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The Demerger Journey – from Facilitation to Frustration

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1 The road from facilitation to frustration[1]

Demerger relief was enacted in 2002 with high hopes. The Ralph Report had lamented four years earlier that the tax consequences of demergers 'act[ed] as an impediment to entities restructuring their operations and may therefore lead to a reduction in the overall efficiency of the economy.' Parliament responded decisively, though with no special urgency, to remove the perceived impediment.[2] Indeed, it ultimately enacted even more generous tax relief than the Ralph Report had recommended – where the Ralph Report had recommended relief for members of widely-held entities, the demerger relief provisions – Division 125 of the *Income Tax Assessment Act 1997* (Cth) (***ITAA 1997***) and section 44(4) of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***) – provide relief for members of widely-held and closely-held entities alike and extend such relief to the demerger group as well as its members.

Parliament anticipated that Division 125 would 'facilitate the demerging of entities by ensuring that tax considerations [were] not an impediment to restructuring a business'[3] and, for emphasis, made that goal the express object of Division 125.[4] Parliament's hopes were widely shared by industry. The Securities Institute of Australia, for example, predicted that Division 125 would 'unlock shareholder value and put Australian companies in a more favourable position to complete globally.'

And for around 15 years, the ATO administered the demerger rules in such a way so as to ensure that the ATO itself did not act as the impediment that Parliament had so consciously chosen to eliminate. Although certain types of transactions were beyond the pale,[5] the ATO, by and large, interpreted the rules to achieve their stated goal of facilitating demergers. Most relevantly, the ATO concluded that demerger relief was available even when the demerged group or the demerged entity was acquired by a third party just after the demerger – even if the acquisition was conditional on the demerger or, in one case, when the two were inter-conditional.[6]

But things changed in 2018. In two sets of transactions – one completed, Unibail-Rodamco and Westfield, and one frustrated, Blackstone and AMA – the ATO reversed course and concluded that demerger relief was not available when the demerger group was acquired after the demerger and the demerger was conditional on the acquisition, or vice versa. And, in March 2019, the ATO reiterated and expanded upon its views in Draft Taxation Determination TD 2019/D1 (***Draft Determination***).

What is the ATO's view in the Draft Determination? In short, that the term 'restructuring' is sufficiently broad and malleable to encompass not only the demergers themselves, but also acquisitions of the demerger group or specific capital placements after the demerger that, broadly, are known, planned or intended to occur at the time of demerger.

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[1] The authors gratefully acknowledge the invaluable research of Emily Graham, a paralegal at Allens, for this paper.

[2] Scrip for scrip rollover relief, which was also recommended by the Ralph Report, was enacted in 2000 in Subdivision 124-M, two years earlier than demerger relief.

[3] Explanatory Memorandum, *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Bill 2002* (Cth), [15.27].

[4] *ITAA 1997* s 125-5.

[5] As we explain later in the paper, the ATO took issue with certain types of demergers, including, for example, demergers that followed acquisitions for which scrip for scrip rollover was claimed: see, e.g. Sections 5.2.3 and 5.2.4.

[6] See Section 5.2.2 below.

2 Has the ATO created a demergency?[7]

The ATO may well dispute this narrative.[8] And, to be fair, at various stages they have adopted an unfavourable view of transactions related to demergers on the basis that those transactions formed part of the 'restructuring'. For example, in 2007, when they concluded that the acquisition of Publishing and Broadcasting Limited by Crown Limited and the subsequent demerger of PBL was part of the same restructuring and therefore ineligible for relief under Division 125.[9] A counter-counter narrative might be that, since Division 125's enactment until at least 2015, the ATO (as far as we're aware) took no issue with post-demerger acquisitions of either the demerged entity or demerger group.[10]

But the key purpose of this paper is not to chronicle the ATO's about-face or to lament the process for communicating it (that is, by denying relief in two transactions of a type previously approved rather than by first expressing their new views publicly). Rather, this paper focuses mainly on the correctness of the ATO's reading of the term 'restructuring' and, in particular, its conclusion that a post-demerger acquisition of the demerged group is part of 'the restructuring' even when the demerger is not conditional on that acquisition. In doing so, we ask:

- What is the textual, contextual and historical basis for the ATO's recent views on the meaning of the term 'restructuring' in Division 125?
- How do other common law countries – the UK, Canada and the US – deal with the issue of post-demerger acquisitions, and other transactions that are broadly related to demergers, and are those rules more certain and administrable than the ATO's views?

In the authors' view, the ATO's view is inconsistent with the long line of Australian and English cases that construe the related words 'reconstruction' and 'reorganisation', the evident (and express) object of Division 125, the context in which the section appears and the broader structure of the ITAA 1997.

Moreover, if Parliament approves the ATO's view as a policy matter (which we do not favour), it should amend Division 125. The ATO's attempt to read 'restructuring' in a particular way to achieve that policy, by late-breaking administration action, is unwise. And, as we explain below, Parliament has ample material from other state and foreign jurisdictions to consider in crafting any new language. Indeed, the Draft Determination assimilates concepts from these jurisdictions – like the 'series of transactions' test in Canada – that are incorporated into the very text of the demerger provisions. Parliament's role is particularly important because demergers, at least in the listed companies context, are rarely implemented without a favourable class ruling, and because there is no practical opportunity or desire to challenge an unfavourable class ruling. As a result, the ATO's interpretation of the law is, for all intents and purposes, the law.

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[7] One of the authors embraces this pun; the other does not.

[8] As we explain later in the paper, the ATO denied demerger relief on at least one occasion in 2015 to a demerger followed by an acquisition, and otherwise interpreted the term 'restructuring' broadly in other contexts.

[9] Class Ruling 2007/111.

[10] In 2010, the ATO denied demerger relief to the shareholders in Lion Selection Ltd, whose shares were, following the demerger of Lion Selection Group Pty Ltd, acquired by Catalpa Resources Ltd. It is not clear, however, whether the subsequent acquisition was the reason the ATO denied demerger relief on that occasion or whether it was the 'Matching Facility' that allowed shareholders to dispose of their new interests under the demerger (through a stockbroker), or the payment of a cash distribution to shareholders (or some combination).

3 Demerger tax relief

3.1 Overview of demerger relief

The demerger relief provisions have two key features:

- The first, and most conspicuous, is concessionary: they provide tax relief to the demerger group and its shareholders. In particular, subject to the application of certain integrity rules:
    - certain owners of 'ownership interests' in the head entity of a 'demerger group' can choose to disregard, or roll over, a capital gain or loss they make on their ownership interests;
    - a 'demerger dividend' that is paid to the owners of ownership interests in the head entity should be treated as not assessable income or exempt income; and
    - members of a demerger group should be able to disregard certain capital gains or losses they make as a result of the disposal of their ownership interests in the demerged entity.
- The second, and less noted, is an integrity feature – that is, a rule for apportioning shareholders' original cost base of their shares in the head entity across those shares and the new shares in the demerged entity. The integrity rule – call it a 'cost base apportionment' rule – applies even when the shareholder does not choose, or is not eligible for, rollover relief.

3.2 Key concepts

The availability of demerger tax relief depends on a number of key concepts, which we summarise in the table below.

Key concept	Description
What is an 'ownership interest'?	▪ An **ownership interest** is a share in a company (including, a 'public unit trust')[11] or unit or other interest in a trust or an option, right or similar interest issued by a company or trustee to acquire a share or a unit or other interest.[12]
What is a 'demerger group'?	▪ A **demerger group** comprises a 'head entity' and one or more 'demerger subsidiaries.'[13]
'Head entity' and 'demerger subsidiary'	▪ A **head entity** is a company or trust in which no other member of the group owns ownership interests.[14] Where an entity owns more than 20% but less than 80% of the ownership interests in a listed public company or listed widely

[11] *ITAA 1997* s 125-230.
[12] *ITAA 1997* s 125-60(1).
[13] *ITAA 1997* s 125-65(1).
[14] *ITAA 1997* s 125-65(3).

	held trust, as a concession, the listed company or trust can choose for that entity not to be a member of the demerger group.[15] ▪ A **demerger subsidiary** is a company or trust in which members of the group, either alone or with other members, hold ownership interests that carry a right to receive 20% or more of any income or capital distributions by the entity, or in the case of a company, the exercise (or control the exercise) of more than 20% of the voting power of the company.[16]
What is a 'demerger'?	For a transaction to be a 'demerger' for the purposes of Division 125, the following conditions must be met: ▪ **(Restructuring condition)** There is a 'restructuring' of a 'demerger group.'[17] ▪ **(80% condition)** Under the 'restructuring':[18] • members of the demerger group dispose of at least 80% of their ownership interests in another member of the demerger group to owners of original interests in the head entity; • at least 80% of the ownership interests of a member of the demerger group in another member end and new interests are issued to owners of ownership interests in the head entity; • the demerged entity issues sufficient new ownership interests in itself with the result that owners of original interests in the head entity own at least 80% of the ownership interests in the demerged entity; or • some combination of the above, with the effect that one or more members of the demerger group stop owning at least 80% of the ownership interests previously owned by the group. ▪ There is, therefore, no single prescribed mechanism for the demerger. It might, for example, occur as a capital reduction that is satisfied by the transfer or issue of ownership interests in the demerged entity, a declaration of dividend that is satisfied by the transfer or issue of ownership interests in the demerged entity, an issuance of shares by the demerged entity to the shareholders, a cancellation of shares held by the demerging entity, or as some combination of these mechanisms.[19] ▪ **(Nothing else condition)** 'Under the restructuring,' the owners of the ownership interests in the head entity acquire a new interest in the demerged entity **and nothing else**.[20]

[15] *ITAA 1997* s 125-65(6).
[16] *ITAA 1997* s 125-65(7).
[17] *ITAA 1997* s 125-70(1)(a).
[18] *ITAA 1997* s 125-70(1)(b).
[19] Explanatory Memorandum, *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measurers) Bill 2002* (Cth) [15.27].
[20] *ITAA 1997* s 125-70(1)(c).

	▪ In addition to the 'proportionality tests' (see below), this condition gives effect to the stated purpose of the demerger relief rules of limiting relief to instances where there is no change in the 'economic position' of members. ▪ The phrase 'and nothing else' is not defined in the tax law, and the limited guidance in the explanatory material gives one clear example of 'something else', namely 'cash.'[21] ▪ The phrase 'nothing else' is used elsewhere in the tax law; the table at **Annexure B** sets out some examples.
	▪ **(Result of interests in head entity)** The acquisition of the new interests must only happen because of an entity's ownership interests in the head entity.[22]
	▪ **(Same entity)** The demerged entity must be the same type of entity as the head entity – for example, if the head entity is a company, the new interests must be interests in a company.[23]
	▪ **(Proportionality tests)** Each owner of ownership interests in the head entity must:[24] • acquire, 'under the demerger', the same proportion (or nearly the same proportion), of new interests in the demerged entity as the owner owned in the head entity just before the demerger; and • just after the demerger, have the same proportionate total market value of ownership interests in the head entity and the demerged entity as the owner owned in the head entity just before the demerger. ▪ This requirement is subject to some limited exceptions relating to employee share schemes and certain 'adjusting instruments' (for example, convertible preference shares).[25]
What does not qualify for relief?	▪ The head entity or the demerged entity must not be a trust that is a 'non-complying superannuation fund.'[26] ▪ An 'off-market' buy-back for the purposes of Division 16K of Part III of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***) is not a demerger. ▪ Circumstances where an owner can obtain a roll-over under another provision for all of the CGT events that happen to the owner's interest in the head entity do not qualify for demerger relief.

[21] Explanatory Memorandum, *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measurers) Bill 2002* (Cth) [15.54].
[22] *ITAA 1997* s 125-70(1)(d)
[23] *ITAA 1997* s 125-70(1)(e).
[24] *ITAA 1997* s 125-70(2).
[25] See generally, *ITAA 1997* s 125-75.
[26] *ITAA 1997* s 125-70(1)(g).

- Demerger relief will not be available for a foreign resident entity, if the new interest is not 'taxable Australian property.'

3.3 Consequences of demerger for owners in Head Entity

3.3.1 Consequences of choosing roll-over relief

Where demerger tax relief is available, the tax consequences for owners may include the following:

- (**capital gain or loss disregarded)** where the owner makes a choice, a capital gain or loss made from a CGT event happening to the ownership interests in the head entity under the demerger is disregarded (for example, a capital gain may arise under CGT event G1 for shareholders where the demerger occurs by way of a capital reduction);[27]

- (**cost base apportioned**) the cost base and reduced cost base of each original interest remaining in the head entity, and each new interest in the demerged entity, is broadly worked out by apportioning, on a reasonable basis (such as respective market values), the total cost base and reduced cost base of the original interests in the head entity (just before the demerger) between the original interests remaining and the new interests in the demerged entity (just after the demerger);[28]

- (**original acquisition date for CGT discount purposes**) the acquisition date, for general CGT purposes, of the new interests will generally be when the owner commenced owning the interests[29] (usually on the 'implementation date' in the case of a scheme of arrangement),[30] and for discount CGT purposes, the acquisition date will generally be when the original interests were acquired. In other words, for the purposes of applying the CGT discount, the acquisition date is **not** refreshed for the new interests acquired by the owner;[31] and

- (**demerger dividend not taxable**) subject to any determination made by the Commissioner under section 45B of the ITAA 1936, the 'dividend component' of a demerger distribution of a company should not be assessable or exempt income,[32] provided, however, that the assets of the demerged entity and its demerger subsidiaries are principally used to carry on business. In other words, the

[27] *ITAA 1997* s 125-80.
[28] See generally, *ITAA 1997* ss 125-80(2)-(3).
[29] *ITAA 1997* s 109-5.
[30] See eg, Class Ruling 2020/10 'Cardno Limited – demerger of Intega Limited'.
[31] See item 2 in the table in *ITAA 1997* s 115-30(1).
[32] Explanatory Memorandum, *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measurers) Bill 2002* (Cth) [15.72].

demerged entity is a viable, independent entity, capable of conducting business in its own right,[33] a provision conspicuously absent from the scrip for scrip rollover rules.[34]

3.3.2 Consequences of not choosing roll-over relief

Where demerger tax relief is available, but **not** chosen, the tax consequences for certain owners may include the following:

- (**capital gain or loss not disregarded)** any capital gain or loss made from a CGT event happening to the ownership interests in the head entity under the demerger would not be disregarded;
- (**cost base apportioned**) as noted above, the cost base apportionment rule would apply in the same way whether or not the shareholder chose relief;[35] and
- (**original acquisition date for CGT discount purposes**) the Commissioner appears to accept that, for CGT discount purposes, the acquisition date will generally be when the original interests were acquired even though roll-over relief is **not** chosen.[36]

3.4 Consequences of demerger for group members

Where demerger tax relief is available,[37] the consequences for a member of a demerger group may include the following:

- (**capital gain or loss disregarded**) a capital gain or loss the member makes for CGT events A1, C2, C3 or K6 happening to its ownership interests in the demerged entity under the demerger is disregarded (a capital gain or loss from other CGT events, for example, CGT event L5, will not be disregarded);[38] and
- (**no CGT event J1**) a CGT event J1 will not happen to the member (or the demerged entity).[39]

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[33] *ITAA 1936* s 44(5). No amount of a demerger distribution that is debited against an amount standing to the credit of a share capital account will be a 'dividend' under subsection 6(1) of the ITAA 1936. Any such amount would not, therefore, be included in the assessable income of an owner of ownership interests in the head entity under subsection 44(1). This is provided, however, that the Commissioner does not make a determination under section 45B that some or all of the 'capital component' of the demerger distribution should be treated as an unfranked dividend under section 45B(3)(b). A detailed consideration of section 45B is beyond the scope of this paper.
[34] As exposed by the Full Federal Court's decision in *FCT v AXA Asia Pacific Holdings Ltd* (2010) 189 FCR 204, where AXA Asia Pacific Holdings Ltd owned all the shares in a company whose only asset was cash. Since the income years concerned in the case, Parliament has introduced in 2009, and in 2015, further integrity rules to prevent the result in AXA Asia. The rules do not, however, contain a requirement in the same or similar terms as under Division 125.
[35] *ITAA 1997* s 125-85.
[36] ATO ID 2003/1031.
[37] The relief is automatic and not dependent on the member's choice. That is, an entity cannot chose for the exemptions not to apply: see, Explanatory Memorandum, *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measurers) Bill 2002* (Cth) [5.62].
[38] *ITAA 1997* s 125-155.
[39] *ITAA 1997* s 125-160. CGT event J1 may occur, for example, where the demerged entity previously acquired a CGT asset from another member of the same 'wholly owned group' under a roll-over under Subdivision 126-B, and because of the demerger, the demerged entity is no longer a member of that wholly-owned group: see generally, *ITAA 1997* s 104-175.

