Small business restructure roll-over: planning issues

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Abstract: Rather than considering the substantive law in this area, this article reflects on the emerging practices and the significant planning issues that arise when using the small business restructure roll-over in relation to business and property restructures. The article also considers the issues that typically arise in these kinds of restructures, such as the need to consider other possible tax relief. Some clients may qualify for both the small business CGT concessions and the small business restructure roll-over on a given set of facts. Which is preferable? The case studies bring these issues to life and also highlight some of the stamp duty issues that invariably arise when restructuring in this area. The article draws on the authors' recent experience in advising on, and assisting clients to implement, restructures under the small business restructure roll-over. The key message is to embrace the concession for all of the opportunities it presents, but do so with a high degree of care.

The small business restructure roll-over (SBRR) has been available to small-to-medium enterprise (SME) owners restructuring their businesses since 1 July 2016.[1] It is therefore timely to reflect on some of the opportunities and challenges posed by these measures in recent years.

This article does not examine the substantive law in this area in any detail. Instead, it reflects on the emerging practices and significant planning issues that arise when using the SBRR in business and property restructures. The article also considers issues that typically arise in a SME restructure, including whether other tax concessions may be preferable to the SBRR and whether stamp duty relief is available.

Recent experience suggests that, while optimal results can sometimes be achieved, the various issues discussed in this article warrant particular attention to ensure certainty of outcomes.

A refresher on the framework

It may be recalled that the object of the SBRR is to facilitate flexibility for small business owners to restructure their businesses and asset holding structures with tax-neutral consequences.[2]

Most SME tax advisers are now familiar with the general criteria. The SBRR is available in relation to an asset that, under a transaction, an entity transfers to one or more entities if:

- the transaction is, or is part of, a genuine restructure of an ongoing business;
- each party to the transfer is either a small business entity, an entity connected with a small business entity or has an affiliate that is a small business entity (within the meaning of Subdiv 328-C of the *Income Tax Assessment Act 1997* (Cth) (ITAA97));
- the transaction does not have the effect of materially changing the individuals that have the ultimate economic ownership of the asset (and their respective shares of that ownership);
- at the time the transfer takes effect, the capital gains tax (CGT) asset is an active asset[3] in relation to which the business is carried on;
- the transferor and transferee meet the residency requirements;[4] and
- the transferor and each transferee choose to apply the SBRR in relation to the transferred assets.[5]

If these criteria are satisfied, the transfer of the asset has no direct consequences under the income tax law.[6] Further, the transferee will be taken for tax purposes to have acquired the asset at the asset's "roll-over cost".[7] This will result in the transferee effectively inheriting the tax characteristics of the asset from the transferor.

SBRR and small business CGT concessions

The SBRR has obvious utility in the tax-effective restructuring of groups that fail to qualify for the small business CGT (SBCGT) concessions but that may otherwise qualify for the SBRR. Such a situation is not uncommon given that the aggregated turnover threshold for the SBCGT concessions is only $2m, compared to $10m for the SBRR.[8]

There are, however, a number of situations where a taxpayer may qualify for both the SBRR and the SBCGT concessions. In this case, careful thought should be given to which relief is preferable in the given circumstances. Some basic differences include:

- the SBCGT concessions allow the transferee to obtain a market value cost base in respect of the asset. In contrast, under the SBRR, the transferee will effectively inherit the cost base of the asset from the transferor. As such, the SBRR is appropriately viewed as deferring any capital gain, rather than disregarding it altogether;
- where the asset that is subject to the SBRR is a pre-CGT asset, the transferee will be taken to have acquired the asset as a pre-CGT asset.[9] This is not the case for the SBCGT concessions. Clearly, the ability to transfer pre-CGT assets while retaining pre-CGT status under the SBRR is a significant opportunity for taxpayers (see further below);

- the SBRR relies on there being a "genuine restructure of an ongoing business". The Commissioner of Taxation adopts a strict interpretation of this requirement, which necessitates a detailed consideration of the facts and circumstances surrounding the transaction.[10] The SBCGT concessions do not have a similar "purposive" requirement. In circumstances where there may be some risk associated with establishing eligibility for the SBRR given its less prescriptive requirements, the SBCGT concessions may be a preferable approach as they provide the taxpayer with greater certainty (in the absence of obtaining a private binding ruling from the Commissioner); and
- self-managed superannuation funds are not eligible transferors or transferees in the case of the SBRR. In contrast, the SBCGT concessions may allow taxpayers to contribute significant wealth to superannuation by accessing their lifetime CGT cap.

