



Law Council
OF AUSTRALIA

Business Law Section

Division Head
Law Design Practice
The Treasury
Langton Crescent
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Via email: lawdesign@treasury.gov.au

22 April 2016

Dear Sir or Madam,

National Innovation and Science Agenda – Increasing Access to Company Losses

The Taxation Committee of the Business Law Section of the Law Council of Australia ("**Committee**") is grateful for the opportunity to make a submission to Treasury in respect of *Tax and Superannuation Laws Amendment (2016 National Innovation and Science Agenda) Bill 2016: Access to Losses ("Losses ED")*.

The Committee supports the objectives of the Losses ED, as it will aid Australian innovation companies in obtaining valuable funding and meaningful assistance from investors.

Subject to the comments and clarification sought below, the Committee supports the proposed amendments to the tax loss rules. The Committee hopes that a concise and pragmatic approach is taken in drafting the final legislation to ensure that the proposed rules work as intended.

Similar business test

The current 'same business test' is to be replaced by a 'business continuity test'. The proposed 'business continuity test' references a number of features:

- The extent to which the assets (including goodwill) that are used in the current business to generate assessable income throughout the business continuity test period were also used in its former business;
- The extent to which the sources from which its current business generated assessable income throughout the business continuity test period were also the sources from which its former business generated assessable income; and
- Whether any changes to its former business are changes that would reasonably be expected to have been made to a similarly placed business.

Having regard to the requirements and the language used, it is possible that the business continuity test in its application would be as restrictive as the current same business test. In particular, the second requirement assesses the extent to which the sources of income generated in the current business are the same sources from which the former business generated assessable income. The concept of source of income is quite broad. It can

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encompass the type of customers, or as explained in the Exposure Draft Explanatory Memorandum (**EM**), the activities or operations. It is also possible that the Commissioner of Taxation may place a different interpretation on the scope of the requirement. The example provided at paragraph 1.27 of the EM is not helpful in this regard. In the example, it is concluded that an Italian restaurant does not generate assessable income from similar sources to a fish & chips shop. Both businesses provide cooked food to customers from the same geographic place. Is it the fact that the taxpayer moved from a dine in focused offering to a takeaway focus the issue or is it a mere change in cuisine that means the business is no longer similar? Similarly in Example 1.1, what would the consequence be if Furnish Art's sales from specialised mattresses accounted for 25%, 50% or 51% of its total sales?

Reasonable minds may reach different conclusions regarding this requirement. We would recommend that further clarification or guidance be provided in relation to this requirement.

The third requirement is whether any changes to the former business are changes that would *reasonably be expected* to have been made to a similarly placed business. It is unclear why the hypothetical assessment is considered necessary. It raises further questions such as how this hypothetical scenario would be benchmarked, would the taxpayer need to undertake a search for its loss making competitors in the same industry as a point of reference. If this is not what the requirement is asking, who and how would this assessment be made?

In our view, the examples provided in relation to this requirement do not necessarily elicit these issues. We recommend that further consideration be given to the scope of this requirement. We would be happy to be involved in assisting with developing this further.

Negative requirements

We note that the proposed section 165-211(3) replicates the negative requirements in section 165-210(2) and uses the same wording such as “a business it had not previously carried on” or “a transaction of a kind that it had not previously entered into”.

Given that the ‘business continuity test’ is intended to refer to *similar* businesses we recommend that the proposed section 165-211(3) uses consistent language as in sections 165-211(1) and 165-211(2).

Availability to other types of trusts

Currently, the same business test is only available to companies and listed widely held trusts for a second bite at the losses cherry.

It should be noted that many start-up businesses may not be companies or listed widely held trusts. They may be established as unlisted trusts (widely held or wholesale). For example, many businesses in the fintech industry are established as trusts that are not listed. Given that the Losses ED is part of a package of measures designed to encourage and reward innovation, we recommend that consideration be paid to whether the same concession should be extended to unlisted trusts.

Further submissions

Due to the time limits imposed for lodgement of submissions, the Committee's comments have been limited to those which were immediately apparent. The Committee would be happy to provide further comment if further time is made available and to consult further on any drafting amendments to the Losses ED.

If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Adrian Varrasso, on 03-8608 2483 or via email: adrian.varrasso@minterellison.com

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Teresa Dyson', written in a cursive style.

Teresa Dyson, Chair
Business Law Section