3.5 Some issues for employees with employee share scheme interests

3.5.1 Does an 'ESS deferred taxing point' occur?

The key tax issue for employees who own ownership interests in the head entity that are 'employee share scheme interests' subject to Subdivisions 83A-C of the ITAA 1997 will usually be whether, as a consequence of the demerger, an 'ESS deferred taxing point' will occur.[40]

If an ESS deferred taxing point occurs, subject to the availability of any roll-over under the ESS rules (see below), the market value of their ESS interests at the time of the ESS deferred taxing point (less any cost base in the interests) would be included in the employee's assessable income.[41]

Whether an ESS deferred taxing point will occur under a demerger will depend on a number of factual matters, including, for example:

- the nature of the employee share plan;
- the manner in which the employee's interests will be dealt with under the demerger (for example, whether there will be any cancellation or variation to the employee's existing interests in the head entity, or whether there will be any accelerated vesting of interests – that is, for example, whether the employee's interests would remain subject to a 'real risk of forfeiture' or 'genuine restrictions on disposal', or become fully vested and freely tradeable); and
- any change to the employee's employment as a consequence of the demerger (for example, if the employee was previously employed by the head entity, but becomes employed by the demerged entity following the demerger).

Most recently, in the Wesfarmers Limited demerger of Coles Group Limited, certain Wesfarmers employees and Coles employees who held shares under one of Wesfarmers' employee share scheme plans were entitled to receive, under the demerger, one share in Coles for each share they held in Wesfarmers (through the Wesfarmers Employee Share Trust).

In Class Ruling CR 2018/16, the Commissioner ruled that the demerger did not cause an ESS deferred taxing point to occur for employees' existing Wesfarmers shares as they remained unvested and subject to disposal restrictions, and there was no cessation of an employee's employment.[42] For those shares acquired by employees under the Wesfarmers 'Tax Exempt Plan' and subject to Subdivision 83A-B (that is, subject to tax on an 'upfront', rather than on a deferred basis), the Commissioner ruled that the

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[40] *ITAA 1997* ss 83A-115 and 83A-120.

[41] *ITAA 1997* s 83A-110. For completeness, even if an ESS deferred taxing point does not occur under Division 83A, it would still be relevant to consider whether the employee has made a capital gain or loss as a consequence of the demerger (and therefore, whether Division 125 would apply to the demerger), where CGT event G1 occurs to the employee's interests in the head company: *ITAA 1997* s 130-80.

[42] See CR 2018/16, paragraph 21. The Commissioner also ruled that the new Coles shares acquired by the employees would not be 'ESS interests' subject to the employee share scheme rules under subsection 83A-10(1). This was because, the Coles shares were not provided to those employees 'in relation to their employment', but as a consequence of their existing Wesfarmers shares: CR 2018/16, paragraph 53.

'minimum holding period' required to qualify for a reduction of up to $1,000 to the amount included in the employee's assessable income, would continue to be satisfied notwithstanding the demerger.[43]

3.5.2 Is a roll-over available?

In certain circumstances, if an ESS deferred taxing point occurs, roll-over relief may be available under Division 83A. Where an employee ceases to hold ESS interests in a company in connection with a 'takeover' or a 'restructure' of the company, but acquires new interests in another company, the employee can treat their new interests as a continuation of their old interests, to the extent that the new interests can reasonably be regarded as matching the old interests.[44] Moreover, where the employee is employed by the new company (or a subsidiary or holding company of the new company), the employee's employment is taken, for the purposes of Division 83A, to be continuation of the employment in respect of which they acquired the old interests.[45]

Relevantly, a 'restructure' will occur where ESS interests in the old company are reasonably regarded as having been replaced, wholly or partly, by ESS interests in the new company as a result of a change.[46] Although the roll-over under Division 83A is intended to apply to demergers,[47] it does not appear to have been applied by the Commissioner in any public or private ruling to a demerger. The Explanatory Memorandum introducing the corresponding roll-over under former Division 13A presaged a reason for this:[48]

> 3.38 Generally, roll-over relief is not available in a demerger because none of the shares or rights in the old company cease to be owned by the employee. After the demerger, the employee will still hold all these shares or rights plus additional shares or rights acquired in the demerged entity. Accordingly, roll-over relief is not available.

In any event, the roll-over may apply, for example, where some or all of an employee's interests in the head company are cancelled under a demerger and replaced with new matching interests in the demerged entity.

Ultimately, whether or not the roll-over is necessary or available may depend upon whether the ESS interests are shares or other rights (e.g. performance rights) and how the demerger is effected e.g. will the employee's employment end as a result of the demerger or will their interests vest? For example, where an ESS taxing point arises because an employee's performance rights vest, a roll-over is unlikely because after the demerger the employee will receive shares in the demerged entity, likely failing the requirement that the new interests 'can reasonably be regarded as matching the old interests'.

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[43] CR 2018/16, paragraphs 47-51.

[44] *ITAA 1997* s 83A-130(2). By way of example, the replacement of shares for rights to acquire shares (or vice versa) would not qualify for roll-over because they would not be regarded as 'matching' interests: Explanatory memorandum to the *Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009* (paragraph 1.255).

[45] *ITAA 1997* s 83A-130(6).

[46] *ITAA 1997* s 83A-130(1)(a)(ii). A 'takeover' is defined to mean an arrangement that is entered into that is intended to result in the old company becoming a '100% subsidiary' of another company: subsection 83A-130(1)(a)(ii).

[47] See, the Explanatory memorandum to the *Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009* (paragraphs 1.244 to 1.249) and the explanatory memorandum to the *Tax Laws Amendment (2004 Measures No. 7) Bill 2004* (paragraphs 3.38 to 3.39).

[48] Explanatory memorandum to the *Tax Laws Amendment (2004 Measures No. 7) Bill 2004*.

4 Demerging abroad: how do other common law countries do it?

4.1 United Kingdom[49]

In the UK, there are two main kinds of demergers:

- exempt dividend demergers; and
- capital reduction – or 'scheme of reconstruction' – demergers.

The main tax consequences of both types of demergers are analogous to those of Division 125:

- the transfer of the demerged business is not treated as an income distribution (i.e. a dividend) for shareholders;
- the receipt of the shares in the demerged entity does not give rise to a capital gains tax charge for shareholders; and
- the demerging entity does not trigger a charge to tax on capital gains when it transfers the demerged business (and any liability to stamp and transfer taxes is, where possible, not triggered).

The rules that apply for exempt dividend demergers and capital reduction demergers are different. For exempt dividend demergers, there is specific legislation contained in the *Corporation Tax Act 2010* (***CTA***) which prevents the demerger from being an income distribution. There is also specific legislation (in the *Taxation of Chargeable Gains Act 1992*) (***TCGA***) which prevents a charge to tax on capital gains for shareholders by treating the exempt demerger as a tax-free reorganisation. As a capital reduction demerger is effected by reducing the share capital of the demerging company, an income distribution for shareholders does not arise and no specific legislation is therefore required. If a capital reduction demerger qualifies as a 'scheme of reconstruction' (as defined in the TCGA), the shareholders will not be taxed on any capital gain.

4.1.1 Scheme of reconstruction demerger

What are the key conditions?

The main conditions of qualifying schemes of reconstruction are:

- first, there must be an arrangement between the company and the shareholders;

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[49] The authors are enormously grateful for the generous comments of Yash Rupal, partner at Linklaters, on this section of the paper, without which it would not have been possible. Of course, it represents a broad summary of the UK rules only (and the authors are not qualified to practise UK law).

- second, the arrangement must be entered into for the purposes of, or in connection with a 'scheme of reconstruction';
- third, under that arrangement, another company (the demerged entity) must issue shares in respect of and in proportion to (or as nearly as may be in proportion to) their relevant holdings in the demerger group (equivalent to the proportionality test in Division 125, discussed above); and
- fourth, the shares in the demerger group are retained by those persons or are cancelled or otherwise extinguished.[50]

Where these conditions are met, the scheme is treated as a share reorganisation[51] with neutral tax consequences for shareholders.[52] If the original shares are retained, the cost is apportioned between the original shares and the new shares. Generally, that apportionment is carried out for listed shares by reference to the market value of the different shares on the first day on which market prices are quoted or published after the share reorganisation takes effect.[53] Where there is a scheme of reconstruction, relief from tax on capital gains is also potentially available for the demerging entity in connection with the assets that are demerged.[54]

What is a scheme of reconstruction?

A 'scheme of reconstruction' is defined as a scheme of merger, division or other restructuring that meets three key conditions.[55] Broadly, those conditions are:

- First, that the scheme involves the issue of ordinary share capital of the demerged company to holders of ordinary share capital of the head company (i.e. the demerging company) and does not involve the issue of ordinary share capital of the successor company, or (as the case may be) any of the successor companies, to anyone else (again, similar to the proportionality and market value tests in Division 125).[56]
- Second, that under the scheme the entitlement of any person to acquire ordinary share capital of the successor company or companies by virtue of holding relevant shares, or relevant shares of any class, is the same as that of any other person holding such shares or shares of that class.[57]
- The third condition may be satisfied in one of two ways:

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[50] *TCGA* s 136.
[51] *TCGA* s 136(2).
[52] For shareholders, *TCGA* section 127 provides, in effect, that the new and old shares of the shareholders are treated as the same asset as the original shares and that no disposal has occurred.
[53] *TCGA* s 130. Where the shares are not listed, the apportionment is made by reference to market values on the date of disposal – s 129.
[54] *TCGA* s 139 - where there is an indirect demerger, the entity that receives the demerged business will inherit the base cost of the demerging entity in the capital assets demerged and the demerging entity will not be subject to tax on capital gains. The main conditions that have to be met for this relief are that the entity which receives the demerged assets must be within the scope of UK tax and the demerging entity must not receive any consideration for the demerger other than the assumption (by the entity receiving the demerged business) of liabilities associated with the demerged business.
[55] *TCGA* sch 5AA.
[56] *TCGA* sch 5AA, para 2.
[57] *TCGA* sch 5AA, para 3.

- the first way (or the third condition) is that the effect of the restructuring is that the business or substantially the whole of the business carried on by the demerger entity is carried on by the demerged entity or the demerger entity and the demerged entity;[58] or
- the second, alternative, way is that the compromise or arrangement with members is carried out in pursuance of a court-approved compromise or arrangement to which Part 26 of the *Companies Act 2006* (arrangements and reconstructions) applies (or a comparable foreign scheme) and no part of the business of the original company, or of any of the original companies, is transferred under the scheme to any other person.[59]

4.1.2 Exempt dividend demergers

The exempt dividend rules contemplate two types of demergers: a direct and an indirect or 'three-cornered' demerger.

Under a direct dividend demerger, the demerging company directly transfers the shares in the demerged entity to shareholders.[60] Under an indirect dividend demerger, the demerger group typically incorporates a new company, transfers the demerged entity to the new company, and that new company issues shares to the demerger group shareholders.[61] Only demergers involving companies resident within the EU can qualify as exempt dividend demergers.[62]

Where the rules apply, shareholders are exempt both from capital gains tax (on the basis that the demerger is treated as a share reorganisation)[63] and from income tax (on the basis that the dividend is not treated a distribution for the purposes of the *Corporation Tax Act*).[64] Additionally, the demerger group is exempt from capital gains tax where an indirect demerger qualifies as a scheme of reconstruction[65] and the shareholders' cost base is apportioned across the old and new shares in the manner described above.

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[58] *TCGA* sch 5AA, para 4.
[59] *TCGA* sch 5AA, para 5.
[60] *CTA* s 1076.
[61] *CTA* s 1077.
[62] *CTA* s 1081(1).
[63] *CTA* s 192.
[64] *CTA* s 1075(1).
[65] *CTA* s 139.

4.2 United States [66]

4.2.1 Overview

US tax law generally permits a corporation (**Distributing**) to distribute the stock and securities of a subsidiary corporation (**Controlled**) without triggering income or gain to Distributing or its shareholders, provided that:

- Distributing must have 'control' (generally, ownership of stock possessing at least 80% of total voting power and ownership of 80% of each class of non-voting stock) of Controlled immediately before the distribution;
- Distributing must generally distribute all of its stock of Controlled;[67]
- the transaction is not a device to distribute the earnings and profits of Distributing or Controlled or both;
- each of Distributing and Controlled must be engaged in the active conduct of a trade or business immediately following the distribution, and each such business must have been conducted continuously for the past 5 years and must not have been acquired in a transaction in which gain or loss was recognised;
- the transaction must be carried out for one or more valid business purposes;
- the direct or indirect owners of Distributing prior to the distribution must retain a direct or indirect interest in each of Distributing and Controlled sufficient to establish a 'continuity of interest'; and
- if either Distributing or Controlled is a 'disqualified investment corporation' (generally, a corporation holding mainly investment assets), then certain other requirements must be satisfied.[68]

Where these requirements are satisfied, then shareholders of Distributing may receive the stock of Controlled without triggering any taxable income or gain and the shareholders' cost base or 'basis' is apportioned according to the fair market values of the old and new shares.[69]

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[66] The authors are enormously grateful for the generous comments of Andrew Morris, partner, and Michelle Lo, Senior Associate, of Linklaters (New York) on this section of the paper, without which it would not have been possible. Of course, it represents a broad summary of the US rules only and none of this should be construed as tax advice (and the authors are not qualified to practise US law). In this part of the paper, all references to '**section**' are to sections of the US Internal Revenue Code of 1986, as amended (the '**Code**'), and all references to '**Reg. §**' are to sections of the US Treasury regulations promulgated under the Code.

[67] A distribution of an amount of stock constituting 'control' of Controlled is also possible, provided the retention of Controlled stock is not pursuant to a plan having as one of its principal purposes the avoidance of US federal income tax. Section 355(a)(1)(D).

[68] If a distribution involves a non-US Distributing or Controlled, or non-US shareholders, additional requirements would apply for non-recognition treatment.

[69] Section 358(b)(2) and (c); Reg. § 1.358-2(a).

To ensure that Distributing does not recognise any gain on the distribution, two conditions must be satisfied:[70]

- Immediately after the distribution, no person owns 'disqualified stock' (i.e., stock acquired by purchase during the 5-year period preceding the distribution) that constitutes a 50% or greater interest (by vote or value) in either Distributing or Controlled; and

- One or more persons must not acquire, either directly or indirectly, stock representing a 50% or greater interest (by vote or value) in either Distributing or Controlled pursuant to a plan (or series of related transactions) that includes the distribution. We discuss this change of ownership condition in Section 8.3 below.

4.3 Canada[71]

In Canada, demergers may be effected in one of three main ways and tax relief is available, to varying extents, for each type. There is also a separate regime available for Canadian resident shareholders when certain foreign companies demerge, and those demergers are exempt from tax under the law of the foreign jurisdiction.

4.3.1 Butterfly reorganisations

The first type of demerger – evocatively described as a 'butterfly reorganisation' – is broadly effected as follows:

- the shareholders of the demerger group exchange a percentage of their shares for common shares in the demerger entity on a fully tax-deferred basis[72] or on a partially tax-deferred basis.[73] The share percentage is generally equal to the percentage, based on fair market value, of demerging entity's assets that are transferred to the demerged entity;

- demerging entity transfers assets to the demerged entity in exchange for non-voting preferred shares of demerged entity with a redemption amount equal to the fair market value of the transferred assets. Demerging entity and demerged entity jointly file an election so that the transfer occurs on a tax-deferred basis;[74]

- demerging entity purchases for cancellation the common shares acquired by the demerged entity by issuing to the demerging entity a promissory note equal to the fair market value of the demerging entity common shares. The amount by which the purchase price exceeds the paid-up capital (PUC)

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[70] Section 355(e).

[71] The authors are enormously grateful for the generous comments of Len Glass, partner at Lawson Lundell LLP, on this section of the paper, without which it would not have been possible. Of course, it represents a broad summary of the Canadian rules only and none of the information contained herein should be construed as tax advice (and the authors are not qualified to practise Canadian law). All references in the footnotes in this section are to provisions of the *Income Tax Act* of Canada.

[72] Under section 81.1(1)(a), the shareholder is treated as having disposed of the exchanged shares at an amount equal to their adjusted cost base, and to have acquired the shares of the demerged entity for the same amount.

[73] By filing a joint section 85 election.

[74] Under section 85.

of the demerging entity common shares is deemed to be received by demerged entity as a tax-free intercorporate dividend, and reduces demerged entity's proceeds of disposition of the demerging entity common shares so that no capital gain arises on the disposition;[75]

- demerged entity redeems the demerging entity preferred shares acquired by demerging entity by issuing to demerging entity a promissory note equal to the fair market value of the demerged entity preferred shares. The tax consequences to demerging entity on the redemption are the same as for demerged entity on the purchase for cancellation of the demerging entity common shares;[76] and
- the amounts owing under the demerging entity and demerged entity promissory notes are set off against each other and the notes are cancelled.