Table 1 summarises some of the major differences between the SBCGT concessions and the SBRR.

It is clear that, in some circumstances, the optimal outcome might be achieved by applying the SBRR in respect of certain assets and the SBCGT concessions for others. One example is where there is a desire to transfer pre-CGT assets such as land to a new holding structure without losing the pre-CGT status of the asset, but also to shift post-CGT assets under the SBCGT concessions so that the transferee may obtain a market value cost base for those assets. The question arises as to whether both the SBCGT concessions and the SBRR can be used concurrently to achieve this outcome.

Concurrent use of SBRR and SBCGT concessions

In the authors' view, there is nothing to suggest that a taxpayer's ability to qualify for the SBCGT concessions would be jeopardised simply because the use of those concessions might be seen as part of an overarching arrangement which also involves applying the SBRR.

One risk, however, is that the transfer of only the pre-CGT assets by application of the SBRR (rather than all assets with unrealised capital gains) might be seen as failing to satisfy the genuine restructure of an ongoing business requirement. For instance, it might be suggested that the isolated transfer of one parcel of land (used in the taxpayer's or a related entity's business) under the SBRR cannot of itself be (or be part of) a genuine restructure of an ongoing business.

The Commissioner has stated that, where a restructure effects a permanent non-recognition of a gain or the creation of artificial timing advantages, this will tend to indicate that there is not a genuine restructure of an ongoing business.[11] In circumstances where the pre-CGT status of the asset is likely to be maintained for longer in the new structure (for example, by holding the asset in a discretionary trust — see further below), this may be of some concern.

In the authors' view, however, it is difficult to see how the Commissioner could succeed in denying the SBRR in these circumstances provided there is a genuine commercial advantage in shifting the pre-CGT land (for example, for asset protection purposes). The Commissioner expressly accepts that transferring only some of the assets required for the ongoing conduct of a business is not inconsistent with there being a genuine restructure of an ongoing business.[12] Moreover, for the purposes of the general anti-avoidance provisions, the taxpayer is arguably only making a choice for which the income tax legislation specifically provides.[13]

Further, the SBRR provisions only require that the transfer to which the SBRR is applied occurs under a transaction that is "part of" a genuine restructure of an ongoing business. There is nothing to suggest that any other transfers that form part of a wider transaction but in respect of which the taxpayer does not choose to apply the SBRR cannot be taken into account when assessing whether the transaction is part of a genuine restructure. In other words, the transfer should still be seen as being part of a genuine restructure — the taxpayer has merely chosen to apply different provisions of the ITAA97 in managing the taxation outcomes.

Before leaving this topic, it is worth briefly noting that sometimes, depending on the facts of the restructure involved, there may be other CGT roll-overs available alongside the SBRR — for instance, a roll-over from a trustee of a trust to a wholly owned company.[14] Therefore, when properly navigating outcomes, it is necessary to consider not only comparisons with SBCGT concessions, but also comparative outcomes of other roll-overs that might be available on the same facts.

Maintaining pre-CGT status

As stated above, one significant benefit associated with the SBRR is the ability to transfer pre-CGT assets while maintaining the pre-CGT status of those assets. One issue that is sometimes overlooked is that, where pre-CGT assets are owned by an individual, those assets will ultimately become subject to the CGT regime on the death of that individual (albeit with a market value cost base).[15] Where the assets are owned by a company or unit trust, the pre-CGT lifespan of those assets may also be limited due to the risk of a change in majority underlying ownership in the company or unit trust.[16]

In contrast, where a pre-CGT asset is owned by a discretionary trust, under the current law, the asset may retain its pre-CGT status for a significant time period, often generations. For example, for trusts governed by jurisdictions subject to the rule against perpetuities, it might be expected that a discretionary trust will not be required to vest for some 80 years

Table 1. Major differences between the SBCGT concessions and the SBRR

	SBCGT concessions	SBRR
Turnover threshold	$2m	$10m
Criteria	More prescriptive	Less prescriptive
Cost base for transferee	Market value cost base uplift	Inherited from transferor
Consequences	Disregard or defer CGT only	Disregard all direct tax consequences
Pre-CGT status	Not preserved	Preserved
Transfers to SMSFs	Permissible	Not permissible
Use of CGT cap	Yes ($1.48m for 2019 income year)	No

from the date of settlement.[17] In trusts governed by South Australian law, under which the rule against perpetuities has been abolished, the pre-CGT status of an asset transferred to a trust under the SBRR might be retained indefinitely.[18] Control over the trust can be passed down over time by transferring the shares in the corporate trustee to the subsequent controller or by changing the person with the ability to appoint and remove the trustee within the same family group, neither of which should give rise to adverse CGT outcomes.

