficiaries who can receive a distribution without triggering a penal tax consequence (being the family trust distribution tax).

Aside from being implemented to access the provisions, an FTE will generally be made by a trustee for one or more of the following reasons:

(1) access to franking credits;

(2) ability to utilise prior year losses and bad debt deductions;

(3) simplifying the continuity of ownership test in relation to the trust loss rules; and

(4) eliminating the need to comply with the trustee beneficiary reporting rules.

An FTE requires a "test individual" be specified, of which their family will benefit from all future distributions.[11]

A test individual's family will broadly include the immediate family of the test individual and their spouse as well as the lineal descendants of the immediate family.[12]

Diagram 1 sets out the "family" of a test individual.

An FTE can be revoked within four years so long as the trust has not incurred a tax loss, claimed a deduction for bad debts or a beneficiary of the trust has not received a franked distribution indirectly through the trust.[13]

An FTE can only be changed once during the four-year window, and only if:

(1) the new primary individual was a member of the family group of the original primary individual as at the date of the change; and

(2) no distributions have been made outside the family group of the new primary individual.

Under the roll-over provisions, it would seem possible that an individual who is a sole shareholder (individual A) of an existing company (Original Co) can roll over assets into a new company (New Co), with the sole shareholder of New Co being a discretionary trust (FTE Trust). Diagram 2 demonstrates how the roll-over can be applied.

The restructure would work as follows:

(1) Original Co has a sole individual shareholder (individual A);

(2) New Co, a new company with the sole shareholder being a trust (with an FTE election made appointing individual A as the test individual), is created; and

(3) the assets of Original Co are transferred to New Co.

Alternatively, where all of the beneficiaries of two trusts are so similar that there is "no practical change in the individuals who economically benefit", roll-over relief will also be available. It is expected that this relief will require satisfaction of the tests that applied to satisfy the cloning rules prior to 31 October 2008, as explained in more detail below.

Cost base

Under the provisions, roll-overs are able to be implemented for no consideration. Furthermore, any transfer of assets is deemed to effectively be tax neutral.

