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Inhibitors for business structuring for Australian small and medium enterprises

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Abstract

The interaction of the tax system with business entities was an area of academic research for Professor C John Taylor, especially the tax treatment of companies and trusts, and the influence of the tax impost on these. This article reports a study of 48 advisors in the small and medium enterprise (SME) sector and explores the factors that may inhibit SMEs from structuring, as well as the techniques used to reduce these inhibitors. The results demonstrate that advisors perceive transfer costs of capital gains tax and stamp duty as major inhibitors, but they are able to use mechanisms to reduce them.

Keywords: business structures, small and medium enterprises (SMEs), restructuring, small business restructure roll-over, choice, barriers, inhibitor

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1. INTRODUCTION

Professor C John Taylor was passionate about history and the lessons learnt from the past. This included his extensive work on treaty negotiations,[1] as well as how governments have struggled to appropriately tax different business entities[2] and/or their members.[3] This consideration of the taxation of business entities is critical, as the utilisation of business entities can be an important way to facilitate economic activity.[4] Over the decades, governments have tried to facilitate commerce through regulating business entities to provide a consistency of legal frameworks,[5] including how they are taxed. In Australia there is a lack of tax neutrality, as a dividend imputation system applies for corporations, partial tax flow-through for trusts, and full tax flow-through for general partnerships and sole traders. A business may also need to change its business structure for tax and other reasons during its life cycle. Factors which inhibit a business from changing business structure may undermine economic activity.

Taylor analysed the interaction of foreign source income rules and Australia's company imputation system.[6] Through this research he considered how the lack of tax neutrality would increase the cost of capital for a resident shareholder when the dividend income was derived by a foreign subsidiary. Taylor noted how the 'current policy of national neutrality at the underlying resident shareholder level would be inhibiting the international expansion of Australian companies'.[7] With Kayis-Kumar, Taylor examined the use of trusts in the Australian economy, including tracing some of the history of taxing trusts.[8] They argued for trustees to be taxed on accumulated trust income, and for any distributions to beneficiaries to be deductible to the trust, with such distributions assessable to the beneficiary; but with a credit for any tax paid by the trustee on accumulated income.[9] In another article, Taylor considered franking credits

[1] For example, C John Taylor, 'The Negotiation and Drafting of the UK-Australia Double Taxation Treaty of 1946' [2009] (2) *British Tax Review* 201.

[2] For this article the following terms are used: (a) 'Entity': describes the legal entity recognised at law, such as a company; note that sometimes the tax law will recognise something as a taxpayer entity (such as a partnership or trust), even though technically it may not be a separate legal entity; (b) 'Business': describes in a broad sense the economic activity of the business being conducted; there may be a number of entities used in a single business; and (c) 'Business Structure': describes the entities used in conducting a business; it may consist of just one entity (such as a sole trader or a company), or a combination of entities (such as a trustee of a trust holding the shares in a trading company).

[3] For example, C John Taylor, 'Development of and Prospects for Corporate-Shareholder Taxation in Australia' (2003) 57 (8) *Bulletin for International Taxation* 346.

[4] Brett Freudenberg, 'Lifting the Veil on Foreign Tax Flow-Through Companies: Could Australian Closely Held Business Benefit from Their Governance Regimes?' (2013) 28(3) *Australian Journal of Corporate Law* 201.

[5] This can be known as networking benefits. See ibid 214: 'This refers to the idea that enacting laws to govern business forms can reduce transaction costs. That is, as case law considering the standard set of rules develops, there is understanding and improved certainty about how the provisions will be applied in the future. These networking benefits extend to third parties, such as trade creditors, dealing with the business form as they have improved understanding about the governance of the business form'.

[6] C John Taylor, 'Alternative Treatments for Foreign Source Income in Australia's Dividend Imputation System' (2005) 20(2) *Australian Tax Forum* 189.

[7] Ibid 263.

[8] Ann Kayis-Kumar and C John Taylor, 'The Application of Capital Gains Tax to Trusts: Conceptual, Technical and Practical Issues, and a Proposal for Reform' (Paper presented at the 31st Australasian Tax Teachers' Association Conference, Perth, 16-18 January 2019).