In light of the above comments, advisers should remain alive to the opportunities presented by the SBRR to preserve the pre-CGT status of assets for significant periods of time. This, of course, relies on the transfers of such assets otherwise falling within the criteria for accessing the SBRR, including that there is a genuine restructure of an ongoing business.

Succession planning objectives

As stated, whether there is a genuine restructure of an ongoing business is one criterion that may be more difficult to establish with certainty.

"Genuine restructure of an ongoing business" is not defined in the legislation. The explanatory memorandum to the Bill which introduced the SBRR[19] (EM) stipulates that the principle will cover a range of potential transferor/transferee combinations and a wide range of factual situations.[20] The principle distinguishes genuine restructures from what Treasury considers "artificial or inappropriately tax-driven schemes".[21]

The Commissioner considers the meaning of "genuine restructure of an ongoing business" in LCR 2016/3. In the authors' experience, a significant issue in this context is the Commissioner's view that succession planning, that is, restructuring to facilitate the inter-generational transfer of wealth, is not considered a genuine restructure of an ongoing business.[22] While on its face this might appear to disqualify a restructure where succession planning is the overriding objective, care should be taken so as not to unduly preclude restructures where succession planning is taken into account. The following matters should be noted in this regard:

- read carefully, the Commissioner's objection appears to be about a *divestment* of assets (or the control of assets) for succession planning purposes. This is arguably distinguishable from embracing a new structure that simply facilitates greater flexibility for succession planning;
- the Commissioner accepts that a genuine restructure of an ongoing business can incorporate any number of genuine commercial drivers. These include, for example, asset protection, facilitating growth, maintaining essential employees, raising new capital and simplifying the taxpayer's affairs.[23] To the extent that adopting a new structure is consistent with the taxpayer's succession planning affairs (or makes succession planning more achievable for the taxpayer), the authors consider that this should be seen as merely ancillary to the overarching commercial drivers of the transaction; and
- in LCR 2016/3, the Commissioner takes issue with a restructure for succession planning in circumstances where the individual ultimate economic owner is "looking to retire" and subsequently disposes of their ownership interests to his sons within three years of the restructure.[24] In the example, the Commissioner states that the individual has "no expectation of running his business going forward" and that the restructure was undertaken "in the course of … winding down and facilitating an inter-generational transfer of wealth". Further, both the Commissioner and the EM refer to a "divestment" of assets as suggesting the lack of a genuine restructure of an ongoing business.[25]

> *"It is highly recommended that documentation implementing the transactions is carefully drafted so that the substance of the transaction is recorded."*

In the authors' view, a restructure under which a structure that enables the future succession planning objectives of the owners to be achieved does not of itself fall within the above parameters set out by the Commissioner as being succession planning for divestment purposes. Where the taxpayers have a genuine intention to carry on the business for the foreseeable future, there is a strong argument that any restructure is not in the course of the taxpayers actually winding down and divesting themselves of assets for succession purposes. It follows that such a restructure should not be precluded from the SBRR.

It is highly recommended that documentation implementing the transactions (for example, company or trustee minutes) is carefully drafted so as to ensure that the substance of the transaction is recorded. The facts and circumstances surrounding the restructure should be accurately recorded contemporaneously with the transactions for which relief is sought.

It might be said that the three-year safe harbour rule can be relied on to satisfy the genuine restructure requirement, regardless of the purpose of the restructure.[26] While this is true, care should be taken in this regard as unexpected events outside the control of the taxpayers may cause a failure to satisfy the safe harbour requirements (for example, the death of one of the ultimate economic owners). As such, the authors' preference is to establish (and carefully document) that there is a genuine restructure of an ongoing business and seek only to rely on the safe harbour as a "back-up".

Case study 1 – restructuring business

The following case study works through some of the practical considerations that typically arise in a restructure involving the SBRR.