Diagram 1: The "family" of a test individual

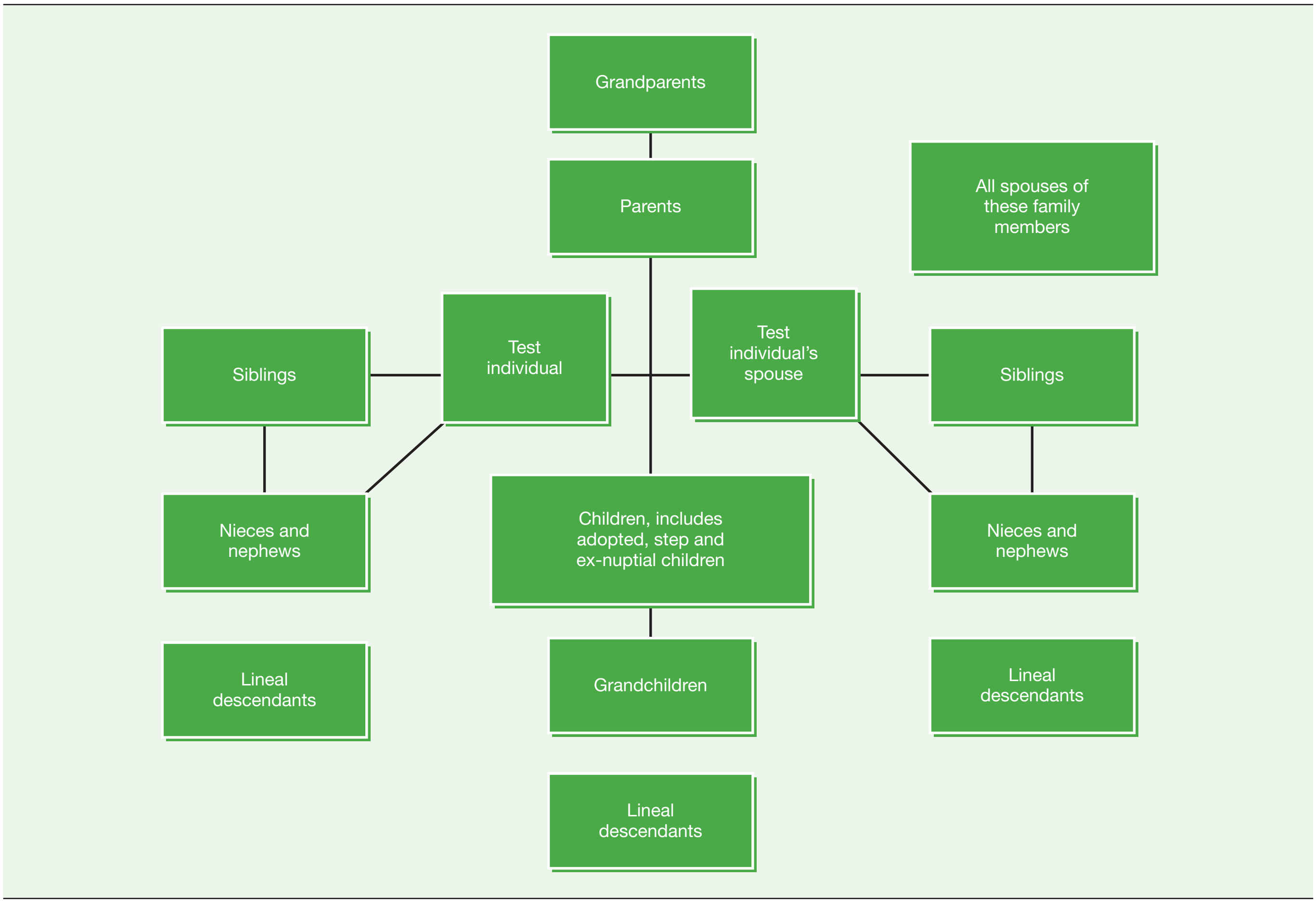
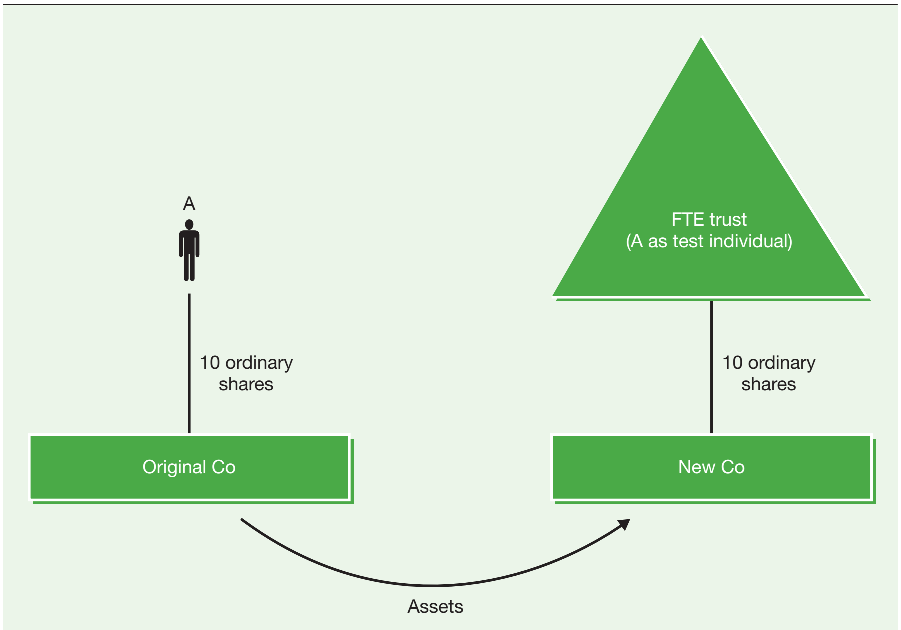


Diagram 2: How the roll-over can be applied



In particular, the provisions operate to ensure that:[14]

(1) for past CGT assets, the transferee inherits the transferor's cost base;

(2) for trading stock, the transfer occurs at cost;

(3) transfer of an asset from a company to a shareholder (for example, in the form of a partnership) will not be a deemed dividend;[15]

(4) pre-CGT assets retain their pre-CGT status after transfer;[16] and

(5) for revenue assets, the transfer occurs at a profit neutral value.