Such a reorganisation should produce a neutral tax result for both the shareholders and demerging entity under the *Income Tax Act,* RSC 1985, c 1 (***Canadian Income Tax Act***). The tax cost of shareholders' shares would be apportioned across the old and new shares, as under Division 125 of the ITAA 1997.[77]

4.3.2 Return of capital demerger

Under this type of demerger, demerging entity distributes shares in the demerger entity as a return of capital. To be tax neutral for shareholders, the reduction of capital must be effected on the winding-up, discontinuance or reorganisation of the company's business under subsection 84(2) of the Canadian Income Tax Act or on a share exchange to which section 86 applies. Under a return of capital demerger, however, there is **no** relief for the demerging entity. The tax cost of shareholders' shares would be apportioned across the old and new shares

4.3.3 Share capital reorganisation

Under this type of demerger, the demerging entity shareholders exchange all of their existing demerging entity common shares for a combination of a new class of demerging entity shares and demerged entity common shares. There is a rollover[78] for a demerger group shareholder (whether Canadian resident or non-resident) when:

- the share exchange occurs in the course of a reorganisation of the capital of demerging entity;
- the shareholder holds the existing demerging entity common shares as capital property; and
- on the exchange, the demerging entity shareholder disposes of all of the demerging entity common shares held by it and receives from demerging entity other shares of demerging entity.

[75] Subsection 84(3) computes the amount of the dividend (redemption amount minus PUC). The definition of 'proceeds of disposition' in section 54 reduces the proceeds to the extent of the deemed dividend computed under 84(3).
[76] Subsection 112(1) provides for a deduction for inter-corporate dividends effectively making the dividend tax-free
[77] Under section 85, a shareholder makes an election in an election form, picking the tax transfer value of the shares being transferred (typically cost) and that determines the tax cost of the shares of the demerged entity issued in consideration.
[78] Under section 86 of the Canadian Income Tax Act.

Under this type of demerger:

- the tax cost of shareholders' cost base is apportioned between the old and new shares;
- shareholders can make a capital gain if the market value of the shares they receive in the demerged entity exceed the tax cost of their shares in the demerging entity; and
- there is no relief for the demerging entity itself.

4.3.4 Tax relief for foreign traded corporations

The last type of concession offers demerger relief for Canadian resident shareholders of US companies, or other companies of countries with which Canada has entered tax treaties, where a publicly traded corporation that is widely held distributes shares in another foreign corporation it owns to its common shareholders.[79]

The relief only applies where the foreign jurisdiction makes shareholder exempt from tax under the laws of that foreign jurisdiction. This type of relief was available for Canadian resident shareholders of BHP when it demerged South32 in 2015.

This is a similar concept to demerger relief available in New Zealand. Under the *Income Tax Act 2007* (New Zealand), demerger relief is available when an ASX-listed company demerges a subsidiary and the demerger is not assessable income or exempt income under the ITAA 1936.[80] At present, the New Zealand relief is limited to shareholders in ASX-listed companies only.

[79] *Income Tax Act 2007*, section 86.1.

[80] *Income Tax Act 2007*, section ED 2B. Interestingly, the relief is limited to relief under the ITAA 1936 not, seemingly, the ITAA 1997.

5 Restructuring: ATO's historical approach

5.1 A 'restructuring': why does it matter?

As explained in section 2 above, a demerger only happens when the conditions in section 125-70 are satisfied.[81] Without a 'demerger', no tax relief is available and the cost base apportionment rule also does not apply. And without a 'restructuring', there is no 'demerger'. In particular, a demerger must involve:

- a 'restructuring'[82]; and
- certain events happening 'under the restructuring', including that:
  - the ownership interests in the demerged entity must be delivered to the original owners in a manner that satisfies the '80% condition'; and
  - the owners of the ownership interests in the head entity must acquire a new interest in the demerged entity and 'nothing else'; and
- under the restructuring,[83] each owner acquiring the same or roughly the same percentage of new interests in the demerged entity 'just after' the restructuring as the owner held in the head entity just before the demerger. Additionally, the owner must have the same proportionate market value of ownership interests in the head entity and demerged entity as the owner held in the head entity just before the restructuring.

So, in sum, it's important to define what the 'restructuring' is, so that you know:

- if there's been one;
- if the prescribed events have happened 'under' it;[84] and
- if shareholders have the requisite ownership interests 'just after' it.

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[81] Explanatory Memorandum, *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measurers) Bill 2002* [15.27].
[82] The term 'restructure' is not defined in ITAA 1997. It is, however, used (together with synonymous terms, such as 'reorganisation') elsewhere in the tax law. Part of construing the word 'restructure' is to consider its uses, and the use of analogous phrases, in the balance of the ITAA 1997 and in certain other contexts; a summary of these uses is set out in **Annexure A**.
[83] In fact, subsection 125-70(2) uses the term 'demerger', which is circular because the definition of demerger itself requires that subsection to be satisfied: subsection 125-70(b)(h).
[84] Although the term 'under' is defined and used for the purposes of the 'Attribution Managed Investment Trust' regime in Division 276, it is not otherwise defined in the ITAA 1997 and therefore should therefore take its ordinary meaning for the purposes of section 125-70. The term 'under' in the phrase 'under the restructuring' means that there must be a sufficient connection between the 'restructuring' and acts and consequences required to occur under that restructuring: *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd* (2000) 201 CLR 520. The source or cause of the acts and consequences must be the restructuring.

5.2 ATO's historic approach to 'restructuring'

5.2.1 ATO's approach to Division 125

Based on our review of rulings published by the ATO involving demerger and other transactions, in the majority of cases, the ATO has defined the 'restructuring' to consist of the demerger transaction **only** (to the exclusion of any other transaction). By doing so, it has, on those occasions, agreed that demerger relief is available.

5.2.2 Demerger-Acquisition Schemes

We summarise the ATO's position on all (publicly available) actual or proposed demerger-acquisition schemes in the table below – that is, arrangements where an acquisition of the head entity or demerged entity occurred immediately, typically under a scheme of arrangement, or within 1 to 3 years after the demerger. These facts emerge:

- Up to 2015, the ATO appears to have permitted demerger relief in each demerger-acquisition scheme since the introduction of Division 125 (including, for instance, in the Texon Petroleum Limited demerger of Talon Petroleum,[85] the Auzex Resources Limited demerger of Auzex Exploration[86] and the Arrow Energy Limited demerger of Dart Energy,[87] each of which was followed by the acquisition by a third party of the head entity).

- As a high water mark, in the 2008 demerger of Buru Energy Ltd by ARC Energy Ltd, and the subsequent acquisition of ARC Energy by Australia Worldwide Exploration Limited, the ATO granted demerger relief to shareholders in ARC Energy despite the demerger and acquisition schemes being inter-conditional. In all other demerger-acquisition schemes during that period, the demerger was always not conditional on the acquisition occurring, but in some cases, the acquisition was conditional on the demerger occurring.[88]

- In 2015, the ATO denied demerger relief to the shareholders in Sirius Resources NL, where it demerged S2 Resources, and subsequent to the demerger, was acquired by Independence Group NL.[89] The demerger and acquisition schemes were inter-conditional.

- In 2018, the ATO denied demerger relief to shareholders in AMA Group Limited and Westfield Corporation Limited. We explain the AMA and Westfield schemes further below.

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[85] See Class Ruling CR 2013/23.
[86] See Class Ruling CR 2012/106.
[87] See Class Ruling CR 2010/33.
[88] See Class Ruling CR 2008/74.
[89] See Independence Group NL ASX Release 27/11/2015 here, attaching letter sent to former Sirius Resources NL shareholders.

Demerger/Acquisition Transactions

Year	Name of Transaction	Description of Transaction	Acquisition Consideration	Demerger Relief	Scrip for Scrip Rollover	Demerger expressly conditional on Acquisition	Acquisition expressly conditional on Demerger
2018	Unibail-Rodamco SE - Westfield	1) Demerger of OneMarket by Westfield Corporation Limited. 2) Unibail-Rodamco SE acquisition of stapled securities of Westfield	Cash and Scrip	✗	✓	✓	✗
	Blackstone-AMA Group Limited	1) Demerger of ACAPCo by AMA Group Limited 2) Blackstone acquisition of AMA Group Limited.	Cash only or Cash and Scrip	✗	N/A	✗	✓
2015	Independence Group NL – Sirius Resources NL	1) Demerger of S2 Resources by Sirius Resources NL 2) Independence Group NL acquisition of Sirius Resources	Cash and Scrip	✗	✓	✓	✓
2013	Sundance - Texon Petroleum Limited	1) Demerger of Talon Petroleum Limited by Texon Petroleum Limited 2) Sundance acquisition of Texon Petroleum Limited	Scrip only	✓	✓	✗	✓
	Auzex Resources Limited – Bullabulling Gold Limited	1) Demerger of Auzex Exploration Limited and Auzex Resources Limited 2) Acquisition of Auzex Resources Limited by Bullabulling Gold Limited	Scrip	✓	✓	✗	✓
	Iron Mountain – Recall Holdings	1) Demerger of Recall Holdings Ltd by Brambles Ltd (July 2013) 2) Iron Mountain Inc acquisition of Recall Holdings Ltd (Jun 2016)	Cash only or Cash and Scrip	✓	✓	✗	✗
2011	PTT Mining Limited - Straits Resources Limited	1) Demerger of Straits Metals by Straits Resources 2) PPT Mining Limited acquisition of Straits Resources Limited	Cash only	✓	✗	✗	✓

2010	CS CSG - Arrow Energy Limited	1) Demerger of Dart Energy Limited by Arrow Energy Limited 2) CS CSG acquisition of Arrow Energy Limited	Cash only	✓	N/A	✗	✓
2008	Australia Worldwide Exploration Limited - ARC Energy Limited	1) Demerger of Buru Energy Ltd by ARC Energy Ltd 2) Australia Worldwide Exploration Limited acquisition of ARC Energy Limited	Cash and Scrip	✓	✓	✓	✓
2007	Symbion - Healthscope	1) Demerger of Mayne Pharma by Mayne Group Ltd (November 2005) 2) Healthscope Limited proposed acquisition of Symbion Health Limited (ka Mayne Group Ltd) (2007)	Cash or Cash & Scrip or Scrip	✓	✓	✗	✗
2006	Hospira – Mayne Pharma	1) Demerger of Mayne Pharma by Mayne Group Ltd (November 2005) 2) Hospira acquisition of Mayne Pharma (September 2006)	Cash	✓	N/A	✗	✗
2005	Oxiana Limited – Minotaur Resources Limited	1) Demerger of Minotaur Exploration Limited (Minex) by Minotaur 2) Oxiana Limited acquisition of Minotaur Resources Limited	Scrip for Scrip	✓	✓	✗	✓
	Woolworths Limited - Progressive Enterprises Holdings Limited	1) Demerger of Progressive Enterprises Holdings Limited by Foodland Associated Limited 2) Woolworths Limited (WOW) acquisition of FAL's New Zealand business assets and Australian Woolworths Action Stores	Cash and/or Scrip	✓	✓	✗	✓
	Metcash Limited - Foodland Associated Limited	1) Demerger of Progressive Enterprises Holdings Limited by Foodland 2) Metcash acquisition of FAL's Australian business assets (excluding Australian Woolworths Action Stores	Cash or Scrip	✓	✓	✗	✓
2004	LionOre – MPI Mines	1) Demerger of Leviathan Resources Limited from MPI Mines Ltd 2) LionOre acquisition of MPI Mines	Cash and Scrip for Scrip	✓	✓	✗	✓

5.2.3 Acquisition-Demerger schemes

A summary of the ATO's approach to the reverse type of scheme – that is, an acquisition followed by a demerger – is below:

- In 2007, the ATO denied demerger relief to shareholders in Publishing and Broadcasting Limited. In that scheme, the shareholders in PBL disposed of their shares to a newly incorporated entity, Crown Limited, for cash and shares in Crown.[90] The shareholders then, as new shareholders in Crown, received an in-specie distribution from Crown of shares in Consolidated Media Holdings Limited. The Commissioner ruled that demerger relief was not available for the in-specie distribution because:
    - the restructuring included the earlier acquisition; and
    - accordingly, the relevant demerger group was the group as it stood prior to the incorporation of Crown, i.e. the PBL group prior to its acquisition by Crown, and therefore Crown was not the head entity of the demerger group.
- Similarly, in 2018, the ATO denied demerger relief to shareholders in Eneabba Gas Limited.[91] Under the Eneabba Gas scheme, UIL Energy Ltd acquired certain entities owned by Eneabba Gas in exchange for issuing certain convertible redeemable preference shares to Enneaba Gas. Eneabba Gas subsequently made a pro rata in specie distribution of the CRPS in UIL to its shareholders. The ATO ruled that demerger relief was not available for the distribution because:
    - the initial acquisition by UIL was part of the same 'restructuring' as the distribution; and
    - accordingly, the relevant demerger group was the group as it stood prior to the acquisition by UIL, at which time UIL was not a member of the demerger group.

5.2.4 Demergers and other transactions

- The ATO does not appear to have denied demerger relief for a demerger occurring prior or subsequent to a capital raising or initial public offering, although, as will be discussed further below, the ATO's views on such transactions appear to have changed.
- A summary of the demerger relief granted in these circumstances is set out at **Annexure C**.

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[90] Class Ruling CR 2007/111.
[91] Class Ruling CR 2018/7.

6 Restructuring: ATO's new approach

6.1 A tale of two transactions

In 2018, things changed. The ATO denied demerger relief in the Westfield-Unibail Rodamco arrangement, and, more significantly, in the AMA Group scheme. To our knowledge, the ATO had never denied demerger relief where the demerger was **not** conditional on the subsequent acquisition.

6.1.1 The AMA Scheme

In April 2018, AMA Group Limited announced proposals whereby:

- AMA would demerge its automotive component, accessory and procurement business into a new company (ACAPCo), to be listed on the ASX pursuant to a demerger scheme. Existing shareholders would receive shares in ACAPCo on a 1:1 basis in proportion to their holding in AMA; and
- Blackstone would subsequently acquire all of the AMA shares (post the demerger) under a scheme of arrangement.

Importantly, the demerger was not conditional on the acquisition (although the acquisition was conditional on the demerger). As noted above, this feature was present in all other schemes previously approved by the ATO, as referred to in the table in section 5.

The parties were entitled to terminate the ACAPCo demerger scheme (and consequently the AMA acquisition scheme) if the ATO failed to grant specific demerger relief under Australian taxation laws.

In June 2018, AMA announced that it 'received a formal response from the Deputy Commissioner of Taxation refusing AMA's request for a ruling for demerger relief.' The AMA announcement did not disclose the basis for the ATO's decision, but did note the AMA Board's disappointment that the Deputy Commissioner of Taxation had taken a 'different view as to the requirements for demerger relief as compared with previous transactions.' While the ATO's views were not publicly available, given the ATO's express views about the Westfield demerger, and, after, the Draft Determination, we don't really have to guess: they concluded that the restructuring encompassed both the demerger and acquisition.

6.1.2 Westfield demerger of OneMarket

Unlike in the AMA transaction, the OneMarket demerger scheme was conditional on the Westfield acquisition schemes proceeding (but not vice versa). In effect, it was a condition of the demerger scheme that consideration was received by Westfield security holders under the acquisition schemes, in circumstances where part of the consideration in the acquisition scheme would be eligible for CGT scrip-for-scrip roll-over relief.

In the OneMarket example, the ATO's view in CR 2018/31 was that the demerger transaction did not satisfy the nothing-else requirement. The demerger and acquisition schemes were viewed as a single restructuring and consequently, in the ATO's view, presumably the consideration provided under the acquisition scheme constituted 'something else' received by Westfield security holders under the restructuring.

6.2 The Draft Determination

Following the denial of demerger relief in the AMA and OneMarket schemes, on 20 March 2019, the Commissioner published Draft Taxation Determination TD 2019/D1 'Income Tax: what is a 'restructuring' for the purposes of subsection 125-70(1) of the *Income Tax Assessment Act 1997*?' (the ***Draft Determination***).

6.2.1 What is a 'restructuring'?

The ATO's core assertion in the Draft Determination is that the term 'restructuring' in subsection 125-70(1) should be interpreted according to its 'ordinary business meaning' and may include 'previous or subsequent transactions in a sequence of transactions.'