> IT Crowd Pty Ltd acts as trustee for a trust known as the IT Crowd Trust (ICT), a discretionary trust controlled by Maurice Moss and established for the benefit of Maurice and his relatives and related entities.
>
> ICT carries on a software development business in New South Wales. The business was commenced in 1990 and now has significant internally generated goodwill as well as valuable

source code (which is protected by copyright). The market value of the source code exceeds its adjustable (or tax written down) value.

ICT's annual turnover in the last income year was $7m and is expected to be $7.5m for the current income year.

ICT owns the premises from which ICT's business is carried on (an office block situated in NSW).

Maurice and his connected entities have net assets of greater than $6m.

Maurice is now seeking to expand ICT's business into new markets and is concerned about risk exposure. In particular, Maurice has been advised that the commercial premises, currently held in the trading entity, is unduly exposed to the risk of claims that may arise from the business operations.

Maurice is also seeking to move to a trading structure with a view to introducing new capital to the business (by way of arm's length investors) to fund the business expansion.

Maurice has two adult children, namely Jen and Roy. In the longer term (around 10 years), it is felt that the commercial premises will be designated for the ultimate control of Jen, who does not work in the business. Maurice ultimately intends for his interest in the business to be controlled by Roy, who works in the business and has contributed to its success.

It is expected that the business may ultimately lease its premises from a third party rather than rely on the premises owned by ICT.

Maurice sees any restructure as an opportunity to address his succession planning affairs concerning Roy and Jen, although it is not Maurice's immediate concern.

A desirable outcome might be achieved in this scenario by transferring either the commercial premises or business from ICT to a private company in which the shares are owned by a discretionary trust controlled by Maurice (NewCo). This structure would assist in achieving the following objectives:

- asset protection by separating the ownership of the business and real estate;
- the ability to attract arm's length investment in future by way of issuing shares in NewCo to new investors; and
- allowing for Maurice to plan for the succession of the business to Roy and the commercial premises to Jen (by providing for a change in the control of the respective shareholding and real property trusts in future).

Stamp duty impact and other CGT relief available?

Stamp duty is a significant issue that must not be overlooked in restructures of this kind.

Most Australian jurisdictions have moved towards a land-based regime, under which duty is primarily imposed on conveyances of land (or interests in entities that hold land) as opposed to transfers of business assets. Care should, however, be taken where the assets are associated with a business that has revenue sourced in Western Australia, the Northern Territory and/or Queensland as duty is levied on transfers of business assets in those jurisdictions. An apportionment may be required in these circumstances.

It is also worth noting that, in South Australia, duty on conveyances of commercial property has been abolished and therefore a restructure involving the land itself might be feasible in South Australia.[27]

In this case, as the commercial building owned by ICT is situated in NSW, it would not be possible to transfer the premises to NewCo without incurring a stamp duty liability. Assuming the stamp duty cost is unacceptable, it will be necessary to transfer the goodwill in ICT's business such that NewCo can commence to carry on the business. Such a transfer should not attract a liability to duty in NSW.

Given that the $6m maximum net asset value test and $2m turnover test for the purposes of Div 152 ITAA97 are not able to be satisfied on the facts of this case study, the SBCGT concessions will not be available.

The Subdiv 122-A ITAA97 roll-over might be considered. This roll-over facilitates the roll-over of assets (including goodwill) from the trustee of a trust to a wholly owned company. However, this would require that ICT wholly owns all of the shares in NewCo. This is inconsistent with Maurice's longer-term succession planning objectives to separate the ownership and control of the commercial premises and the business. The SBRR is therefore likely to lead to a more desirable outcome.

Challenges with ultimate economic ownership

A threshold question is whether the transaction contemplated would have the effect of materially changing the individuals that have the ultimate economic ownership of the business assets.

It is first necessary to determine which individuals have ultimate economic ownership of the assets before the transfer. Curiously, the term "ultimate economic ownership" is not defined in the legislation. The EM describes "ultimate economic owners" as individuals who, directly or indirectly, beneficially own an asset.[28] While, as a matter of law, no person has a beneficial interest in asset held on the terms of a discretionary trust, both the EM and the Commissioner in LCR 2016/3 appear to accept that in some cases, it may be possible to establish that the individuals that have ultimate economic ownership of assets have not changed, notwithstanding that the transferor or the transferee is a discretionary trust. In particular:

- the EM suggests that where there is no "practical change" in which individuals economically benefit from the assets before and after the roll-over, then ultimate economic ownership would be maintained;[29] and
- in example 4 in LCR 2016/3, the Commissioner concludes that an individual controller of a discretionary trust with "no family" was the ultimate economic owner of the assets of the trust.