[9] Ibid.

flowing through partnerships and trusts; and the problems that could arise with this.[10] To try to improve this, one of his arguments was for a proportionate approach.[11] Taylor also analysed Australia's imputation system and evaluated proposals for foreign source income in terms of international tax policy criteria.[12] Taylor observed that 'corporate-shareholder taxation … is more complex than it needs to be for those Australian companies which do not have nonresident shareholders'.[13] In that article Taylor considered how the international tax environment has led to the complexity of the domestic tax system, which in part can be due to a legacy of the choices made in the development of Australia's dividend imputation system.[14] Taylor observed that the resulting complex tax system 'arguably distorts … constructive business activity'.[15] Research has demonstrated that Taylor's concern about the tax system potentially influencing business structure choice is well founded.[16]

From an advisor perspective, an important task is the selection of a business structure that can assist clients with a small and medium enterprise (SME)[17] to realise the commercial potential of their business. This business structure choice can have significant implications in terms of debt and equity finance, legal obligations, asset protection, and taxation. In Australia the popular business entities are companies and trusts (especially discretionary trusts).[18] Taylor's research delved deeply into how these two structures and/or their members are taxed.[19]

If one considers the business life cycle[20] from inception to survival, growth, expansion, and maturity, the business's needs and attributes are likely to alter. This can mean the choice of business structure may arise more than once in the business' life cycle, and it may be reassessed by advisors and their clients at various stages. However, any change in business structure might be difficult. This article reports, from the advisors' perspective, the inhibitors for SMEs to change business structures. This is an important consideration, as it is of concern that SMEs could be trapped in a business structure that

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[10] C John Taylor, 'Problems with Franking Credits Flowing Through Partnerships and Trusts: The 2004 Amendments and a Simpler Alternative' (2005) 34(3) *Australian Tax Review* 154 ('Problems with Franking Credits').
[11] Ibid 179.
[12] C John Taylor, 'Dividend Imputation and Distributions of Non Portfolio Foreign Source Income: An Evaluation of Some Alternative Approaches' (2005) 1(2) *Journal of the Australasian Tax Teachers Association* 192.
[13] C John Taylor, 'An Old Tax is a Simple Tax: A Back to the Future Suggestion for the Simplification of Australian Corporate-Shareholder Taxation' (2006) 2(1) *Journal of the Australasian Tax Teachers Association* 30, 32.
[14] Ibid 45.
[15] Ibid 56.
[16] Barbara Trad and Brett Freudenberg, 'All Things Being Equal: Small Business Structure Choice' (2017) 12(1) *Journal of the Australasian Tax Teachers Association* 136; Brett Freudenberg, 'Tax on My Mind: Advisors' Recommendations for Choice of Business Form' (2013) 42(1) *Australian Tax Review* 33.
[17] This research uses a definition that is based on a combination of the Australian Taxation Office and Australian Bureau of Statistics characteristics. Specifically, an SME business is defined as a business with an annual turnover of less than AUD 100 million, and less than 200 equivalent full-time employees. See Australian Taxation Office, *Taxation Statistics 2018-19* (2021) Table 1 and Australian Bureau of Statistics, *Counts of Australian Businesses, Including Entries and Exits, July 2017 to June 2021* (Cat No 8165.0, 2021) Table 10.
[18] Australian Taxation Office, above n 17.
[19] See, for example, Taylor, 'Problems with Franking Credits', above n 10.
[20] Mel Scott and Richard Bruce, 'Five Stages of Growth in Small Business' (1987) 20(3) *Long Range Planning* 45.

is no longer considered appropriate for their business, thereby not having the opportunity to realise their full economic potential.

The study reported in this article is focused on SMEs because they are important to the economy and the social fabric of society. In member countries of the Organisation for Economic Co-operation and Development (OECD), SMEs are the major form of entrepreneurship: on average they account for approximately 99 per cent of all businesses and 70 per cent of employment.[21] SMEs contribute to value creation, generating more than 50 per cent of value added to the economy.[22] In Australia, SMEs represent over 99 per cent of all businesses and they significantly contribute to the Australian economy in terms of employment (67 per cent) and Gross Domestic Product (GDP) (57 per cent).[23] Furthermore, SMEs play an important part in the fabric of commerce and society, as they can contribute to larger businesses by being customers or suppliers.[24] Additionally, SMEs may create employment opportunities across geographic areas and sectors,[25] and provide opportunities for skill development for low-skilled workers.[26]

Recent research has revealed advisors' perceptions that most SMEs had not adopted an appropriate business structure due to an absence of advice at the inception stage of the business.[27] Even if an appropriate structure had been initially adopted, given a change in the business's circumstances, such as growth, it may be desirable to alter the business structure. Australian policy-makers have recognised this and have introduced a number of concessions to facilitate restructuring, such as the *Small Business Restructure Roll-Over* (SBRR) tax relief.[28] However, concerns have been raised about whether the SBRR provides adequate restructure relief,[29] especially as it appears not to apply when an established business, a sole trader, wants to transfer to a trading company with shares held by a discretionary trust. Research has provided empirical evidence that such a structure can be the most recommended structure for SMEs.[30] It is important to appreciate what factors may be inhibiting the adoption of advisors' preferred business structures for SMEs, and it is this question which motivates the research reported in this article.