The Commissioner states at paragraphs 2 and 3 of the Draft Determination:

> 2. In subsection 125-70(1), a 'restructuring' of the demerger group has its ordinary business meaning. It refers to the reorganisation of a group of companies or trusts. What constitutes a particular restructuring is essentially a question of fact. **However, all the steps which occur under a <u>single plan of reorganisation</u> will usually constitute the restructuring. It is not necessarily confined to the steps or transactions that deliver the ownership interests in an entity to the owners of the head entity of the demerger group, but may include previous or subsequent transactions in a <u>sequence of transactions</u>.** Commercial understanding and the objectively inferred plan for reorganisation will determine which steps or transactions form part of the restructuring of the demerger group.
>
> 3. Transactions which are to occur under a plan for the reorganisation of the demerger group **<u>may constitute parts of the restructuring of the demerger group</u>** even though those transactions are legally independent of each other, contingent on different events, or may not all occur. For example, if a transaction or step is subject to separate decision-making processes (such as separate votes by shareholders of the company that is the head entity of the demerger group) from the steps taken to separate an entity, it may still be part of the restructuring. Thus the planned transfer of interests in the separated entity by all the owners of those interests to a particular acquiring entity would generally be considered to form part of the restructuring where commercially the separation of the interests would be understood to be a step in a plan for the owners to transfer their interests in the separated entity to the acquiring entity.

Note two things about this passage:

- First, the ATO interprets the term 'restructuring' to encompass related transactions – that is, it does not contend that those related transactions mean that the demerger is not a restructuring, only that the restructuring is broader than the demerger.
- Second, the ATO uses words and phrases in this passage and the balance of the Draft Determination like 'plan', 'connected plan', 'planned transfer', 'step in a plan' and 'sequence of

transactions.' These are concepts borrowed from tax integrity provisions and decisions, Australian and foreign, interpreting them. Indeed, as will be apparent from section 8 below, the ATO has tacitly incorporated the US, English and Canadian approaches to interpreting integrity rules contained in the demerger provisions of those jurisdictions.

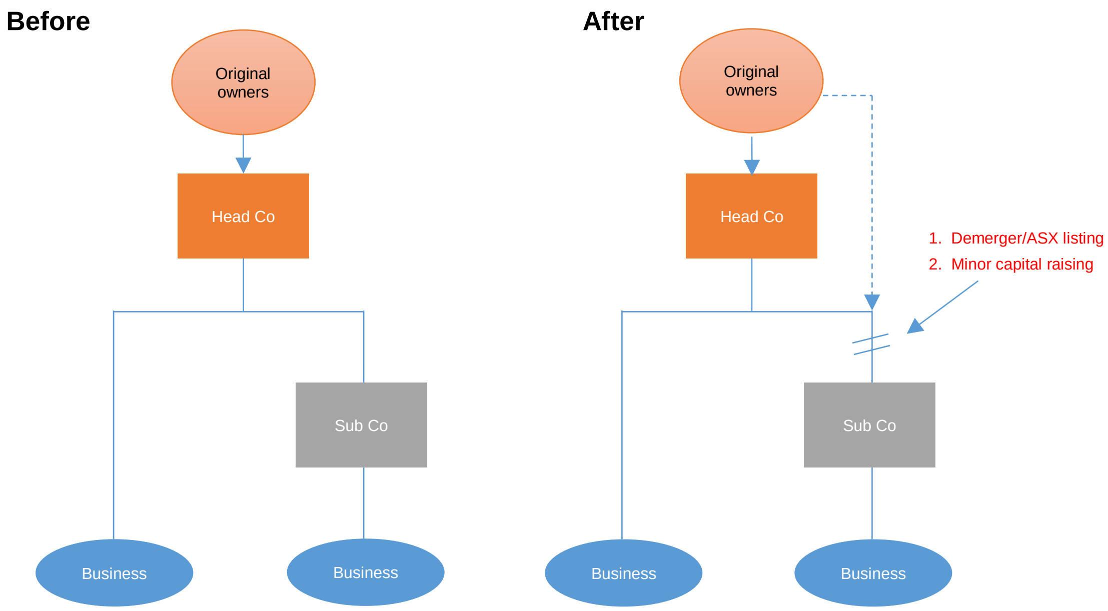
In the Draft Determination, the Commissioner also makes the following key points:

- the events described in subsection 125-70(1)(b) (the 80% condition) and subsection 125-70(1)(c) (the nothing else condition) may not, of themselves, constitute the entire scope of the restructuring because, in the Commissioner's view, those are conditions which must be satisfied 'under' the restructuring (paragraph 44);
- the scope of the restructuring is also relevant to the proportionality tests (in subsection 125-70(2)) because they are tested by reference to what occurs 'under a demerger' (paragraph 47);
- the statutory intention for demerger relief is that it should only be available where 'the economic position' of the original owners remains the same before and after the restructuring (paragraph 45);
- the assessment of whether there has been a change to the economic position of the original owners should be tested by considering 'events, acts or transactions' occurring before or after the delivery of the ownership interests to the original owners (paragraph 49); and
- this interpretation best achieves the purpose of Division 125 because it ensures that a restructuring that does not result in a change in the economic position of the original owners will qualify for demerger relief (paragraph 65).

6.2.2 Transactions occurring prior and subsequent a demerger

In the Draft Determination, the Commissioner provides six illustrative examples.

Example 1 – post-separation capital raising



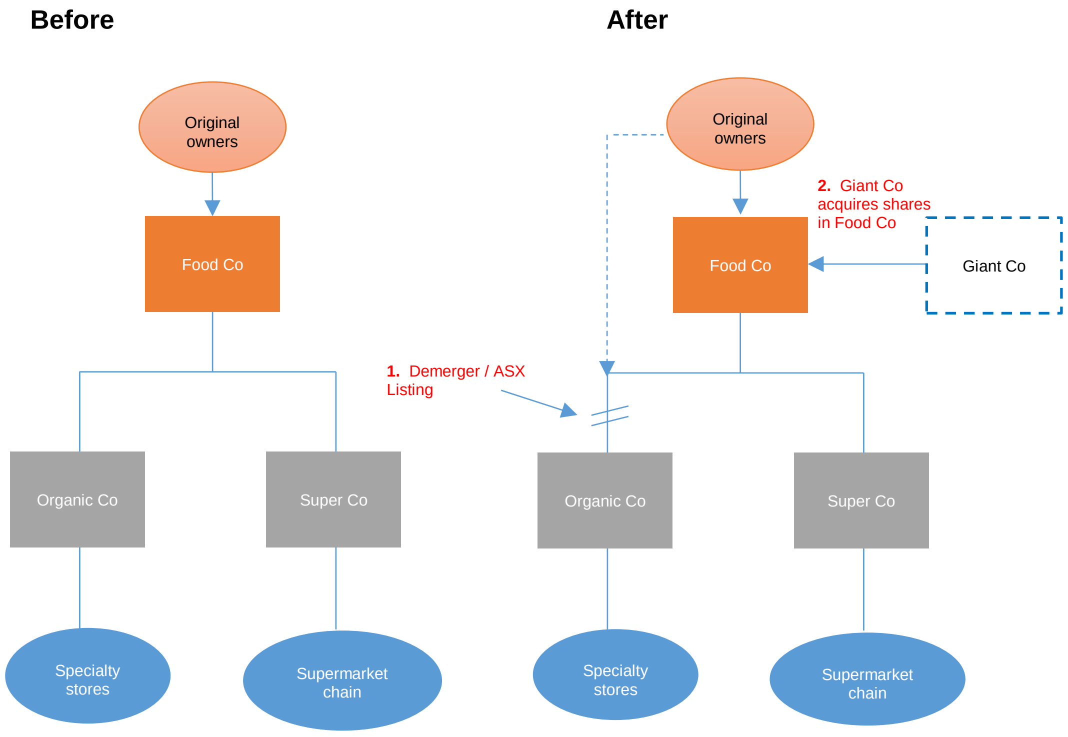
- Head Co plans to 'separate' Sub Co by way of an in-specie distribution of the shares in Sub Co to Head Co shareholders, and list the shares in Sub Co on the ASX (the current structure does not provide the kind of management attention and capital that Sub Co requires).
- Sub Co expects to undertake a 'minor capital raising' following the listing – the capital raising will be done 'independently' of, and is not conditional upon, the in specie distribution and listing.
- The Commissioner concludes that, it is therefore reasonable to infer that, even without the capital raising, the demerger would still have proceeded, suggesting that the capital raising is not part of a 'connected plan' and therefore that the capital raising would **not** form part of the 'restructuring.'
- What emerges from this Example, and Example 3 below, is that the ATO's inquiry in determining whether another transaction forms part of the same 'restructuring' as the demerger is largely intended to be an objective assessment – or prediction – about whether the demerger would have occurred in the absence of the subsequent transaction.

Example 2 – post-separation capital raising

- The facts are the same as Example 1, **except**, prior to the separation:
  - the capital raised equals half the value of Sub Co;
  - Sub Co distributes by way of return of capital or dividend 50% of its net assets; and
  - Head Co negotiates with an unrelated third party interested in acquiring a half stake in Sub Co's business to acquire the shares in Sub Co that would be issued under the capital raising.
- The Commissioner considers that the third party negotiations are 'significant', and concludes that the capital raising would form an integral part of the commercial plan for the reorganisation and would constitute part of the 'restructuring.'

- On that basis, the 'proportionality condition' **would not** be satisfied.

Example 3 – sale of head entity after the separation of a subsidiary



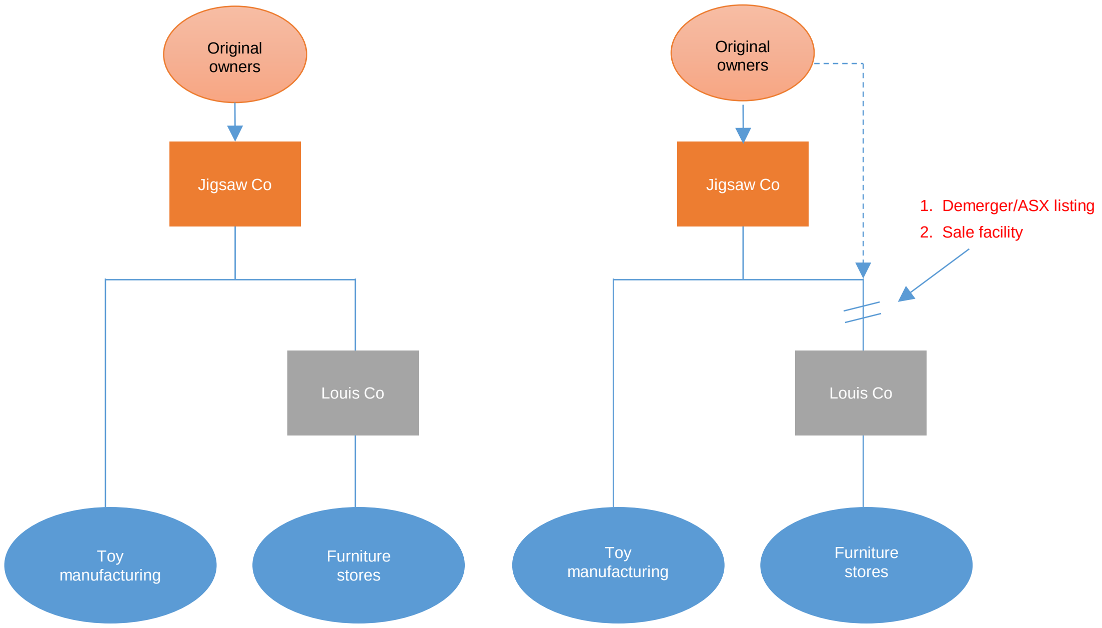
- Food Co proposes to separate Organic Co by making an in specie distribution to Food Co shareholders of the shares in Organic Co, and listing Organic Co shares on the ASX.
- The separation is part of a plan to prepare for the sale of Food Co to Giant Co, and is a condition precedent to a sale of the shares in Food Co to Giant Co (but not vice versa – that is, the demerger is not conditional on the acquisition).
- The Commissioner concludes that the sale of Food Co forms part of a connected plan to separate Organic Co, and **would** form part of the 'restructuring' – even though the demerger could occur without the acquisition occurring. Why? Again, it appears to be based on an objective assessment or prediction about whether the demerger would actually have proceeded. Says the ATO: 'It is unlikely the in specie distribution of Organic Co shares would occur except in preparation for the Giant Co takeover proposal. Indeed, the proposal put forward by the Board is to both separate Organic Co and sell Food Co shares after the separation.'
- On that basis, the 'nothing else condition' and the 'proportionality requirements' **would not** be satisfied.

Example 4 – sale of head entity after the separation of a subsidiary

- Same facts as Example 3, **except** discussions with Giant Co terminate and 8 months later, after implementation of the separation, Mid Co announces that it will acquire the shares in Food Co.
- The Commissioner concludes that the Mid Co takeover bid is legally and commercially independent of the separation, and therefore, **will not** form part of the 'restructuring.'

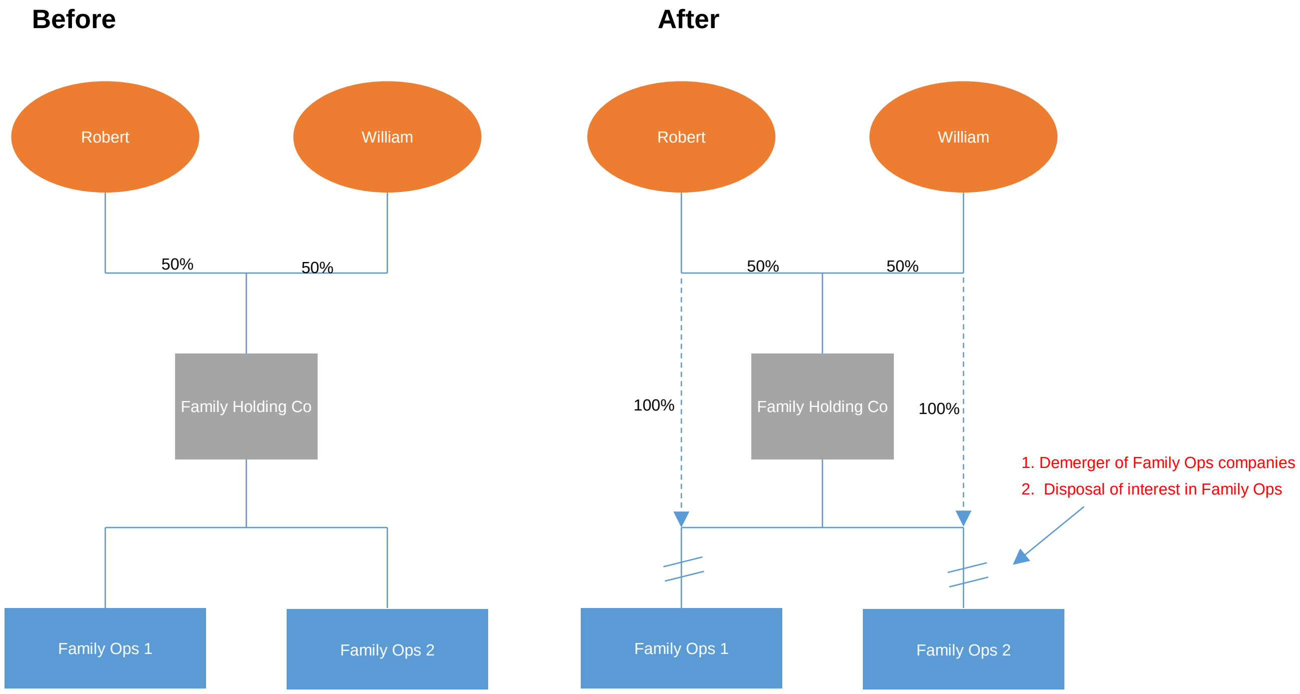
Example 5 – sale facility

Before **After**



- Jigsaw Co proposes to separate Louis Co and list the shares in Louis Co on the ASX.
- Under the scheme, immediately after the separation, non-executive shareholders can use a 'sale facility' to dispose of their new shares and the sale agent will remit sale proceeds to the shareholders (with a 5% premium, funded by Louis Co).
- The Commissioner concludes that the use of the sale facility, and the subsequent payment made to shareholders, forms part of the 'restructuring.'
- On that basis, the 'nothing else condition' and 'proportionality condition' **would not** be satisfied.

Example 6 – separation by closely-held corporate group



- Robert and William each propose assuming full ownership and control of one business – Robert will take Family Ops 1 and William will take Family Ops 2.
- Family Holding Co makes an in specie distribution of shares in Family Ops 1 and Family Op 2 to Robert and William respectively.
- Robert exchanges his shares in Family Ops 2 for shares in Family Ops 1 and William exchanges his shares in Family Ops 1 for shares in Family Ops 2 – thereby, Robert becomes the sole owner of shares in Family Ops 1 and William the sole of owner of shares in Family Ops 2.
- The Commissioner concludes that the exchange of shares would be an essential component of the separation of the Family Ops companies and therefore **would** form part of the restructuring.
- On that basis, the 'nothing else condition' and 'proportionality condition' would **not** be satisfied.