Notwithstanding the above comments, the Commissioner goes on to state in LCR 2016/3 that a transfer of assets to or from a discretionary trust will generally not meet the requirements for ultimate economic ownership on their facts.[30]

While an argument may be put forward that there is no change in economic ownership where Maurice is the sole controller of both ICT and the new discretionary trust shareholder in NewCo where distributions have only historically been made to Maurice, this approach does not provide for much certainty. In the authors' view, the ATO example of a discretionary trust transaction that satisfies the economic ownership test (without relying on the alternative test — see directly below) should be limited to its specific facts, rather than relied on as a general proposition in relation to transfers involving discretionary trusts.

To address the above difficulties associated with discretionary trusts, an alternative economic ownership test is provided in s 328-440 ITAA97. This test will be satisfied where:

- either just before or just after the transaction (or both) the asset is included in the property of a non-fixed trust that is a family trust (this requires that there is a family trust election in force);
- every individual who, just before the transfer took effect, had ultimate economic ownership of the asset was a member of the family group (within the meaning of Sch 2F to the *Income Tax Assessment Act 1936* (Cth)) relating to the trust or trusts referred to above; and
- every individual who, just after the transfer takes effect, has the ultimate economic ownership of the asset is a member of that family group.

On the basis that ultimate economic ownership is traced through NewCo's shareholder to the persons benefiting under the shareholding trust, the above requirements should be satisfied provided ICT and the new discretionary trust shareholder make family trust elections specifying the same test individual (eg Maurice). This would allow for all possible ultimate economic owners before and after the transaction to be members of the same family group.

Importantly, if the transferor was any entity other than a discretionary trust, it would not be possible to transfer the assets to a company owned by a discretionary trust and apply the SBRR. This is on the basis that neither before nor after the transaction would the asset have been included in the property of a discretionary trust. The assets are instead being included in the property of a company (regardless of the nature of its shareholders). The Commissioner adopts this view in LCR 2016/3.[31]

Genuine restructure established on these facts?

A further issue in this scenario is whether the transfer of the goodwill is part of a genuine restructure of an ongoing business. Clearly, the desire to move to a structure that encourages arm's length investment as well as asset protection is a significant motive. While the taxpayer's instructions are clear that succession is only incidental, there may be some concern that, on review, the ATO may take issue with this. As such, care should be taken to ensure that the transaction documents reflect the substance of the arrangement as a genuine restructure for the abovementioned commercial purposes. Reliance on the safe-harbour provision in this situation is not advisable given that there may be a new issue of shares to a third party within the next three years. This would cause a change in the ultimate economic ownership and therefore preclude the safe harbour from applying.

On the basis that the goodwill will be transferred to the new company, a further question arises as to whether the transfer should occur for market value consideration (or any consideration at all). There is little direct guidance on this issue.

A number of the examples contained in LCR 2016/3 proceed on the basis that assets are transferred for no consideration. There may be some benefit for the company in acquiring the goodwill for its market value in the sense that credit loans could be created in the company that would allow for the payment of amounts from the company to ICT by way of non-assessable loan repayments in future. Alternatively, a sale price for the transfer of the business to the new company for nominal consideration (eg $1) should also be sufficient.

Regardless of the sale price, the new company would inherit the cost base (and therefore a significant unrealised gain) on the internally generated goodwill. On the basis that the new business entity is a company, Maurice should of course be mindful that NewCo will be unable to access the general 50% discount on a future disposal of the business. This would not be an issue if a future disposal by way of share sale is contemplated.

Disregarding all direct tax consequences – a significant advantage

A significant advantage the SBRR has over other roll-overs and concessions is that it extends to assets that have income tax rather than CGT implications on their transfer. In the above case study, the transfer of the source code may give rise to a balancing adjustment if its market value is in excess of its adjustable (tax written down) value. However, on the basis that the SBRR applies, the depreciating asset comprising the source code (and all other depreciating assets) could be transferred to NewCo on a tax-neutral basis.[32] In particular, the effect of the roll-over in s 40-340(1) ITAA97 (which in turn depends on satisfying the SBRR) is that there is no balancing adjustment event for the transferor.[33] NewCo would continue to deduct the decline in value using the same method and effective life used by the ICT.