Difficult issues may arise when a shareholder is also an employee of the restructure entity. For example, if a company transfers assets to a partnership of which the employee is a partner, it may constitute a fringe benefit. This is confirmed in the explanatory memorandum (EM) which states "nor will the amendments affect a tax liability arising under another Commonwealth taxing statute (for example, fringe benefits tax)".[17]

Loss denial rule

Where consideration is provided by way of issuing membership interests, the loss denial rules disregard any capital loss made by a subsequent disposal. The loss denial rules also apply where assets are transferred from an entity to a company of which the entity has a direct or indirect interest.[18]

Example 1.8 of the EM confirms that any capital loss made due to the mismatch between the cost base and market value because of the roll-over will be disregarded. The loss denial rules do, however, allow an entity to claim a loss where it can be shown that the loss is attributable to a matter other than the restructure.[19]

Division 152 overlap

Where the small business concessions have previously been applied, the provisions provide a "pass-through" approach whereby the transferee stands in the shoes of the transferor who previously applied the Div 152 ITAA97 concessions.[20]

Under other traditional roll-overs, the ownership period for the small business 15-year exemption is generally "reset". Practically, this resetting of the ownership period was often a significant deterrent to restructuring to a new business entity. The provisions specifically amend s 152-115 ITAA97 by inserting a new s 152-115(3) that provides for the ownership period to continue after the restructure.

Integrity measures and the safe harbour rule

Given the broad nature of the provisions, discrete integrity measures have been included, namely:

(1) the requirements that the transaction is a genuine restructure of an ongoing business (integrity rule);[21] and

(2) while "genuine" is not itself defined, a transaction will be a genuine restructure if for three years after the relevant restructure (safe harbour rule):[22]

  (a) there is no change in ultimate economic ownership of significant assets;

  (b) significant assets continue to be active assets; and

  (c) significant assets are not used for personal purposes.

Whether a restructure is "genuine" will ultimately be a question of fact for the courts to determine. The EM does not provide an exhaustive definition of what is likely to be a genuine restructure, however, presumably, any bona fide estate or succession planning restructure will satisfy the requirement.

The conclusion is supported by the example in the EM which states that a restructure will be genuine if "it is not a divestment or preliminary step to facilitate the economic realisation of assets".[23]

The example is also significant for restructures which may occur prior to a business sale. In that context, if the ultimate sale of the business, through either an asset or share sale, occurs within three years of the initial restructure, it is unlikely that the genuine restructure criteria will be satisfied.

Other examples provided in the EM include:[2]

(1) transactions which enhance business efficiency;

(2) the business continues to operate even though the underlying legal structure has changed;

(3) the new structure is one which would have been used if professional advice was sought before establishing the business; and

(4) it is not artificial or unduly tax driven.

Subdivision 328-G and the 50% CGT discount

The EM confirms that the 50% CGT discount available under Subdiv 115-A ITAA97 is reset after a transfer relying on the provisions, meaning the transferee must hold a CGT asset for at least 12 months from the date of the restructure before the 50% CGT discount applies.[17] This is in contrast to the 15-year significant individual test, which continues to apply despite the restructure.[24]

It is also relevant to note that the safe harbour rules do not of themselves prevent the application of Pt IVA of the *Income Tax Assessment Act 1936* (Cth).

Overview of restructuring trusts

Trusts have long been the "structure of choice" for business owners.

Where a trust has built up significant assets, there is often a desire to "split" assets among a number of trusts. The reasons for this include:

(1) achieving an equal split of assets between family members as part of an estate plan;

(2) allowing assets to be controlled by some family members and other assets to be controlled by other family members as part of a succession or estate plan; and

(3) separating multiple business activities and minimising the risks associated with each as part of achieving best practice from an asset protection perspective.

Transactions of this nature can have a number of revenue-related consequences, including:

(1) CGT on asset transfer;

(2) stamp duty; and

(3) trust resettlement due to variations of the trust deed.

Trust cloning and trust splitting offer pathways to achieve a restructure of trust assets while minimising adverse transaction costs.

Trust "cloning" has historically been synonymous with trust "mirroring". That is, assets of a trust are transferred to a separate identical trust or trusts with no changes to the meaning or effect of the trust deed. The arrangement thus provides for different trust estates.