6.3 WOTSO demerger

The WOTSO Limited demerger scheme is an interesting recent example of the ATO seemingly applying Example 2 in the Draft Determination (the class ruling was published on 4 March 2020. In that scheme, the ATO granted demerger relief to shareholders in Blackwall Limited who, as a consequence of a return of capital, received an ordinary share in WOTSO Limited for each share they held in Blackwall.

The ATO ruled that a 'demerger' (as defined in section 125-70) occurred under the 'scheme' that was the subject of the ruling, which included, relevantly, a proposal by WOTSO to raise capital following the demerger 'to expand its operations.'[92]

According to an announcement made by Blackwall on 19 November 2019, WOTSO intended to raise capital, in conjunction with the demerger, of up to $10m through an 'entitlement offer' and $30m through 'a strategic placement.' On 3 December 2019, Blackwall confirmed that WOTSO had entered into a 'Memorandum of Understanding with a significant ASX listed diversified property group regarding an investment of up to $20 million under the strategic placement' (this amounted to approximately two thirds of the value of WOTSO prior to the demerger).

Following the demerger, however, an announcement made by WOTSO (on 24 January 2020) advised shareholders that '[a]s a result of certain regulatory considerations, it has been agreed that the strategic placement will not proceed.' It is possible that these 'regulatory considerations' may have included a concern raised by the ATO, by analogy to Example 2 in the Draft Determination, about the availability of demerger relief if such a placement were to have been made (although, no such detail was provided by either company). In contrast, the ATO appears to have accepted that the proposed 'entitlement offer' would not give rise to the same concern (presumably because it resembled Example 1).

[92] Class Ruling CR 2020/11 (paragraph 40).

7 *What is a 'restructuring'? A matter of construction*

7.1.1 Approaching the task of construing 'restructuring'

How should 'restructuring' be interpreted in section 125-70? Begin with the uncontroversial: because the term is not defined in the ITAA 1997, it bears its natural and ordinary meaning, as informed by the context in which it appears and the legislative policy that is evident from that context.[93] The context includes not only its role within Division 125, but Division 125's broader role and purpose within the ITAA 1997. Context, the High Court has said, is not to be considered as an after-thought: it must be considered at the same time as construing the ordinary meaning of the words, because context may affect that ordinary meaning.[94] Context can disambiguate the text.

These interpretive tools are not controversial. What *is* controversial is the *manner* and *result* of applying those rules. The result of the ATO's application is the Draft Determination. Although the ATO's views are plausible, the authors do not think they represent the best reading of the provisions. Focusing on demerger-acquisition schemes, the authors believe that, applying the interpretive tools, the best reading is that demergers that are not conditional on subsequent acquisitions exclusively comprise the relevant restructuring. The same conclusion applies with equal force to subsequent capital raisings.

7.1.2 What is a 'restructuring'?

First to the text – the beginning and end of the statutory inquiry.[95] Because the word 'restructuring' is undefined, and because it is not a term of art, it bears its natural and ordinary meaning. Given its placement within the demerger provisions – and Parliament's explicit object in section 125-5 of facilitating demergers – that natural and ordinary meaning is the natural and ordinary meaning in business or commerce. The ATO agrees with this, it seems: they state that the term must be given its 'ordinary business meaning.' As Buckley J observed in *In re South African Supply and Cold Storage Co* [1904] 2 Ch 268 of the analogous word 'reconstruction' – discussed in more detail below –

> Neither of these words, 'reconstruction' and 'amalgamation,' has any definite legal meaning. Each is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term 'reconstruction' or 'amalgamation.'

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[93] The High Court most recently reaffirmed this principle in *Australian Securities and Investments Commission v King* [2020] HCA 4 (delivered on 11 March 2020); see also *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 2.

[94] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

[95] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519.

According to the Oxford English Dictionary (online), the term 'restructure' or 'restructuring' means

> reconstruction; reorganise. Also: an instance of this. 1. transitive. To give a new structure to; to organize differently; to rebuild, rearrange. Also intransitive with reflexive meaning.

The term 'restructuring' does not appear to have been expressly considered by an Australian court or tribunal in the context of the ITAA 1997 (or, so far as we're aware, in any Australian tax context). The term 'reconstruction', however, has been considered by Australian and English courts, both in the company and revenue context. 'Reconstruction' has been used interchangeably with 'reorganisation,'[96] and the extrinsic materials make clear that 'restructuring' is used interchangeably with 'reorganisation'.[97]

As explained below, those Australian and English authorities, read as a whole, tend to contradict the Commissioner's central proposition in the Draft Determination that a restructuring or reconstruction encompasses transactions that are implemented before or after the demerger and as a result of which economic ownership is materially changed. Indeed, those authorities establish the very opposite: a reconstruction cannot encompass subsequent transactions that substantially alters the ownership of the company carrying on the business that is sold. Canadian courts appear to have reached the same conclusion.[98]

English corporate law authority

A long line of English cases, in the general, revenue and corporate contexts, have held that a reconstruction or reorganisation, or scheme of reconstruction or reorganisation, does not include any transaction which results in a significant change in the shareholders that carry on the business at issue. Thus, there is no reconstruction where the arrangements result in a sale of a business to an 'outsider' (to use a term in one of the cases), even where the shareholders obtain a minority stake in the outsider. Nor is there a reconstruction where two businesses of a company are effectively divided between two different sets of shareholders, sometimes referred to as a partition.

Over 130 years ago, in *Hooper v Western Countries & South Wales Telephone Company Limited* (1892) 68 LT 78, Chitty J explained his view that 'reorganisation' of a company was synonymous with a 'reconstruction' of a company, but that those concepts differed from an 'amalgamation'. He said (at paragraph 80):

> The words in question [reorganisation or reconstruction] are not words of art. They have no technical meaning in law ... The usual mode of reconstruction is when a company resolves to wind itself up, and proposes the formation of a new company, which is to consist of the old shareholders, and to take over the old undertaking, the old shareholders receiving shares in the new company. In that case the old company ceases to exist in point of law, and there is in form a sale to the members of a new corporation. But the company is in substance, and may be fairly said to be, reconstructed ... The question to be asked is, whether the new company is

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[96] See *CIBC Mellon Trust Company v Bell Canada*, [2008] 4 R.J.Q. 1029, 43, which notes that the UK and Canadian authorities holds the words have essentially the same meaning; see also *Hooper v Western Counties and South Wales Telephone Company Limited* (1892) 68 LT 78 and *R. v Santiago Mines Ltd* [1947] 1 D.L.R. 642 at 648.
B.L.R. (4th) 39 at 60

[97] Indeed, the ATO uses the terms interchangeably in the Draft Determination and notes that the statutory term changed from 'reorganisation' to 'restructuring' during the public consultation on the demerger provisions.

[98] 'Reorganisation: a commercial concept juridically defined', Clémentine Sallée* and David Tournier, The Canadian Bar Review, Volume 88.

> practically the same as the old, even though in law it is a separate corporation? **According to the text-writers reconstruction does not include amalgamation, or a sale by a company of its undertaking to another existing company** ... In my opinion there was not a reconstruction.

Buckley J reached the same conclusion – that a sale cannot constitute a reorganisation – in *Re South African Supply and Cold Storage Co* [1904] 2 Ch 268 (***Cold Storage***). *Cold Storage* tends to be cited in most decisions, English and Australian, that consider the meaning of the term 'reconstruction' or 'reorganisation', whether in private instruments (as in *Cold Storage*) or in legislation.[99] It's as to 'reconstruction' as Sun Newspapers is to 'of a capital nature.'

The facts in *Cold Storage* were complicated,[100] but the key elements of the arrangements involved:

- Supply Company sold certain business assets to Australasian Company (***Supply Business***) for £1 million, satisfied by Australasian Company issuing shares to Supply (as a result of which it was the sole or substantially sole shareholder).
- Supply Company retained certain assets (***Retained Assets***), including cash and investments and other assets, worth approximately £1.5 million.
- Another company, Cold Storage Trust Company, was then formed for the particular purpose of acquiring the Retained Assets.
- Having acquired the Supply Business, Australasian Company then sold that business – as well as trading stock and working capital – to Imperial Company, a competitor of Supply Company, for £1.5 million, which was mainly paid by Imperial Company issuing shares to Australasian Company.
- So, pausing there, Supply Company then held interests in Imperial Company indirectly through its shares in Australasian Company.
- Supply Agreement then sold the Retained Assets plus the shares in the Australasian Company to Cold Storage in return for all the shares in in the Cold Storage Trust Company.
- The economic result so far? Supply Company owned all the shares in the Cold Storage Trust Company, which had two assets, the Retained Assets, and the shares in the Australasian Company. Its shares in the Australasian Company represented an indirect interest in Imperial Trust, which conducted the Supply Business and its pre-existing business.
- Supply Company then voluntarily wound up and distributed its shares in the Cold Storage Trust Company to its shareholders and the Australasian Company wound up and distributed its shares in Imperial Company to the Cold Storage Trust Company.

Under the company constitutions, preference shareholders and debenture holders were eligible for a 15% bonus on the par value of their shares and debentures on the winding up of Supply Company and

[99] It's also referred to by Canadian decisions and at least one decision of the Singaporean High Court: *Clifford Development Pte Ltd v Commissioner of Stamp Duties* [2008] SGHC 168.
[100] The main difficulty is not understanding *what* happened, but *why* it happened. No real explanation is offered in the judgment.

Australasian Company if the winding up was **'for the purpose of reconstruction or amalgamation.'** Those shareholders and debenture holders argued that the windings up satisfied that condition.

Buckley J explained the meaning of reconstruction and amalgamation in similar terms as Chitty J had in *Hooper*, saying (at paragraph 286):

> Then it remains to consider whether what was done was for the purpose of 'reconstruction or amalgamation.' What does 'reconstruction' mean? To my mind it means this. **An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on—that would be a mere sale—but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on.** It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same.

On 'amalgamation', he said (at paragraph 287):

> There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam - a blending of two undertakings. ... The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern.

Applying those terms, Buckley J held that the winding up of Supply Company was for the purpose of a reconstruction because the Supply Company's business was effectively 'reproduced in the hands of another corporation', the Cold Storage Trust Company. Buckley J then held that the winding up of the Cold Storage Trust Company was not a reconstruction; it was, rather, an amalgamation because it resulted in the Australasian Company's business and the Imperial Company's business being 'blended' (his word) in the Imperial Company's hands, and the shareholders of the Australasian Company become shareholders in the Imperial Company to replace the shares they held in the Australasian Company. In short, the windings up were for the purpose of reconstruction or amalgamation because the entities were wound up not for the purpose of discontinuing with their undertakings, but for the purpose of continuing to be the owners of the undertakings in an altered form.

English stamp duty authority

This common sense concept of reconstruction hasn't been limited to the company law context. In *Brooklands Selangor Holdings Ltd v. Inland Revenue Commissioners* [1970] 1 WLR 429 (***Brooklands***), for example, it was applied to a UK stamp duty statute. The case arose out of a disagreement between the minority shareholders of Brooklands Selangor Holdings Ltd. (BSR) and its majority shareholder, Plantation Holdings Limited (PH), which had recently acquired 72 per cent of BSR's preference shares and over 50 per cent of its ordinary shares. To resolve their disagreement, the shareholders agreed to divide BSR's assets through a scheme of arrangement. In substance, a new company was incorporated and BSR transferred certain assets to the new company – the shares in that new company were distributed to the minority shareholders and the majority shareholder became the sole shareholder in BSR.

Incidentally, does this sound of partition sound familiar? Recall Example 6 of the Draft Determination, which involves two brothers who disagree and divide the company's assets through a demerger and sale.

The question under section 55 of the Finance Act 1927 (UK) was whether the arrangements amounted to a 'scheme of reconstruction' and was therefore exempt from stamp duty.

No, answered Pennycuick J. Adopting Buckley J's description of a reconstruction, he concluded that:

> The effect of that transaction is that the holders of the stock in the taxpayer company [BSH] are most substantially different from the holders of the stock in BSR. That is to say, they consist of approximately half only in value, though the vast majority in number of the holders of the stock in BSR. **So the transaction represents the transfer of a part of BSR's undertaking from the holders of the whole of the stock in BSR to the holders only of approximately half the stock in BSR**.
>
> That, I think, involves a substantial alteration in the membership of the two companies within the meaning of the passages which I have quoted from the judgments of Chitty and Buckley JJ. It seems to me that that transaction is not a reconstruction and that a transfer made pursuant to that transaction falls neither within the letter nor within the intent of s 55.

English income tax authority

The same principle has been applied in the UK capital gains tax context. *Fallon and Another v Fellows* [2001] STC 1409 involved, as in *Brooklands*, a division of two businesses (a locks business and a pressings business) of a single company (***FM***) between two sets of shareholders so that, after the division was completed, each set of shareholders effectively exclusively owned one of those businesses. Again, think of the brothers in Example 6 of the Draft Determination.

The basic means of achieving the division or partition was:

- first, to alter the rights of the shares held by one set of shareholders of FM so that those shareholders were economically exposed only to the locks business, and to alter the rights of the shares held by the other set of shareholders of FM so that those shareholders were economically exposed to the pressings business (***Share Variation Step***);
- second, FM incorporated two separate companies and transferred one business to each company (***Incorporation Step***); and
- third, FM was wound up and distributed the shares in the locks subsidiary to one set of shareholders, and the shares in the pressings subsidiary to another set (***Winding Up Step***).

Shareholders in the locks company sold some of their shares over six years later. The capital gains tax question was whether the shareholders had a tax cost in those shares equal to their market value at the time of distribution, or whether they were stuck with their original cost base in the company. The shareholders would be stuck with the original cost base under the Capital Gains Tax Act 1979 (UK) if the arrangement involved a 'scheme of reconstruction' – unsurprisingly, the revenue then argued that the arrangement did involve such a scheme, meaning more capital gains tax was owed on the later sale.

Faced with *Brooklands*, there was only one clear answer: there was not a scheme for reorganisation. It did not matter, as the revenue had argued, that the businesses were transferred to two companies not one. He noted:

> In the context [of the South African case], I think it clear that, when the learned Judge [Buckley J.] referred to persons carrying on an undertaking, he had in mind the shareholders who were carrying it on through a corporate body. He was referring to persons carrying on an undertaking in the sense of owning it, not in the sense of being involved in the management of the business operations. (…) [H]e was referring to the concept that shareholders were persons who, through an interposed corporate vehicle, owned the undertaking and, in the sense of being the owners of it, carried it on.

Nor were the stamp duty cases materially distinguishable, as the revenue asserted:

> The commissioners, in my view, did not attach sufficient significance to the stamp duty cases, especially Brooklands Selangor Holdings, on what is and what is not a reconstruction. They perceived differences between the stamp duty legislation and the capital gains tax legislation which in my view are scarcely there or at least are relatively insignificant. (...) [T]he key point in my view is that, when the draftsman of the [capital gains tax] provisions used the critical expression 'a scheme for the reconstruction of any company or companies ...' he fairly obviously took that wording form s.55 of the 1927 Act. (...) I agree with the Revenue that the cases on what was and what was not a reconstruction for stamp duty were relevant to what was and what was not a reconstruction for [capital gains tax], and I do not think that the Special Commissioners attached sufficient weight to them.

There's one aspect of *Fallon* that might be thought of as supporting the Commissioner's reading of the term 'reconstruction' in the Draft Determination. The revenue had argued that, looking at the structure after the Share Variation Step, one set of shareholders were exposed to the locks business, and one set to the pressing business. After that step, nothing changed – they were still economically exposed to those and only those businesses, but the middleman (FM) had simply been cut out. Comparing the position after the Share Variation Step and the position after the Winding Up Step, there was only a reorganisation.

Parks J rejected that argument by rejecting the premise: it wasn't correct to look at the position after the Share Variation Step; it was necessary to look the position before the Share Variation Step. He said:

> The reclassification of the shares into A and B shares with streamed rights was a step in the scheme. It was purely a transient feature, and was merely a piece of mechanics built into the scheme as a whole.

The authors' view is that this common-sense conclusion does not support the Commissioner's interpretation. First, and foremost, Parks J was construing the entire phrase 'the scheme of reconstruction,' not the isolated word 'reconstruction' or 'restructuring', as appears in Division 125. As explained below, Parliament knows how to use phrases like scheme for reorganising (a la Division 615), but it declined to do so in Division 125. Second, the structure of the scheme was that the Share Variation Step would not occur if the subsequent steps did not occur. Compare that to a demerger which is **not** dependent on a subsequent acquisition.

There are other UK cases applying the same principles, but you get the point.[101]

[101] See, e.g. *Fidelity Investments International Plc v Mytravel Group Plc* [2004] EWCA Civ 1734.