An alternative that might be considered in this scenario is transferring the business to a unit trust in which the units are held by a discretionary trust. Having the unit trust carry on the business might still satisfy the above commercial objectives on the basis that a unit trust would be an appropriate vehicle to accommodate arm's length investors. Such a transaction should still qualify for the SBRR where a family trust election is made in respect of the discretionary trust unitholder specifying the same test individual.

Whether a unit trust or company (both owned by a discretionary trust) is preferable will involve consideration of the usual criteria when comparing these entities.

Case study 2 – restructuring primary production land

The SBRR presents some significant opportunities for primary producers wishing to restructure their land holdings, particularly where their net assets will often exceed $6m but their aggregated turnover will not necessarily exceed $10m.

Consider the following case study.

KingCo Pty Ltd (KingCo) is an Australian resident private company that owns primary production land in rural Victoria. Details of the land are as follows:

Land	Acquisition date	Cost base	Market value
Greenacre (wheat and barley)	2 February 1991	$400,000	$5,000,000
Brownacre (wheat and barley)	30 March 2005	$1,500,000	$5,000,000
Red Earth (vineyards)	10 December 1984	$150,000	$10,000,000

Although Red Earth was acquired by KingCo in 1984, the first vineyard plantings occurred in 1997.

William King (now deceased) and William's wife, Wilhelmina King (DOB: 05/04/1935), were the original shareholders of KingCo. The shares are now held as follows:

- 10 ordinary shares: Wilhelmina, acquired 1 July 1981;
- 5 ordinary shares: Wilhelmina's son, Henry King (DOB: 13/08/1960), acquired on William's death on 5 January 2013; and
- 5 ordinary shares: Wilhelmina's son, George King (DOB: 20/12/1964), acquired on William's death on 5 January 2013.

Wilhelmina has a third son, Rupert (DOB: 01/04/1958), who works at a local timber mill. Rupert received primary production land from William and Wilhelmina when Rupert was younger but lost the land when he became bankrupt. Rupert has no involvement with the primary production business and is estranged from Wilhelmina.

All of the primary production land owned by KingCo is made available to a partnership comprising of Wilhelmina, Henry and George, each with a one-third share (King Partnership).

The King Partnership conducts a cropping and grape-growing primary production business on the above land. The partnership had a turnover of approximately $3.9m for the year ended 30 June 2018 and is likely to have a similar turnover for the current year.

The King Partnership has used the land in carrying on its primary production business since each parcel of land was acquired.

Henry and George have no intention to sell the land but would like to see it transferred to discretionary trust structures.

Wilhelmina, who is estranged from Rupert, is keen to see the restructure occur and does not want Rupert to have any involvement in the primary production business or land ownership.

Wilhelmina is also concerned that, on her death, Rupert may make a claim for testator's family maintenance under the *Administration and Probate Act 1958* (Vic). Wilhelmina has been advised that if the land is held by the trustees of discretionary trusts, the risk of a claim against these assets will be substantially lessened.

On these facts, SBCGT concessions are not available given the market value of the land held by KingCo and the turnover of the King Partnership. No other roll-overs appear to be available.

Motivations for transfer of land to discretionary trusts

The SBRR might be used to transfer the land to one or more discretionary trusts. In this case, it may make sense to establish three new discretionary trusts each to hold one parcel of land (and each with its own corporate trustee). While this might facilitate a more flexible structure for future succession planning, there is no immediate plan to divest assets (or the control of assets) from the current owners. That said, the motivations behind the restructure need to be carefully explored to ensure it is a genuine restructure of an ongoing business.

Holding the land in discretionary trusts might dissuade Rupert from making a claim against Wilhelmina's shares in KingCo (and indirectly against the primary production land). The primary production land would no longer be held by KingCo. Since claims under the *Administration and Probate Act 1958* can only be made against estate assets, any claim against Wilhelmina's shares in KingCo would not have the same significance (the company may even be wound up as part of the restructure). Therefore, the restructure does provide an opportunity to minimise the exposure of the primary production land to a possible testator's family maintenance claim by Rupert following Wilhelmina's death.

Any shares held by Wilhelmina in the trustee companies would still be estate assets but those shares would not carry any financial value — only part control of the trustee companies. There is also the question of the appointorship — the power to appoint and remove the trustee — of each of the land-holding discretionary trusts.