In contrast, trust splitting is where the assets of the trust are split (within the same trust) so that different trustees are simply appointed for each part. The ability to split a trust will depend largely on whether the relevant trust deed includes a power to appoint a separate trustee in respect of those assets to be separated from the remaining assets.

For both cloning and splitting, care must be taken to identify the location of each asset of the trust for duty purposes, as different states have different requirements for each potential exemption.

Power to transfer trust assets

Before considering how a trust can be restructured, it is important to ensure that the trustee has the necessary powers under the trust deed to split or clone the trust.

Broadly, for trust splitting, the trustee must be given the power to appoint another trustee with respect to a particular asset. Where the original deed does not contain such a power, a deed of variation can be prepared.

An example provision is set out below:

> "Asset Sub-Trust" means any Property of the Trust over which a Principal has appointed a separate trustee.
>
> Without limiting the provisions of this clause, the Principal may:
>
> (a) appoint a separate trustee in respect of separate assets of the Trust Fund, including any Asset Sub-Trust;
>
> (b) remove a trustee appointed and appoint another trustee in their place; and
>
> (c) appoint one or more additional trustees to any Asset Sub-Trusts in respect of which a separate trustee has been appointed.
>
> The Principal may exercise the power to appoint a new trustee under this clause in favour of themselves.

Similarly, in the context of trust cloning, where no consideration is being provided, trustees must ensure that they have adequate powers to transfer trust property.

An example provision is set out below:

> **Power to deal with trust property**
>
> To, in the Trustee's absolute discretion, sell or purchase all or any part of the Trust Fund (including any real or personal property) to or from itself in its capacity as trustee of any trust having the same terms and beneficiaries as the Trust (on such terms as the Trustee thinks fit, including for nominal consideration).

In a trust cloning situation, generally, a trustee will declare that they cease to hold the assets for the original trust and commence holding them as trustee for the cloned trust.

An example provision allowing a trustee to make such a declaration is set out below:

> **Power to hold property for any other trust with the same terms**
>
> The Trustee may:
>
> (a) cease to hold any part of the trust fund on the terms of the Trust; and
>
> (b) start to hold that part of the trust fund on the terms of any other trust where the Beneficiaries are the same as the Trust,
>
> as the Trustee decides.

Trust cloning

While the heyday of discretionary trust cloning effectively ended when the government changed the way that CGT events E1 and E2 operated on 31 October 2008,[25] the provisions re-enliven CGT effective trust cloning.

Historically, trust cloning involved the creation of a separate trust that was in almost every respect identical to the original trust. If structured correctly, trust cloning enabled the subsequent transfer of assets from the original trust to the new cloned trust, without CGT consequences.

Trust cloning did not historically invoke CGT consequences primarily because the essential terms of the original trust were preserved in the cloned trust. For cloning to be effective, there had to be no change to the meaning or effect of the original deed.

Generally, the discretionary nature of most family trusts allowed a transfer of ownership and effective control of the trust assets without changing the essential terms of the trust deed.

Diagram 3 illustrates how a trust is cloned.

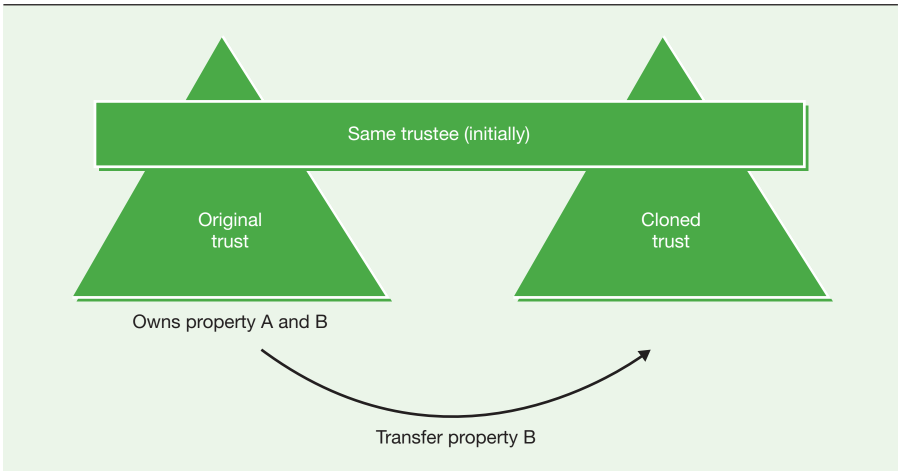
Cloning was (even after the rule changes on 31 October 2008) an effective tool regularly used in succession planning, asset protection and arranging finance. The ongoing relevance of trust cloning was due to the ability to manage CGT via other concessions, such as utilising losses or accessing the small business concession under Div 152. Trust cloning, for discretionary trusts under the provisions, is arguably likely to be a far more widely accessible strategy than the previous regime. This is because of the requirement that the original and cloned trust being "virtually identical" is no longer being applicable.