Australian cases

Australian cases have adopted Buckley J's formulation of reconstruction in the company law context. Under section 413(1) of the *Corporations Act 2001* (Cth), the Court may make certain orders to effect a compromise or arrangement that has been proposed 'for the purposes of, or in connection with, a scheme for the reconstruction of a Part 5.1 body…' In construing the phrase 'scheme for the reconstruction', the Federal Court has adopted Buckley J's formulation: see, for example, *Re Stork ICM Australia Pty Ltd* [2006] FCA 1846 and *Fiducian Portfolio Services Ltd v Fiducian Investment Management Services Ltd* (No 2) [2015] FCA 95.

So has the Commissioner. The Commissioner has previously referred to (and relied upon) the English cases in formulating his views on the availability of roll-over under the predecessor provisions to Division 615 of the ITAA 1997.[102] Under section 615-5, a taxpayer may choose roll-over if, relevantly, the taxpayer disposes of its shares in a company or units in a unit trust for shares in an interposed company 'under a scheme for reorganising' the affairs of the company or unit trust.

In Taxation Ruling TR 1997/18, the Commissioner considered the meaning of the phrase 'scheme for the reorganisation' of the affairs of a company or unit trust. The Commissioner concludes that 'a merger cannot constitute a reorganisation' for the purposes of the application of section 160ZZPA, and in doing so, refers to the established body of case law distinguishing the term 'reorganisation' with 'amalgamation'. The Commissioner concludes that the reference in these cases to 'amalgamation' is typically understood in an Australian context as a 'merger' or 'takeover.' In the case of a share disposal under a merger or takeover, the Commissioner states (at paragraph 40) that 'there is a change in the economic ownership of the underlying assets of the target company after takeover,' and therefore, it cannot constitute a 'scheme for the reorganisation' of the affairs of a unit trust or company.

7.1.3 Context and structure

The ordinary meaning of 'reconstruction', as interpreted by English and Australian authorities, does not encompass transactions that involve significant changes in the ownership of the company carrying on the enterprise or holding the relevant assets. And the authorities, and extrinsic materials, as indicated above, indicate that 'reconstruction', 'reorganisation' and 'restructuring' are all used interchangeably. The Commissioner's approach to the term in the Draft Determination does not refer to those authorities (or his own ruling TR 1997/18), and it's inconsistent with them. But do the context, structure and policy of Division 125, and its role within the ITAA 1997, support the Commissioner's reading? Just the opposite.

[102] Taxation Ruling TR 1997/18 was issued in the context of former section 160ZZZPA to 160ZZZPD of the ITAA 1936. Those now repealed provisions were subsequently re-written into former Subdivision 124-G of the ITAA 1997, and are presently found in Division 615 of the ITAA 1997. A precursory note to the ruling states that, '[t]his ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect.' See also, paragraph 32 of Taxation Ruling TR 2006/10, which states that 'where the law is re-enacted or remade, the public ruling contains to apply.'

7.1.4 Division 125's express object

Consider Division 125's purpose. Fortunately, it's not hard to divine. In section 125-5, Parliament spelled it out for us: to facilitate the demerging of entities by ensuring that capital gains tax considerations are not an impediment to restructuring a business. Yes, the section uses the same term 'restructuring' and so, in that sense, it doesn't advance the analysis about what a restructuring is. But it also uses the term 'demerging', which is not defined (although, of course, the term 'demerger' is). The undefined word 'demerging' should be given its natural and ordinary meaning as a commercial term that involves the transfer of the ownership, or substantial ownership, of a subsidiary entity to the parent entity's members. Understood in that context, it would, we submit, not include a subsequent acquisition of the demerger group or demerged entity or a capital raising, especially if it was not conditional upon the occurrence of such a subsequent event.

An interpretation, moreover, that reads 'restructuring' sufficiently broadly that it prevents arrangements that are prevalent in the market place and proposed for genuine commercial purposes does not facilitate demergers; it stifles them.

7.1.5 Section 45B

All this may suggest, at most, that the ATO's view that restructuring includes, for example, a post-demerger acquisition, is misguided. But, you might say, it doesn't refute an argument the ATO does *not* make – where the demerger immediately precedes an acquisition of the demerger group and the demerged entity, the demerger cannot be a restructuring because the acquisition must be counted in determining whether there is a restructuring. That is, there is no restructuring at all. If so, the reasoning of the Draft Determination is wrong, but the result (no 'demerger') is right.

But the contextual evidence points the other way. Most importantly, when Division 125 was enacted, section 45B, the anti-avoidance provision, was amended to apply when persons were 'provided with a demerger benefit' in certain circumstances. A person is provided with a demerger benefit when it receives ownership interests in a company or the value of ownership interests owned by that person increased *and* that is 'in relation to a demerger.' As amended, section 45B therefore can apply when a person receives one of two types of benefits: a capital benefit (the original type of benefit) and a demerger benefit (the benefit included in 2002). A capital benefit is defined to exclude a demerger dividend.[103]

Section 45B only applies if 'there is a scheme under which a person is provided with a demerger benefit or a capital benefit by a company.'[104] Applying that to demerger benefits, and reading that with the definition of demerger benefit, section 45B only applies where there is a scheme under which a person is provided with certain ownership interests in a company (or the person's ownership interests increase in value) 'in relation to a demerger.'

Next, turn to the non-incidental purpose condition in section 45B – that is, having regard to 'the relevant circumstances,' it would be concluded that the persons, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so (we're paraphrasing) for a non-incidental

[103] *ITAA 1936* s 45B(6).
[104] *ITAA 1936* s 45B(2)(a).

purpose of enabling a taxpayer to obtain a tax benefit.[105] The 'relevant circumstances' are a non-exhaustive list of factors that must be considered in determining whether the non-incidental purpose is met. One of those mandatory factors, set out in paragraph 45B(8)(i), was substituted at the same time as Division 125 was introduced in 2002.[106] That paragraph reads:

> The relevant circumstances of a scheme include the following: …
>
> (i) if the scheme involves the provision of ownership interests and the later disposal of those interests, or an increase in the value of ownership interests and the later disposal of those interests:
>
> > (i) the period for which the ownership interests are held by the holder of the interests; and
> >
> > (ii) when the arrangement for the disposal of the ownership interests was entered into;

Paragraph (i) applies equally to demerger and capital benefits. As explained above, if there has been no demerger, there can be no demerger benefit. So, as applied to demerger benefits, paragraph (i) presupposes that there has been a demerger under section 125-70. But if a demerger that immediately precedes an acquisition would not be a 'restructuring', there would be no 'restructuring', no 'demerger benefit' and paragraph (i) would be largely superfluous, at least as applied to demerger benefits. Given that it was substituted at the same time as the definition of demerger benefit was inserted,[107] the clear legislative intention is that it could apply equally to demerger benefits. Any reading of restructuring that would prevent a demerger from being a 'restructuring' because of a subsequent acquisition of the demerged entity[108] would make paragraph (i) largely superfluous, and it is an elementary rule of statutory construction that, to the greatest extent possible, all words must be given some independent meaning.[109] This context may explain why the ATO do not seek to argue that the consequence of an acquisition of the demerged or demerger group immediately after the acquisition is not a restructuring at all. Indeed, the ATO's own, still current practice statement PS LA 2005/21 assumes that related acquisitions do not necessarily mean there is no 'restructuring.'

Incidentally, section 45B is the provision that many commentators originally feared would make post-demerger acquisitions difficult.[110] But section 45B requires an assessment of objective purpose, a far more indeterminate and unpredictable inquiry than forming a view about the scope of the 'restructuring'.

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[105] *ITAA 1936* s 45B(2)(c).

[106] Previously, section 45B(5)(i) had addressed the later disposal of shares that had increased in value, and another paragraph (45B(6)) prescribed the relevant considerations in addressing this factor.

[107] *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Act 2002* (Cth) sch 16.

[108] Paragraph (i) would not seem to apply where ownership interests in the head company are subsequently disposed of.

[109] See, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71]. One potential response is that paragraph (i) could still apply where acquisitions occur after demergers but not just after – that is, the demerger would be a restructuring because the disposal is sufficiently disconnected from the demerger. While plausible, this response is not entirely convincing because section 45B applies where there is a scheme under which a person is provided with a demerger or capital benefit, and where the disposal is sufficiently disconnected from the demerger, it's hard to think that there are many cases in which it would be part of the scheme.

[110] See, for example, Gordon Thring, 'Some Issues with Demerger Relief' (2002) 37(4) *Taxation in Australia* 176.

7.1.6 Just a 'restructuring': a comparison to other statutory phrases

There are other contextual clues that support reading 'restructuring' narrowly to include only the steps under which the demerger is effected. Division 125, in contrast to other rollover or tax deferral provisions, does not use the phrase 'scheme for the restructuring.' Using the phrase 'scheme for the restructuring,' for example, would naturally invite a consideration of any steps that form part of the scheme. A 'scheme' is defined broadly in section 995-1 of the ITAA 1997 and includes any arrangement or scheme, proposal or course of conduct. In 2002, Parliament had some available models: for example, now-repealed Subdivisions 124-G and 124-H, the precursor to Division 615, used the phrase 'scheme for reorganising its affairs.' Subdivision 124-M used the phrase 'single arrangement.' Parliament chose not to define a demerger in this way, rather choosing the unadorned 'restructuring.'

One more subdivision is worth mentioning. Subdivision 328-G was enacted in 2016 to provide rollover relief to restructures of small businesses. Its object is:

> …to facilitate flexibility for owners of small business entities to restructure their businesses, and the way their business assets are held, while disregarding tax gains and losses that would otherwise arise.

Under section 328-430, a roll-over is available in relation to an asset that, under a transaction, an entity transfers to one or more other entities if, among other conditions:

> (a) the transaction is, or is a part of, a genuine restructure of an ongoing business…

According to the Commissioner' Law Companion Guideline LCR 2016/3, one of the factors which would tend to indicate a restructure is not 'genuine restructure of an ongoing business' is where the restructure is a preliminary step to facilitate the economic realisation of assets.

Subdivision 328-435 establishes a safe harbour rule – a transaction will be taken to be or be part of a genuine restructure of an ongoing business if, in the 3 year period after the transaction takes effect:

> (a) there is no change in ultimate economic ownership of any of the significant assets of the business (other than trading stock) that were transferred under the transaction; and
>
> (b) those significant assets continue to be active assets; and
>
> (c) there is no significant or material use of those significant assets for private purposes.

Recall the Commissioner's conclusion that a post-demerger acquisition can or will qualify as a restructure (genuine or otherwise). The safe harbour rule tends to undermine that conclusion. If a change of control was part of the restructure, the safe harbour would be largely redundant.

The safe harbour might also be characterised as suggesting that a transfer of an asset followed by a change of control cannot be a restructuring because of the change of control (again, *not* the ATO's argument). Applying that to the Division 125 context, it might be argued that it supports the argument, discussed above, that a demerger, which is followed by an acquisition, cannot be a restructuring.

But the language of section 328-430 is significantly different to the corresponding language of Division 125. Division 125 focuses on whether a restructuring has occurred. Division 328-G, in contrast, focuses on whether the transaction at issue is – *or is part of* – a genuine restructure of an ongoing business. The language, as with Division 615, invites a consideration of related transactions of which the transaction is a part. This, in turns, raises the sort of issues considered in the integrity provisions discussed in Section 8 below. Division 125 does not.

7.2 ATO's restructuring view: a self-defeating policy?

As we described above, in the context of demergers by listed companies, what the ATO says, goes. No ruling means, in the ordinary course, no demerger. But the ATO's conclusion that demergers followed by subsequent acquisitions or specific sale facilities are ineligible is strangely self-defeating. The view is not limited to acquisitions that are eligible for scrip for scrip – it applies equally to cash acquisitions. So, where the ATO rules that demerger relief is unavailable, the practical upshot is that the demerger won't go ahead and so the acquisition won't go ahead. The tax that the ATO would otherwise collect on the sale of shares in the demerged entity or demerger group isn't payable.

It's also a policy that favours commercial uncertainty above certainty. A demerger followed by an acquisition that has been approved by shareholders under a scheme of arrangement fails the test. But an acquisition that occurs a short time after the demerger – where the demerger group has a reasonable hope or expectation that it will be acquired – could be OK (but, on the ATO's approach, who really knows?). Certainly, an unplanned acquisition that occurs a short time after the demerger with the precise same economic effects for the shareholders is OK. Substantially same economic outcome, materially different result. Commercial randomness has never been more appealing.

8 What can we learn from other common law countries?

8.1 What do we need to learn?

As we argue above, there are good reasons why if Parliament approves, as a policy matter, the ATO's view on demergers (which we would disfavour), it should amend Division 125. We summarise in this section the foreign sources from which it may borrow. For example, it might borrow from the US regulations that create statutory presumptions about when a transaction that occurs before or after a demerger is permissible and when it is not. Or it might look to Canada, which, in addressing the same issue, has adopted the UK so-called fiscal nullity jurisprudence about whether the demerger and related transaction are part of a 'series of transactions'.

But these sources are relevant for another reason – they reveal that the ATO's interpretation of restructuring draws on common integrity rules found in those countries (and this one). Of course, Parliament need not only look abroad. It might include a rule, as in stamp duty legislation providing relief for corporate reconstructions, that automatically revokes any exemption when there is a change of ownership of the group within a prescribed time period; or that conditions relief on there being a sole purpose of 'making internal adjustments to corporate arrangements'. Or, it could consider importing phrase like 'that together form or arise from, substantially one transaction or one series of transactions'[111] or 'one series of transactions'.[112] One more example: a demerger 'issued in pursuance of, or as part of an agreement or arrangement…that had the purpose'[113] of…fill in desired policy result.

8.2 UK

Recall that in the UK there are two different types of demerger which are based on two different sets of tax provisions (Section 4.1 above). Whether or not a post-acquisition demerger affects demerger relief may depend on whether the demerger is a capital reduction or exempt dividend demerger. Under the exempt dividend demerger rules, a scheme or arrangement does not qualify for relief when:

> the main purpose or one of the main purposes [of the 'scheme or arrangement' is] …
>
> (d) the acquisition by any person or persons, other than the members of the distributing company, of control of—
>
> (i) the distributing company,
>
> (ii) any other relevant company, or

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[111] Section 66ab of the now-repealed Stamp Duties Act 1923-1978 (SA), considered in *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 398.

[112] Section 73 of the Finance (1909-20) Act (UK), considered in Attorney-General v Cohen [1937] 1 KB 478.

[113] As in section 44(2D) of the ITAA 1936, considered in *Commissioner of Taxation v Lutovi Investments Proprietary Limited* (1978) 140 CLR 434.

> (iii) any company which belongs to the same group as the distributing company or any other relevant company…

It is likely, therefore, that when the demerger occurs immediately prior to the acquisition, and the acquisition is conditional on the demerger (or where the demerger is conditional on the acquisition), the relevant scheme or arrangement may have as one of its 'main purposes' the acquisition of the demerger or demerged group. If so, the demerger would have tax consequences for the shareholders (they would receive a taxable dividend).[114]

By contrast, under the current capital reduction demerger rules, it is generally expected that, with care, subsequent acquisitions should not invalidate demerger reliefs provided that the subsequent acquisition can be said to occur after the scheme of reconstruction has been completed. Generally, it is possible to view the scheme of reconstruction as ending once the shares in the demerged company are issued to the shareholders and subsequent transactions are therefore not part of the scheme of arrangement. Indeed, there is a specific provision that confirms that if shares in the demerged company are issued after the latest date on which shares in the demerged entity are issued, that issue of shares shall be disregarded for the purposes of the first and second conditions.[115]

8.3 United States

Under the US demerger rules, the reader may recall that a condition of demerger relief for the demerger group (not the shareholders) was satisfying a change of ownership condition – namely, one or more persons must not acquire, either directly or indirectly, stock representing a 50% or greater interest (by vote or value) in either Distributing or Controlled pursuant to a plan (or series of related transactions) that includes the distribution (Section 4.2 above)

Where the change of ownership condition is failed, Distributing ceases to be eligible for relief and would realise a gain on the distribution. Shareholders, however, are *not* affected by the failure of this condition. The effect of this condition therefore differs from the effect of a demerger not qualifying for relief under Division 125 – under the US rules, the failure is visited only on the demerger group, whereas in Australia the failure is visited on both the demerger group and the shareholders.

8.3.1 Key policy basis for change of ownership condition

The key reason for the change of ownership conditions appears to be a concern that corporate taxpayers would use the above tax-free distribution rules to separate wanted and unwanted businesses, and then sell the unwanted business without recognising corporate level gain. The House and Senate reports relating to the enactment of section 355(e) observed:

> The Committee believes that section 355 was intended to permit the tax-free division of existing business arrangements among existing shareholders. In cases in which it is intended that new shareholders will

[114] The capital gains tax consequences for the company are not necessarily affected. The demerger company can therefore still qualify for relief on a direct or indirect dividend demerger.
[115] Paragraph 7.