To duplicate the current control, Henry, George and Wilhelmina might be the appointors of the land holding trusts while they are alive but the trust deeds may provide that, on the death of any one of them, the appointor becomes the survivor. Therefore, on Wilhelmina's death, Henry and George might be expected to jointly control each trust. Again, care should be taken in addressing this issue — lest ensuring that the restructure cannot be characterised as a divestment for succession planning purposes.

Finally, it is worth noting that the new structure should provide for far greater asset protection for the land beyond specific concerns relating to any claim brought by Rupert. With the shares in KingCo owned by individuals, the land was always vulnerable to claims against those individuals who were also members of the operating partnership. Achieving greater asset protection may also be an important factor in restructuring the land into a number of separate discretionary trust structures each with its own corporate trustee.

Stamp duty relief impact on transaction structure

In all SBRR restructures, it is necessary to consider the precise transfers to be undertaken. The SBRR provides a reasonable amount of flexibility in how the transaction might be structured. However, in this area, it may often be stamp duty relief that shapes the transaction or transactions in question.

It will be recalled that the land is located in Victoria. In Victoria, the duties legislation allows for the transfer of qualifying primary production land directly from a company, in which all of the shares are owned by natural person relatives, to a trustee of a discretionary trust where the terms of the trust restrict the beneficiaries in respect of the primary production land to the natural person relatives of the shareholders of the transferor.[34]

Provided the trust deeds for the new landholding trusts are appropriately drafted to fall within the duty relief, the primary production land held by KingCo may therefore be transferred to the new trusts without giving rise to a duty liability. It goes without saying that the relevant primary production duty exemption (if any) should be reviewed if dealing with land in other jurisdictions as not all Australian jurisdictions have an equivalent exemption.

Transfers of assets from companies for inadequate consideration – can it be done?

A further issue in relation to the transaction structure is whether the land in KingCo can simply be transferred to the new trust for nil or nominal consideration, or whether a market value purchase price is required (which may be vendor financed by KingCo).

The numerous examples in LCR 2016/2, LCR 2016/3 and the EM are largely silent on this issue. Relevantly, the Commissioner in LCR 2016/2 proceeds on the basis that the transfer from a company under the SBRR can be for nil consideration, in consideration for the transferee undertaking to discharge the company's liabilities or for valuable consideration.[35] It is clear that any Div 7A deemed dividend that may otherwise arise due to there being a payment to a shareholder or associate is disregarded under the SBRR as a direct tax consequence of the transfer.[36] However, where there is a vendor financed purchase price (giving rise to a debit loan in the company), the Commissioner considers that the subsequent forgiveness of that loan or a failure to place that loan on Div 7A complying terms is an indirect tax consequence of the transfer, and therefore gives rise to a Div 7A deemed dividend.[37]

In light of the above comments, it appears that the land can be transferred from KingCo to the new trusts without any need to create a debit loan in KingCo or otherwise first transfer the land to the shareholders as a dividend (or effect a members' voluntary liquidation to access tax-free reserves in doing so). This may give rise to unusual accounting treatment in KingCo.

If this approach is taken, there is also a need to consider any issues arising under the *Corporations Act 2001* (Cth) in relation to the directors entering into the transaction where most (if not all) of the value in the company will be eliminated.

Further issues to consider

Having considered the transaction structure, some other observations should be made in relation to the criteria for accessing the SBRR in this scenario:

- It might be suggested that Greenacre, Brownacre and Red Earth cannot be held by separate discretionary trusts, but instead need to be held by a discretionary trust controlled by Wilhelmina as to 50% of all of the land, a discretionary trust controlled by George as to 25% of the land and a discretionary trust controlled by Henry as to the remaining 25%. Will they fail the requirement that there is no material change in ultimate economic ownership otherwise?

This is unlikely. As noted already, discretionary trusts are viewed as having ultimate economic owners where they have made a family trust election and the individuals fall within the trust's family group. Therefore, as long as the new trusts make family trust elections which include Wilhelmina, George and Henry within their respective family groups, this requirement should be satisfied.

- The exact structure of the discretionary trusts that will hold the land also needs to be considered in light of the need for there to be a genuine restructure and not a divestment. Should the shares in each trustee company be held 50% by Wilhelmina, 25% by George and 25% by Henry? This does not appear necessary to ensure there is no material change in economic ownership since a family trust election ensures that Wilhelmina, George and Henry are part of each trust's family group. It may, however, be helpful in preventing any argument that there has been a divestment for succession planning purposes and therefore no genuine restructure of an ongoing business.