Trust cloning, without relying on the FTE exemption, is likely to remain potentially relevant in certain factual scenarios, including (as one example) where there is a desire to transfer assets to a trust that has not made an FTE.

Meaning of "the beneficiaries and terms of both trusts are the same"

Where the FTE exemption is not preferred as the pathway to access the provisions between trusts, it is likely that the trust cloning rules from prior to 31 October 2008 will apply. The Australian Taxation Office set out its view in relation to the meaning of the words "the beneficiaries and terms of

Diagram 3: How a trust is cloned



both trusts are the same" in the withdrawn TR 2006/4W.

TR 2006/4W dealt specifically with Subdiv 104-E ITAA97 (CGT E events), which has since been amended to remove the ability to trust clone for CGT purposes, other than in relation to fixed trusts. It is assumed the tests set out in TR 2006/4W are analogous to what is required under the provisions, although arguably the historical requirements in TR 2006/4W were more onerous, because the test in new provisions is that there be "no material change" in those who economically benefit.

In TR 2006/4W, the ATO confirmed that the following requirements must have been satisfied when cloning a trust to ensure access to the then applicable CGT exceptions:[26]

(1) the appointor or principal must have been the same;

(2) the vesting date must have been the same;

(3) the direct or named beneficiaries must have been the same;

(4) the trusts must have been governed by the same state laws;

(5) all other terms of the trusts must have had the same meaning and effect;

(6) any additional clauses in the cloned trust (as compared to the original trust) would mean the exception in CGT events E1 and E2 would not apply; and

(7) if an FTE (or interposed entity election) had been made with respect to the original trust, then the cloned trust must have made the same election, and in respect of the same family member.

However, the following items were not requirements for the exceptions to apply:[27]

(1) the trustee did not need to be the same;

(2) the name of the trust may have been different; and

(3) the establishment date may have been different.

Identical meaning and effect

The above summary did not mean that the two trust deeds had to be worded identically. Rather, it required that the deed for the original trust and the deed for the cloned trust must have had exactly the same meaning and effect. When testing this, the ATO required that all terms be taken into account, even those that were administrative in nature.

In practice, this required that the terms of each cloned trust were:

(1) worded identically to the terms of the original trust, where the reproduction of the words resulted in the same meaning and effect as was in the original trust; and

(2) worded differently to the terms of the original trust, where this was necessary to ensure the same meaning and effect as was in the original trust.

Whether all of the above requirements will be necessary to satisfy the provisions is open to debate. Certainly, the requirement that identical FTEs must be made will not be relevant, given the safety net alternative test under the provisions uses these criteria.

The EM confirms that for discretionary trusts, the provisions are "intended to provide additional flexibility to small family businesses … if the ultimate economic ownership of those assets remain in the family".[28]

Significantly, the new provisions do not require the trust deed of a recipient trust to have an identical meaning and effect to that of the transferor trust. In particular, so long as the trusts involved in the arrangement have the same test individual under a valid FTE, then there are no additional requirements relating to the trust instrument to access the relief under the provisions.

Practically, care will need to be taken on a case-by-case basis to ensure that issues such as trust powers (to gift the assets), trustee duties (to beneficiaries) and credit loans are all managed whenever seeking to rely on the provisions.

Subdivision 328-G and refreshing trust

Given the broad nature of the provisions, existing trusts with problematic provisions should be able to transfer assets to a "clean-skin" trust, avoiding the difficulties. Examples include:

(1) the current deed contains no, or limited, powers of variation;

(2) the trust is close to vesting; or

(3) the existing deed has a narrow class of potential beneficiaries (subject of course to the inherent limitations imposed by the FTE that will have been made).