> acquire ownership of a business in connection with a spin-off, the transaction more closely resembles a corporate-level disposition of the portion of the business that is acquired.

An example of the potential abuse is below:

> **Example**
>
> Parent Company (**P**) owns all the stock of Subsidiary 1 (**S1**), and S1 operates the Wanted business as well as owns all the stock of Subsidiary 2 (**S2**), which operates the Unwanted business. P's cost base (or 'basis', in US tax parlance) in S1's stock is $45, S1's cost base (or 'inside asset basis', in US tax parlance) in the assets of its Wanted business is $45, the value of the Wanted business is $50, and the value of S1's stock (including the value of S2) is $150. S1's cost base or basis in the S2 stock is $0, the inside basis of S2's assets is $0, and the value of S2's stock is $100. If S1 were to sell the stock of S2 outright, S1 would recognize a total gain of $100.
>
> Instead, S1 distributes the S2 stock to P in a transaction that qualifies for tax-free treatment under section 355. P's basis in the stock of S1 is $15 ($50/$150 times the $45 stock basis in the S1 stock) and the inside asset basis of S1 is $45; P's basis in the S2 stock is $30 ($100/$150 times the $45 basis in the S1 stock) and the inside asset basis of S2 is $0. After a period of time, P presumably can sell S2 for $100 without causing the prior distribution by S1 of S2 to be taxable, and recognize only $70 of gain (rather than $100).

8.3.2 What is a plan or series of related transactions?

The Internal Revenue Code does not define what a plan or series of related transactions is. In April 2005, the IRS published a final set of regulation to address this question.[116] These regulations run for some 17 pages. They contain a variety of safe harbours (including a 'super safe harbour') and factors that are relevant to characterising whether a transaction is part of the same plan or series of transactions as the demerger.

Where a safe harbour does not apply, whether a distribution and an acquisition are part of a plan is determined based on all the facts and circumstances.[117] Sound familiar? That assessment is made by considering a non-exclusive list of positive (i.e., non-plan) and negative (i.e., plan) factors.[118] The importance of any such factor in any given situation will depend on the particular case.

The super safe harbor rule for a post-distribution acquisition (other than an acquisition involving a public offering) states that such acquisition cannot be considered part of a plan or series of related transactions including a distribution unless there was an agreement, understanding, arrangement or substantial negotiations regarding the acquisition or a similar acquisition at some time during the two year period ending on the date of the distribution.[119]

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[116] Under the United States' doctrine of *Chevron* deference, courts defer to the IRS's interpretation of most such regulations where they are ambiguous. Australia does not have such a doctrine.

[117] Reg. § 1.355-7(b)(1).

[118] Reg. § 1.355-7(b)(3), (4).

[119] Reg. § 1.355-7(b)(2). 'Substantial negotiations' generally require discussions of significant economic terms by officers, directors, controlling shareholders, or other authorised representatives and the acquirer and Distributing or Controlled. Reg. § 1.355-7(h)(1)(iv).

For an acquisition that occurs after a distribution (other than an acquisition involving a public offering), the list of plan factors includes:

- there was an agreement, understanding, arrangement or substantial negotiations regarding such acquisition at some time during the two years ending on the date of the distribution;[120] and
- the distribution was motivated by a business purpose to facilitate such acquisition.[121]

The existence of an agreement, understanding, arrangement, or substantial negotiations does not preclude the taxpayer from establishing that the distribution and acquisition are not part of the plan. The regulations confirm:

> For example, in the case of an acquisition (other than involving a public offering) after a distribution, if the distribution was motivated in whole or substantial part by a corporate business purpose (within the meaning of § 1.355-2(b)) other than a business purpose to facilitate the acquisition or a similar acquisition of Distributing or Controlled ...and would have occurred at approximately the same time and in similar form regardless of whether the acquisition or a similar acquisition was effected ...the taxpayer may be able to establish that the distribution and the acquisition are not part of a plan.'[122]

For an acquisition that occurs after a distribution (other than an acquisition involving a public offering), the list of non-plan factors includes:

- an identifiable, unexpected change in market or business conditions occurring after the distribution resulted in the acquisition, which was otherwise unexpected at the time of the distribution;[123]
- the distribution was motivated in whole or substantial part by a corporate business purpose other than a business purpose to facilitate such an acquisition;[124] and
- the distribution would have occurred at approximately the same time and in similar form regardless of such an acquisition.[125]

For an acquisition that occurs after a distribution (other than an acquisition involving a public offering), the list of safe harbours include where:

- (a) the acquisition occurs more than six months after the distribution; (b) there was no agreement, understanding, arrangement or substantial negotiations concerning such an acquisition during the year before and six months after the distribution; and (c) the distribution was motivated in whole or substantial part by a corporate business purpose other than to facilitate an acquisition of the acquired corporation;[126]
- (a) the acquisition occurs more than six months after the distribution; (b) during the year preceding and six months following the distribution, there was no agreement, understanding, arrangement or substantial negotiations concerning the acquisition or a similar acquisition and no more than 25%

[120] Reg. § 1.355-7(b)(3)(i).
[121] Reg. § 1.355-7(b)(3)(v).
[122] Reg. § 1.355-7(b)(2).
[123] Reg. § 1.355-7(b)(4)(ii).
[124] Reg. § 1.355-7(b)(4)(v).
[125] Reg. §1.355-7(b)(4)(vi).
[126] Reg. §1.355-7(d)(1).

of the stock of the acquired corporation was acquired (or the subject of an agreement, etc.); and (c) the distribution was not motivated by a business purpose to facilitate the acquisition in question (or similar acquisition);[127] and

- (a) there was no agreement, understanding, or arrangement concerning the post-distribution acquisition or a similar acquisition at the time of the distribution; and (b) there was no agreement, understanding, arrangement or substantial negotiations concerning the acquisition or a similar acquisition within one year after the distribution.[128]

8.4 Canada

We focus in this part on the effect of a post-demerger acquisition on a butterfly reorganisation, since that provides equivalent relief to that under Division 125 of the ITAA 1997. Under the Canadian Income Tax Act, there is a complicated anti-avoidance rule that is designed to prevent Canadian resident shareholders from converting a taxable capital gain on the disposition of shares held in another corporation into a dividend that would not otherwise be taxable because it is an inter-corporate dividend.[129]

The application of this anti-avoidance rule to butterfly reorganisations is complex and involves exceptions and exceptions to those exceptions. In short, although the anti-avoidance rule would generally apply to butterfly reorganisations, there is a specific exemption for certain butterfly reorganisations (reorganisation exemption).[130] The purpose of that rule is to:

> mitigate the effect of the wide net cast by subsection 55(2) and give recognition to the notion that shareholder of a corporation should be able to divide the underlying corporate assets on a tax-deferred basis as a means of separating business activities.[131]

There is, however, an exception to the reorganisation exemption – call it the 'series of transactions' rule – where the dividend:

> was received as part of a series of transactions or events in which
>
> …
>
> (ii) control of a distributing corporation that made a distribution as part of the series or of a transferee corporation in relation to the distributing corporation was acquired (otherwise than as a result of a permitted acquisition, permitted exchange or permitted redemption in relation to the (distribution) by any person or group of persons…

There are other exceptions to the reorganisation exemption that also apply where dividends paid or acquisitions of property 'as part of the series of transactions or events' under which control or ownership of the demerging group or the demerged entity sufficiently change.

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[127] Reg. §1.355-7(d)(2).
[128] Reg. §1.355-7(d)(3).
[129] Section 55(2). *The Queen v Placer Dome Inc* 96 DTC 6562 at 6563.
[130] Section 55(3)(b).
[131] *Northern Hot Oil Services Limited v Her Majesty the Queen* [1997] 2 CTC 2543, citing 'The Butterfly Reorganisation: A Descriptive Analysis', Robert J Dart, FCA, and Howard J Kellough 1988 CR 20:2.

The Canadian Income Tax Act contains its own definition of 'series of transactions', which reads:[132]

> For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

Broadly, under Canadian jurisprudence, the phrase 'series of transactions', as used in the exemption to the reorganisation exemption, has been held to encompass two concepts:

- a common law concept: Canadian courts have interpreted it to adopt the House of Lords' jurisprudence on the so-called 'fiscal nullity' doctrine in cases like *Furniss v Dawson* [1984] AC 474 and *Craven v White* [1989] AC 459; and
- an extended statutory concept: even if there is not a series of transactions in the common law sense, there will be a series of transactions where there are related transactions or events completed 'in contemplation' of the series.

8.4.1 Common law concept

Under the English approach in cases like *Furniss v Dawson* [1984] AC 474 and *Craven v White* [1989] AC 459,[133] which has been adopted by the Canadian Supreme Court,[134] there are four main conditions:

- first, the series of transactions was, at the time when the intermediate transaction was entered into, preordained to produce a given result;
- second, that the transaction had no other purpose than tax mitigation;
- third, there was at that time no practical likelihood that the replanned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life; and
- fourth, the pre-ordained events did in fact take place.

As interpreted by the Canadian courts, pre-ordination means that:

> when the first transaction of the series is implemented, all essential features of the subsequent transaction or transactions are determined by persons who have the firm intention and ability to implement them. That is, there must be no practical likelihood that the subsequent transaction or transactions will not take place.[135]

[132] Section 248(10) of the Income Tax Act.

[133] Incidentally, the House of Lords (now the Supreme Court) has recently retreated from, or rationalised, the holdings in those cases. In *MacNiven (Her Majesty's Inspector of Taxes) v Westmoreland Investments Ltd* [2001] All ER (D) 93 (Feb), the House of Lords rejected the idea that those cases require courts to adopt an overarching principle of construction that interprets legislation to disregard commercially unnecessary steps under a tax avoidance scheme. Rather, the House of Lords anchored their reasoning in more traditional statutory interpretation principles, holding that the innovation of those decisions was to interpret certain tax concepts 'disposal' and 'loss' as referring to commercial concepts and therefore excluded paper-losses.

[134] *Canada Trustco v Canada* 2005 DTC 5523, approving *OSFC Holdings v Her Majesty the Queen* [2001] FCA 260 at [24].

[135] *OSFC Holdings v Her Majesty the Queen* [2001] FCA 260 at [24].

8.4.2 Statutory concept

Canadian courts have held there to be related transactions 'completed in contemplation of the series' where the parties to the transaction 'knew of the series, such that it could be said that they took into account when deciding to complete the transaction'.[136] The Canadian Supreme Court has expanded the test even further in two cases. In the first, the Supreme Court clarified that "'in contemplation' is read not in the sense of actual knowledge but in the broader sense of 'because of' or 'in relation to' the series."[137] In the second, it said:

> The text and context of s. 248(10) leave open when the contemplation of the series must take place. Nothing in the text specifies when the related transaction must be completed in relation to the series. **Specifically, nothing suggests that the related transaction must be completed in contemplation of a subsequent series**. The context of the provision is to expand the definition of a series which is an indication against a narrow [prospective] interpretation.[138] [emphasis added]

Accordingly, under this reading, the related transaction can occur **after** the common law series.[139] Under this jurisprudence on the extended meaning, a demerger that is followed by an acquisition is likely to trigger the series of transactions rule and therefore mean that the reorganisation exemption is not available even when the demerger is **not** conditional on the subsequent acquisition.

8.5 A hypothetical

Put yourself in a legislator's shoes. You want to facilitate demergers but you don't want them to be used to facilitate subsequent acquisitions, specific capital raisings or divisions of businesses. You have a few different options. You can introduce an explicit post or pre-ownership condition. You can use a broader, more amorphous test, asking whether the arrangements were part of a 'series of transactions' or a plan to change ownership, as in Canada or the US. Or you can borrow from other existing statutory phrases like 'scheme of reorganisation.' Do you pick one of these?

Now you're a different legislator – you're not bothered by subsequent acquisitions or specific capital raisings as a policy matter. How do you design the rules so that they don't stifle those transactions?

One of the hypothetical legislators uses the term 'restructuring' and (pardon the pun) nothing else. Which legislator does that sound like?

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[136] *OSFC Holdings v Her Majesty the Queen* [2001] FCA 260 at [24].
[137] *Canada Trustco v Canada* (2005) DTC 5523.
[138] *Copthorne Holdings Ltd v The Queen* (2007) TCC 481 per Rothstein J.
[139] The Meaning and Effect of the Copthorne Decision on 'Series of Transactions' for the Non-GAAR Provisions of the Income Tax Act, Robert Kepes, Robert Kopstein, and Corinne MacCarthy, Canadian Tax Foundation, 2012 Conference Report.

9 Will the road wind back to facilitation?

The Draft Determination has been in draft for just shy of a year. The time for comments closed long ago. And while it is possible that the ATO could reconsider its views in the Draft Determination, it seems unlikely. But the issues will resurface, in other contexts.

The ATO is expecting to publish additional guidance material on 'back to back' CGT roll-overs (when is not clear). Back to back rollovers have been a source of ATO consternation for a while. Although the ATO's views on demergers and acquisition schemes are not limited to schemes in which scrip for scrip rollover relief is available, part of the ATO's discomfort may arise from the fact that in many such schemes shareholders will be eligible for at least partial rollover relief and therefore in which there are back to back rollovers.

Separately, in February 2020, the Board of Taxation announced that it was conducting a review of the CGT roll-over rules, including demerger roll-over relief under Division 125. It has been tasked with rationalising and simplifying the existing CGT roll-overs and associated provisions to make them easier to use and interpret. The Board will be conducting consultation over the coming months, and it is expecting to release a discussion paper in June 2020 with a final report expected to be provided to the Government by 30 November 2020.

Annexure A: statutory uses and counterparts of 'restructuring'

Statutory reference	Description	Comments
ITAA 1997 **Section 83A-130** **(Subdivision 83A-C – Deferred inclusion of gain in assessable income – Takeovers and restructures)**	'ESS interests… can reasonably be regarded as having been replaced, wholly or partly, by ESS interests in one or more other companies as a result of a change (the restructure) in the ownership (including the structure of the ownership) of the old company or a demerger subsidiary of the old company'.	▪ This provision concerns the deferred taxing point for employee share schemes where there is a takeover or restructure. In this provision, 'restructures' are distinguished from 'an arrangement (the ***takeover***)…that is intended to result in a company (the old company) becoming a 100% subsidiary of another company'.
ITAA 1936 **Section 139GCC** **(Former Division 13A – Employee Share Schemes)** ***REPEALED***	'A 'restructure' of a company is a change in the ownership, or the structure of the ownership, of the company as a result of which some or all shares or rights held in the company under an employee share scheme immediately before the change: (a) are replaced; or (b) could reasonably be regarded as having been replaced; wholly or partly by shares or rights in one or more other companies.'	▪ This repealed provision concerned the definition of 'restructure' with respect to employee share schemes. Sections 139GCB and 139GCC distinguish between a '100% takeover' and a 'restructure'. In contrast to a 'restructure', a '100% takeover' is defined as 'an arrangement that is intended to result in the company becoming a 100% subsidiary of the other company, or of a holding company or subsidiary of the other company'. 100% Takeovers and Restructures are treated the same under Former Subdivision DA. ▪ The Explanatory Memorandum to the Act introducing these sections (the *Tax Laws Amendment (2004 Measures No. 7) Act 2005*) describes both takeover/mergers and other restructures (including demergers) as 'corporate restructures' generally' (p. 51).
ITAA 1997 **Section 124-855(1)**	'A roll-over may be available for a restructuring (a trust restructure) if: (a) a trust, or 2 or more trusts, (the transferor) dispose of all of their CGT assets to a company limited by shares (the transferee); and	▪ This provision concerns rollover relief for the disposal of CGT assets undertaken pursuant to a trust restructuring.