- The active asset test and the turnover test will require that a connection is established between KingCo and the King Partnership on the basis that those entities are controlled by the same third entity.

Here it might be suggested that, although controlled by three persons, namely, Wilhelmina, Henry and George, those same three persons also control the partnership and therefore the necessary connection is established.

- For the reasons set out above, family trust elections would need to be made in respect of the new landholding trusts in order to satisfy the ultimate economic ownership requirement.

On the basis the SBRR is applied to the transfers, the capital gains arising to KingCo on the transfer of Greenacre and Brownacre should be disregarded. In relation to Red Earth, the following should be noted:

- while Red Earth was acquired by KingCo prior to 20 September 1985, an assessment needs to be made as to whether Red Earth has become a post-CGT asset by virtue of the changes in KingCo's shareholding;
- while, in this case, the majority underlying interest holders have changed (the test requires that *more* than 50% of the majority underlying interests is retained),[38] the exception in relation to shares inherited as a result of the death of a person should apply here.[39] Therefore, on these facts, the Red Earth land should remain a pre-CGT asset of KingCo; and
- although Red Earth is a pre-CGT asset, the vineyard plantings that occurred in 1997 may constitute post-CGT improvements. On the basis that the improvements are post-CGT assets, SBRR should apply to disregard the capital gain arising on the improvements. The effect of the SBRR is that Red Earth retains its pre-CGT status in the new landholding trust, but with any post-CGT improvements at a cost base inherited from KingCo.

Achieving optimal outcomes

The SBRR relief provides a significant opportunity for SME taxpayers to restructure their affairs in order to achieve a variety of commercial outcomes, both by application of the SBRR itself or in conjunction with the pre-existing CGT concessions. Nevertheless, it is clear that a high degree of attention to detail is required in advising on, and implementing, any restructure under the relief.

Can you achieve optimal outcomes through the SBRR? Yes, but roll over with care!

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References

1 *Tax Laws Amendment (Small Business Restructure Roll-over) Act 2016* (Cth), which inserted Subdiv 328-G of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

2 Ss 328-40 and 328-45 ITAA97.

3 This adopts the same definition as set out in Div 152 ITAA97 in respect of the small business CGT concessions (SBCGT concessions).

4 Broadly, that the entity is a resident of Australia for taxation purposes: s 328-445 ITAA97.

5 S 328-430 ITAA97.

6 S 328-450 ITAA97.

7 S 328-455 ITAA97.

8 This was originally $2m but was subsequently amended to $10m with effect from 1 July 2016: *Treasury Laws Amendment (Enterprise Tax Plan) Act 2017* (Cth).

9 S 328-460 ITAA97.

10 LCR 2016/3.

11 Para 10 of LCR 2016/3.

12 Para 11 of LCR 2016/3.

13 S 177C(2) of the *Income Tax Assessment Act 1936* (Cth).

14 Subdiv 122-A ITAA97.

15 S 128-15 ITAA97.

16 Div 149 ITAA97.

17 This might be longer in jurisdictions that allow for the perpetuity period to be the common law period of a life in being plus 21 years.

18 S 61 of the *Law of Property Act 1936* (SA). This is subject to the power of the Supreme Court of South Australia to order the vesting of trust assets on application by eligible persons: s 62 of the *Law of Property Act 1936* (SA).

19 Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016 (Cth).

20 Para 1.19 of the explanatory memorandum to the Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016 (EM).

21 Para 1.20 of the EM.

22 See paras 53 to 59 (example 6) of LCR 2016/3. The Commissioner adopts the same view in PBR 1051248643553.

23 LCR 2016/3.

24 Example 6 in LCR 2016/3.

25 Para 7 of LCR 2016/3 and para 1.22 of the EM.

26 S 328-435 ITAA97.

27 S 105A of the *Stamp Duties Act 1923* (SA).

28 Para 1.29 of the EM.

29 Para 1.34 of the EM.

30 Para 107 of LCR 2016/3.

31 Para 110 of LCR 2016/3.

32 Item 8 in the table in s 40-340(1) ITAA97.

33 S 40-345 ITAA97.

34 S 56 of the *Duties Act 2000* (Vic).

35 Paras 5 to 11, 39 and 65 of LCR 2016/2.

36 Para 11 of LCR 2016/2 and paras 1.46 and 1.47 of the EM.

37 Para 69 of LCR 2016/2.

38 S 149-15(1) ITAA97.

39 S 149-30(3) and (4) ITAA97.