Given the adverse CGT events that may arise due to resettlement caused by improper variations, or CGT event E5 occurring when a trust vests, the ability to rely on the provisions to bypass historical limitations is significant.

"Clean-skin" trust and genuine restructure

The ability to transfer assets to a clean-skin trust will depend on satisfying the genuine restructure test. This will ultimately be a question of fact and degree.

Where adverse tax costs are significant drivers for restructuring, particularly where a trust is close to vesting, there is case law which, by analogy, arguably supports the position that such a transaction is a genuine restructure.

There are a number of cases that have involved trustees applying to court under the relevant state-based Trusts Act for an extension to the vesting date of the trust that may prove useful in this regard.[29]

Every trust established in Australia, with the exception of those in South Australia, has a maximum lifespan known as the "vesting period" or "vesting date".

This maximum lifespan arises from three sources:

(1) the common law rule against perpetuities;

(2) the Trusts Act in the relevant jurisdiction; and

(3) the trust instrument.

In general, the vesting date will be the date 80 years from the date of establishment of the trust, however, regularly it is discovered that the trust instrument specifies a shorter period (sometimes as short as 20 years).

Many trust vesting issues arise as a result of a shorter vesting period having been specified in the trust instrument, often without the trustee, beneficiaries or their advisers being aware until after the date has passed.

One potential advantage of relying on the provisions to transfer assets out of a "problematic" trust would be ensuring the recipient trust deed is governed by the laws of South Australia. South Australia is unique among all Australian jurisdictions as it essentially abolished the rule against perpetuities in 1996.

This means trusts established under South Australian law can potentially exist indefinitely, rather than being required to vest after the "life in being" or statutory 80-year period has expired.

The abolition of the perpetuity period concept in South Australia is subject to s 62 of the *Law of Property Act 1936* (SA), which gives the court, if requested, the power to order a trust to vest if, 80 years or more after the disposition, the trust is unvested, taking into account the spirit of the original disposition.

In other words, although a trust will not automatically vest in South Australia after 80 years, an interested party may apply to the court to exercise its discretion to wind up the trust after that period has elapsed.

There are a number of key questions in the context of trust vesting as a result of the South Australian provisions, which are outside the scope of this article.

Trust splitting

The practical uses of trust splitting are broadly the same as those of trust cloning. The key differences from an estate planning perspective is that there is no complete autonomy for the controls of each split trust and the asset protection afforded by trust splitting is not as robust as that provided via trust cloning.

As discussed above, trust cloning involves establishing a separate, discrete trust and transferring assets between the two trusts.

Trust splitting, on the other hand, involves establishing a "sub-trust" within the original trust, so there is still only one trust, but different trustees are appointed for different assets held within that trust. The splitting of a trust does not involve a change to the beneficiaries or to the powers conferred on the trustee.

The ability to split a trust will depend on the powers provided in the trust deed to appoint a separate trustee in respect of those assets which have been split.

Diagram 4 illustrates how a trust is split.

Trust splitting may not be ideal from an estate and succession planning perspective, as there can be practical difficulties in relation to separating the control of the original trust and each sub-trust.

In particular, as a minimum, the following issues would need to be addressed:

(1) how any principal, appointor or guardian roles are structured under the trust deed;

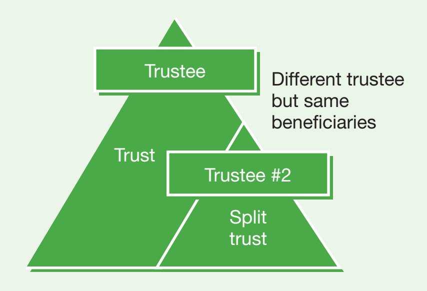
(2) the effect of any FTE (the potential ability to make a oneoff change to an FTE does not generally assist with trust splitting, as only one FTE can be made for the trust as a whole); and

(3) the ability (or inability) to obtain separate tax file numbers and GST registrations for the original trust and the sub-trust, if required.