(Subdivision 124-N – Disposal of assets by trust to a company)	(b) CGT event E4 is capable of applying to all of the units and interests in the transferor; and (c) the requirements in section 124-860 are met.'	
***ITAA 1997* Sections 202-47(1)(b), 615-35(b) and 703-37(4)(a)** **(Subdivisions 204-C – Which distributions can be franked?, 615-A – Choosing to obtain rollovers and 703 – Consolidated groups and their members)**	**Section 202-47(1):** 'This section applies to an amount paid by a body corporate if: (a) the body corporate is a non-operating holding company within the meaning of the Financial Sector (Transfer and Restructure) Act 1999; and (b) a restructure instrument under Part 4A of that Act is in force in relation to the body…' **Section 615-35(1):** 'For the purposes of this Division, disregard any shares in the original entity that can be disregarded under subsection 703-37(4) if: (a) the interposed company is a non-operating holding company within the meaning of the *Financial Sector (Transfer and Restructure) Act 1999*; and (b) a restructure instrument under Part 4A of that Act is in force in relation to the interposed company; and…' **Section 703-37(4):** 'Disregard a share in the preference-share issuing body if: (a) a restructure instrument under Part 4A of the Financial Sector (Transfer and Restructure) Act 1999 is in force in relation to a non-operating holding company within the meaning of that Act…'	▪ These provisions concern ADI restructures. Whether a restructure has occurred depends on whether a restructure instrument under Part 4A of the *Financial Sector (Transfer and Restructure) Act 1999* is in force in relation to the body. ▪ The Explanatory Memoranda to these provisions do not contain substantive guidance on what constitutes a restructure outside the context of a transaction deemed to be such under the *Financial Sector (Transfer and Restructure) Act 1999.*

***ITAA 1997* Section 328-430(1)(a) and 328-435** **(Subdivision 328-G – Restructures of Small Businesses)**	**Section 328-430(1):** 'A roll-over under this Subdivision is available in relation to an asset that, under a transaction, an entity (the transferor) transfers to one or more other entities (transferees) if: (a) the transaction is, or is a part of, a <u>genuine restructure</u> of an ongoing business…' **Section 328-435:** 'For the purposes of paragraph 328-430(1)(a) (but without limiting that paragraph), a transaction is, or is a part of, a <u>genuine restructure</u> of an ongoing business if, in the 3 year period after the transaction takes effect: (a) there is no change in ultimate economic ownership of any of the significant assets of the business (other than trading stock) that were transferred under the transaction; and (b) those significant assets continue to be active assets; and (c) there is no significant or material use of those significant assets for private purposes.'	▪ These provisions concern small business restructures. To qualify for a roll-over relief in relation to an asset that is transferred to one or more entities, the transaction must be part of <u>a genuine restructuring of an ongoing business.</u> ▪ The Explanatory Memorandum adopts a general, expansive view of restructuring. The Explanatory Memorandum states that 'small businesses may operate as sole traders, partnerships, trusts, companies or any combination of these…The most appropriate structure for a small business may change over time, or a new small business may choose an initial legal structure that it later finds to be inappropriate' (p. 5). The Explanatory Memorandum notes that a small business may then need to restructure its operations into one of the other structures listed to develop and grow.
***ITAA 1997* Section 124-1045(1)(d)(ii)** **(Subdivision 124-Q – exchange of stapled ownership interests for ownership interests in a unit trust)**	'There is a roll-over if:… (d) under a <u>scheme for reorganising</u> the affairs of the relevant stapled entities, you and the other entities that own the ownership interests in the stapled entities (together the exchanging members)…'	▪ This provision concerns rollover relief for an exchange of stapled ownership interests for units in a unit trust (for example, when a public unit trust is interposed between holders of interests in a stapled group and the entities in that group). One of the requirements for roll-over relief is that the exchanging holders stop owning the former interests and acquire ownership interests in the unit trust (and nothing else) 'under a <u>scheme for reorganising</u> the affairs of the relevant stapled entities'. ▪ The Explanatory Memorandum states that 'A scheme for reorganising the affairs of the relevant stapled entities would be any arrangement or any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise. When the scheme is completed will be a factual matter, that is, when all the steps of the scheme have been done' [8.33].

***ITAA 1997* Section 615-5(1)(c)** **(Subdivision 615-A – Rollovers for Business Structures, Choosing to Obtain Rollovers)**	'You can choose to obtain a roll-over if:… (c) under a scheme for reorganising its affairs, the exchanging members dispose of all their shares or units in it to a company (the interposed company) in exchange for shares in the interposed company (and nothing else)'.	▪ This provision concerns disposing of interests in one entity for shares in another company. The extracted passage is one of the conditions which must be satisfied. ▪ The Explanatory Memoranda to the current and predecessor provisions do not contain substantive guidance on what constitutes a scheme for reorganising.
***ITAA 1997* Section 615-10(1)(e)** **(Subdivision 615-A – Rollovers for Business Structures, Choosing to Obtain Rollovers)**	'You can choose to obtain a roll-over if you are a member of a company or a unit trust (the original entity), and under a scheme for reorganising its affairs…'This provision concerns redeeming or cancelling interests in one entity for shares in another company. The provision requires that several conditions be met 'under a scheme for reorganising its affairs'.	▪ This provision concerns redeeming or cancelling interests in one entity for shares in another company. The provision requires that several conditions be met 'under a scheme for reorganising its affairs'. ▪ The Explanatory Memoranda to the current and predecessor provisions do not contain substantive guidance on what constitutes a scheme for reorganising.
***Corporations Act 2001* Section 588GA(2)(e)** **(Part 5.7B – Recovering Property or Compensation for the Benefit of Creditors of an Insolvent Company)**	'For the purposes of (but without limiting) subsection (1), in working out whether a course of action is reasonably likely to lead to a better outcome for the company, regard may be had to whether the person:… (e) is developing or implementing a plan for restructuring the company to improve its financial position.'	▪ This provision provides a safe harbour to directors who may engaged in insolvent trading while actively seeking to turnaround a business. In determining whether a person has started developing one or more courses of action that are reasonably likely to lead to a better outcome for the company, regard may be had to whether the person is 'developing or implementing a plan for restructuring the company to improve its financial position'. ▪ The Explanatory Memorandum adopts wide view of restructuring. The provisions aim to assist companies that are 'restructuring under administration, a compromise or arrangement aimed at avoiding being wound up in insolvent or when a managing controller has been appointed over all or substantially all of the property of the company' (p. 3). Otherwise, the term restructuring is used generally without specifically defining what constitutes a restructure.

Corporations Act 2001 **Sections 9** **(Part 1.2, Division 1 – Interpretation, General)**	'Arrangement , in Part 5.1, includes a reorganisation of the share capital of a body corporate by the consolidation of shares of different classes, by the division of shares into shares of different classes, or by both of those methods'. Part 5.1 concerns 'Arrangements and Reconstructions'.	▪ This provision contains definitions for the *Corporations Act 2001* (Cth). This definition relates to Part 5.1, which concerns 'Arrangements and Reconstructions'. ▪ The Explanatory Memorandum to the provision does not contain substantive guidance on the legislative intent behind this provision or the meaning of reorganisation more generally.
Duties Act 1997 **(NSW) Section 284B** **(Chapter 11, Part 2 – Restructuring a unit trust for land tax purposes)**	The provision is titled 'Restructuring a unit trust for land tax purposes' but does not contain the term restructure within the text of the provision.	▪ This provision provides a stamp duty exemption for instruments executed between 6 June 2006 and 1 January 2008 that vary the trust deed of a fixed trust to allow the trust to qualify as a fixed trust for the purposes of the *Land Tax Management Act 1956* (NSW) but do not change the entitlements of unitholders. ▪ The Explanatory Memorandum to this provision does not contain substantive guidance on what constitutes a restructure outside the context of the *Land Tax Management Act 1956* (NSW).

Annexure B: statutory uses and counterparts of 'nothing else'

Statutory reference	Description	Comments
Section 125-70(1)(c) (Division 125 – demerger tax relief)	'acquires a new interest and nothing else'	Introduced in 2002 (no predecessor provision)
Sections 124-240(1)(c) and 124-245(1)(c) (Subdivision 124-E – exchange of shares or units)	'issues you with new shares/units (and you receive nothing else) in substitution for the original shares/units'	Introduced in 1998 (predecessor provisions were sections 160ZZP and 160ZZPAA of the ITAA 1936)
Sections 124-295(5) and 124-300(5) (Subdivision 124-F – exchange or rights or options)	'you must receive nothing else in substitution for the original rights or original option'	Introduced in 1998 (predecessor provisions were sections 160ZZPAB and 160ZZPAC respectively of the ITAA 1936)
Section 124-520(2)(a) (Subdivision 124-I – change of incorporation)	'as a result of the conversion you are issued with shares in the company and you receive nothing else'	Introduced in 1998 (predecessor provision was section 160ZZPH of the ITAA 1936)
Section 124-1045(1)(d)(ii) (Subdivision 124-Q – exchange of stapled ownership interests for ownership interests in a unit trust)	'acquire ownership interests in a new unit trust (the interposed trust) and nothing else…'	Introduced in 2007 (no predecessor provision)
Section 615-5(1)(c) (Subdivision 615-A – Rollovers for Business Structures, Choosing to Obtain Rollovers)	'in exchange for shares in the interposed company (and nothing else)'	Introduced in 2014 (predecessor provisions were sections 124-360 and 124-445 of the ITAA 1997)
Section 615-10(1)(e) (Subdivision 615-A – Rollovers for Business Structures, Choosing to Obtain Rollovers)	'receives shares (and nothing else) in the interposed company'	Introduced in 2014 (predecessor provisions were sections 124-370 and 124-455 of the ITAA 1997)
Section 122-20(1) (Subdivision 122A - Disposal or creation of assets by an individual or trustee to a wholly-owned company)	'The consideration you receive for the trigger event happening must be only shares in the company…' or, in a disposal case, shares and an undertaking to discharge one or more liabilities.'	Introduced in 1998 (predecessor provision was 160ZZN of the ITAA 1936)

Section 122-30(1) (Subdivision 122B - Disposal or creation of assets by partners to a wholly-owned company)	'The consideration the partners receive must be only shares in the company… or, in a disposal case, shares and an undertaking to discharge one or more liabilities.'	Introduced in 1998 (predecessor provision was 160ZZNA of the ITAA 1936)
***Section 124-360(1)(c) (Subdivision 124-G – Exchange of shares in one company for shares in another company)**	'in exchange for shares in the interposed company (and nothing else)'	Introduced in 1998 (predecessor provision was 160ZZPA of the ITAA 1936)
*** Section 124-445(c) (Subdivision 124-H – Exchange of units in a unit trust for shares in a company)**	'in exchange for shares in the company (and nothing else)'	Introduced in 1998 (predecessor provision was 160ZZPA of the ITAA 1936)
*** Section 124-370(1)(e) (Subdivision 124-G – Exchange of shares in one company for shares in another company)**	'each exchanging member receives shares (and nothing else) in the interposed company'	Introduced in 1998 (predecessor provision was 160ZZPB of the ITAA 1936)
*** Section 124-455(1)(e) (Subdivision 124-H – Exchange of units in a unit trust for shares in a company)**	'each exchanging member receives shares (and nothing else) in the company'	Introduced in 1998 (predecessor provision was 160ZZPB of the ITAA 1936)

Annexure C: Demerger/Other Transactions

Year	Name of Transaction	Description of Transaction	Demerger Relief	Comments
2020	Blackwall Limited and WOTSO Limited	1) Demerger of WOTSO Limited by Blackwall Limited 2) Capital raising by WOTSO Limited	✓	See discussion above at section 6.3
2018	Eneabba Gas Limited – UIL	1) Acquisition of redeemable preference shares in UIL by Eneabba in exchange for shares in Eneabba Gas Limited subsidiaries 2) Demerger of UIL by Eneabba Gas	✕	Demerger relief not available because the demerged entity, UIL, was not a subsidiary of Eneabba when the restructuring commenced
2017	Todd River Resources Limited and TNG Limited	1) IPO of Todd River Resources 2) Demerger of Todd River Resources Limited by TNG Limited	✓	The demerger was conditional on the IPO
2016	NZME Limited and APN News & Media Limited	1) Capital raising by APN 2) Demerger of NZME Limited by APN News & Media Limited	✓	The demerger and the capital raising were independent of each other
	Graphex Mining Limited and Indiana Resources Limited	1) Demerger of Graphex Mining Limited by Indiana Resources Limited 2) IPO of shares in Graphex Mining Limited	✓	The demerger was conditional on the IPO
2014	Jacana Minerals Limited and Syrah Resources Limited	1) Demerger of Jacana Minerals Limited by Syrah Resources Limited 2) IPO of shares in Jacana Minerals Limited	✓	
	Enterprise Uranium Ltd and Enterprise Metals Limited	1) Demerger of Enterprise Uranium Ltd by Enterprise Metals Limited 2) IPO of shares in Enterprise Uranium Ltd	✓	
2013	Bondi – World Titanium Resources	1) Demerger of Lyell Resources Limited by Bondi Mining Ltd 2) Bondi Mining Ltd acquisition of World Titanium Resources Ltd	✓	The acquisition was conditional on the demerger. Note, in this scheme, the head entity (Bondi Mining) later acquired a third entity (World Titanium Resources)

2010	Mineral Deposits Limited and Teranga Gold Corporation	1) Demerger of Teranga Gold Corporation by Mineral Deposits Limited 2) IPO of shares in Teranga Gold Corporation	✓	The demerger was conditional on the IPO
	White Rock Minerals Limited and Rex Minerals Limited	1) Demerger of White Rock Minerals Limited by Rex Minerals Limited 2) IPO of shares in White Rock Minerals Limited	✓	
	Catalpa Resources Ltd – Lion Selection Ltd	1) Demerger of Lion Selection Group Ltd (LSG) by Lion Selection Ltd (Note: Lion Selection Ltd shareholders had the choice to dispose of their LSG shares under a 'Matching Facility') 2) Payment of a cash distribution of 10 cents per share 3) Catalpa Resources Ltd acquisition of Lion Selection Ltd	✗	Scrip for scrip rollover relief was available. The demerger was not conditional on the acquisition but the acquisition was conditional on the demerger
2010	Intoll International Limited and Macquarie Atlas Roads International Limited	1) Demerger of Macquarie Atlas Roads International Limited (MQA Bermuda) by Intoll International Limited	✓	
	Intoll Trust (II) demerger and Macquarie Atlas Roads Limited	1) Demerger of Macquarie Atlas Roads Limited (MQA Australia) by Intoll Trust (II) 2) Special distribution of 10c per unit paid to unit holders in the trust.	✗	The demerger and special distribution were both parts of the same scheme of arrangement
2008	Uramet Minerals Limited and Elkedra Diamonds NL	1) Capital raising and IPO of shares in Uramet Minerals Limited 2) Demerger of Uramet Minerals Limited by Elkedra Diamonds NL 3) Acquisition of Elkedra Diamonds by Vaaldiam	✓	The demerger was conditional on the IPO and the acquisition of Elkedra Diamonds by Vaaldiam. The acquisition was not conditional on the demerger
	Asciano Ltd and Toll Holdings Ltd	1) Establishment of Asciano Trust 2) Demerger of Asciano Ltd by Toll Holdings Ltd 3) Fully franked dividend and return of capital paid to shareholders in Toll Holdings compulsorily applied to units in Asciano Finance Trust	✓	The demerger, unit scheme and share scheme (stapling) were interconditional The establishment of Asciano Trust and the demerger of Asciano Ltd were undertaken under separate schemes of arrangement
	Autogen Research Pty Ltd and ChemGenex Pharmaceuticals Ltd	1) Demerger of Autogen Research Pty Ltd by ChemGenex Pharmaceuticals Ltd 2) ChemGenex to reduce share capital	✓	

		3) Autogen to raise funds through public offering of shares, private share placement and strategic partnerships 4) Autogen to acquire another target company		
	Mercury Mobility Ltd by Cellnet Group Ltd	1) Demerger of Mercury Mobility Ltd by Cellnet Group Ltd 2) IPO of shares in Mercury Mobility Ltd	✓	The demerger was not conditional on the IPO. The ATO note at paragraph 38 of CR 2008/33: 'The capital raising undertaken by Mercury after the demerger does not cause an entity that owned an original ownership interest in the head entity of the demerger group to acquire something else under the restructuring of the demerger group other than its new interest for the purpose of paragraph 125-70(1)(c) of the ITAA 1997.'
	Iron Road Limited and Adelaide Resources Limited	1) IPO of shares in Iron Road Limited 2) Demerger of Iron Road Limited by Adelaide Resources Limited	✓	
2007	Pacific Mines Limited and Summit Resources Limited	1) Demerger of Pacific Mines Limited by Summit Resources Limited 2) IPO of shares in Pacific Mines Limited	✓	Demerger conditional on ASX listing
	Publishing and Broadcasting Limited – Crown Limited	1) Acquisition of PBL by Crown via scrip for scrip 2) Capital reduction of Crown and demerger of PBH as Consolidated Media Holdings Limited	✗	Both transactions were interconditional. Scrip for scrip relief was allowed.
2006	Sydney Roads Trust/Sydney Roads Ltd and MIT1/MIT2/MIGIL	1) IPO of Sydney Roads Trust and Sydney Roads Limited 2) Demerger of SRT/SRL from MIT1/MIT2/MIGIL	✓	
2004	Centro Property Trust and Centro Property Ltd	1) Demerger of PRX by Centro Property Trust (CPT) to unitholders in CPT 2) Disposal by CPT of PPM shares to shareholders of CPL 3) PXR acquires CPT units and PMM acquires CPL shares	✓	The demerger of PRX qualified for demerger relief despite the units in CPT being acquired by PXR