In some cases, where liability and asset protection issues are not important and some ongoing cooperation among the trustees of the original trust and the sub-trust is feasible, trust splitting can be a useful tool in succession planning.

As the assets are still held in the same trust, albeit with different trustees appointed, this effectively limits the CGT consequences of trust splitting, regardless of the provisions. In particular, while there is a change of legal owner when a new trustee is appointed, the exception under the CGT rules regarding a mere change of trustee should be available.

Diagram 4: How a trust is split



Specific comments on the CGT consequences of splitting

Generally, CGT relief should be available on trust splitting without relying on the provisions and the basis for this is outlined in more detail below. In light of the following analysis, it is expected that there will be significant flexibility to amend or change the terms of a sub-trust without any CGT consequences, relying on the provisions.

CGT events

But for the provisions, the CGT events which may have potential application to a trust split are A1, E1 and E2.[30]

CGT event A1 arises on a disposal of an asset. However, where there is a disposal as a result of a new trustee being appointed for particular assets, the exception regarding a mere change of trustee should be available.

CGT event E1 arises if a trust is created over a CGT asset. Splitting does not generally create a new declaration of trust or settlement. A new trust should not arise merely by appointing a new trustee in respect of particular assets held by the trust, and therefore CGT event E1 should not apply.

CGT event E2 occurs where an asset is transferred to a trust. With a trust split, CGT event E2 does not occur as the assets are still held in the same trust, although different trustees are appointed.

Trust splitting and resettlement

Where the parties to a relationship control a trust, regardless of whether trust cloning or splitting is utilised, steps will usually need to be taken to remove one party from being involved in the trust.

That may involve ensuring the party resigns as an appointor of the trust, as a trustee or as a shareholder/director of a corporate trustee and renounces their interests as a beneficiary.

Where changes are being made to a trust, the possibility of a tax resettlement needs to be considered.

The consequences of a tax resettlement include:

(1) all assets are treated as having been disposed of by the original trust and settled on the new trust (ie CGT event E1 occurs); and

(2) any losses in the trust are forgone and cannot be carried forward to offset income in the "new" trust.

In a recent private binding ruling, the ATO has confirmed the likely ATO approach to trust splitting, prior to the provisions. Briefly, in this ruling, the ATO confirmed:[31]

(1) the insertion of powers into a trust instrument to provide a trustee the ability to create a split trust will not be a resettlement if the power of variation is sufficiently wide;

(2) a change of trusteeship in relation to certain trust assets will not cause any tax consequences, again subject to the trust deed providing the requisite powers;

(3) a change to the person nominated as principal or appointor of a split trust will not cause any tax consequences, again subject to the trust deed providing the requisite powers;

(4) varying a trust deed to limit each trustee's right of indemnity such that each trustee is only permitted to be indemnified from the assets of the split trust they act as trustee for will not cause a resettlement; and

(5) narrowing by deed amendment the class of beneficiaries of each split trust to focus around the family unit intended to control that trust will cause a resettlement.

Arguably, under the provisions, the only substantive aspect of most traditional splitting arrangements flagged in the ruling as leading to a resettlement (ie narrowing the class of beneficiaries of each split trust) will be able to be managed by simply relying on the FTE safety net and by the roll-over provisions which have the effect of switching off the income tax provisions.[14]

Stamp duty

The decision to split or clone a trust will largely depend on the ability to avoid any adverse stamp duty costs on transfer.

A substantive discussion of the duty outcomes is outside the scope of this article.

Trust splitting

Duty payable on a transfer of assets due to a change or retirement in most Australian states and territories is either nominal or exempt from duty.

In the ACT and Western Australia, nominal duty of $20 is payable when dutiable property is transferred due to a change in trustee.[32] Similarly in NSW and Tasmania, $50 is payable.[33] New South Wales limits the nominal duty exemption for a change of trustee to trust deeds that contain provisions ensuring that:

(1) none of the trustees of the trust after the appointment of a new trustee are or can become a beneficiary under the trust; and

(2) the transfer is not part of a scheme for conferring an interest, in relation to the trust property, on a new trustee or any other person, whether as a beneficiary or otherwise, to the detriment of the beneficial interest or potential beneficial interest of any person.

> *"... existing trusts with problematic provisions should be able to transfer assets to a 'clean skin' trust ..."*

In Queensland and the Northern Territory, a change of trustee is exempt from duty.[34]

While in Victoria, although the change of trustee is exempt from duty, as part of the anti-avoidance regime, the Commissioner holds a residual discretion if the transfer is part of a broader commercial objective.[35] Given that trust splitting generally occurs within the context of estate planning, it is likely that the Commissioner will allow the exemption.

For completeness, it should be noted that each state and territory also contains general anti-avoidance provisions.

Trust cloning

In contrast, duty relief for trust cloning is only likely to be available as follows:

(1) Queensland — all assets;

(2) NSW — landholder companies (duty on business assets will be abolished on 1 July 2016); and

(3) Victoria, South Australia, Tasmania and the Australian Capital Territory — all business assets, other than real property.

Before considering whether to clone a trust, it is critical to carefully read the duty exemptions for each state and territory.

Traditional roll-over relief

When restructuring a business, it is important consider all possible roll-overs. While the Subdivision provisions provide significant flexibility in form and functionality, the other existing CGT roll-over rules may still be relevant in many restructures.

The more obvious examples for where the provisions may not be accessible include:

(1) assets that are not active;

(2) where the $2m turnover test cannot be satisfied; or

(3) where the ultimate economic ownership test cannot be satisfied.

Each of the main CGT concessions that are most often used in restructures are set out in an earlier article.[36]

Conclusion

The provisions provide businesses and their advisers with a powerful restructuring framework that represents a significant liberalisation of historical rules. There are, however, a number of fundamental issues in relation to how to satisfy the provisions in any factual scenario.

As is the case with almost all aspects of tax-related advice, it is therefore critical to adopt a methodical approach that addresses all potential issues.

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References

1 Explanatory memorandum to the Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016, p 8.

2 S 328-110 ITAA97.

3 S 328-430(1)(b) ITAA97.

4 S 328-430 ITAA97.

5 S 328-425 ITAA97.

6 S 328-430(1)(c) ITAA97.

7 See, specifically, *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 607, 615.

8 See, generally, *R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1993) 10 WAR 59 at 63, 79.

9 S 328-440 ITAA97.

10 Sch 2F to the *Income Tax Assessment Act 1936* (Cth) (ITAA36).

11 S 272-80, Sch 2F ITAA36.

12 S 272-95, Sch 2F ITAA36.

13 S 272-80(6A), Sch 2F ITAA36.

14 S 328-450 ITAA97.

15 Pursuant to Div 7A ITAA36.

16 S 328-460 ITAA97.

17 Explanatory memorandum to the Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016, p 15.

18 S 328-465 ITAA97.

19 S 328-470 ITAA97.

20 S 328-475 ITAA97.

21 S 328-430(1)(a) ITAA97.

22 S 328-345 ITAA97.

23 Explanatory memorandum to the Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016, p 9.

24 See, specifically, s 152-115(3) ITAA97.

25 See, specifically, the Tax Laws Amendment (2009 Measures No. 6) Bill 2010 (Cth).

26 Para 4 of TR 2006/4W.

27 Ibid para 25.

28 Explanatory memorandum to the Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016, p 12.

29 See, specifically: *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004; *Re Plator Nominees Pty Ltd* [2012] VSC 284; *Re Arthur Brady Family Trust*; *Re Trekmore Trading Trust* [2014] QSC 244; contrast the decision in *Paloto Pty Ltd v Herro* [2015] NSWSC 445.

30 See, generally, s 104-5 ITAA97.

31 PBR 1012921290075. See, generally, M Burgess and P Ellwood, "Trust splitting — some clarity at last", (2016) 6 *Weekly Tax Bulletin* 144.

32 S 54 of the *Duties Act 1999* (ACT); s 118 of the *Duties Act 2008* (WA).

33 S 54 of the *Duties Act 1997* (NSW); s 37 of the *Duties Act 2001* (Tas).

34 S 117 of the *Duties Act 2001* (Qld); s 6, Sch 2 to the *Stamp Duty Act* (NT).

35 S 33 of the *Duties Act 2000* (Vic).

36 M Burgess, "Revenue-effective corporate restructures", (2015) 50(6) *Taxation in Australia* 323.