The research reported in this article is a study of 48 advisors who were provided with one of 12 business scenarios to recommend a business structure for either an established or new business. After recommending their business structure(s), advisors were then questioned about the inhibitors to the adoption of their recommended structure. The

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[21] OECD, *Entrepreneurship at a Glance 2017* (OECD Publishing, 2017).
[22] Ibid.
[23] Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Affordable Capital for SME Growth* (2018).
[24] Greg Tanzer, 'What Is ASIC Doing to Help Small Business?' (Speech to the Council of Small Business Australia (COSBOA) Conference, Sydney, 2015).
[25] OECD, 'Enhancing the Contributions of SMEs in a Global and Digitalised Economy', C/MIN2017(8) (29 May 2017).
[26] Ibid.
[27] Barbara Trad, Brett Freudenberg and John Minas, 'Small Business Restructure Roll-Over: In Need of Its Own Restructure?' (2022) 37(1) *Australian Tax Forum* 105 ('Small Business Restructure Roll-Over').
[28] Ibid. *Income Tax Assessment Act 1997* (Cth) Sub-div 328-G (ITAA 1997).
[29] Trad et al, 'Small Business Restructure Roll-Over', above n 27.
[30] Barbara Trad, John Minas, Brett Freudenberg and Craig Cameron, 'Choice of Australian Business Structures in the SME Sector: What Do Advisors Recommend?' (2023) 52(3) *Australian Tax Review* 177 ('Choice of Australian Business Structures').

results demonstrate a difference between the factors that impact an established business compared to a new business. For established businesses, transfer costs (such as capital gains tax (CGT) and stamp duty) are more frequently mentioned by advisors as inhibitors, whereas for new businesses, the more frequently mentioned inhibitors are establishment costs and client understanding. The second part of the results then analyses the techniques used by advisors to reduce these inhibitors. This further analysis demonstrates that advisors are using an array of different tax concessions to reduce the tax impost (sometimes with concessions not technically for restructuring) or alternatively the restructuring may be only partially implemented resulting in legacy issues. Through these results, policy recommendations are formulated to better facilitate structuring by SMEs.

Section 2 provides an outline of the business structures and the restructuring relief available for SMEs in Australia. Section 3 sets out the research methodology undertaken and the demographics of the advisors participating in this study, followed by the results in section 4. Through the analysis of the results, recommendations are proposed, and areas of possible future research are considered in section 5, before the conclusion in section 6.

2. STRUCTURING ISSUES

To gain a deeper understanding of what is known about business structure choice for Australian SMEs, the following section outlines the current understanding about businesses altering their structure.

2.1 Business structure choice

In Australia, SMEs may operate as sole traders, partnerships, trusts,[31] companies, or a combination of structures.[32] Until recently the understanding about what the considerations are when choosing a business structure in Australia was limited. The possible considerations that may influence the choice of business structure include tax,[33]

[31] Note that, unlike other jurisdictions, Australian businesses can utilise the trust for trading activities: Brett Freudenberg and Dale Boccabella, ‘Changing Use of Business Structures: Have University Business Law Teachers Failed to Reflect this in Their Teaching?’ (2014) 9(1) *Journal of the Australasian Tax Teachers Association* 180. Note also that, legally, the trust is not a separate legal entity.

[32] Brett Freudenberg, ‘Fact or Fiction? A Sustainable Tax Transparent Form for Closely Held Businesses in Australia’ (2009) 24(3) *Australian Tax Forum* 373.

[33] Trad and Freudenberg, above n 16, 142, have noted that ‘[n]umerous studies have demonstrated that there is a potential influence by tax arbitrages for taxpayers when considering the choice of a business structure. In the US, research by Scholes and Wolfson, and by Gordon and MacKie-Mason, has considered the effect on business structure choice due to the 1986 tax reforms’, citing Myron Scholes and Mark Wolfson, ‘Issues in the Theory of Optimal Capital Structure’ in Sudipto Bhattacharya and George M Constantinides (eds), *Theory of Valuation: Frontiers of Modern Financial Theory, Vol 1* (Rowman and Littlefield, 1989) 49; Roger H Gordon and Jeffrey MacKie-Mason, ‘Effects of the Tax Reform Act of 1986 on Corporate Financial Policy and Organizational Form’ (National Bureau of Economic Research Working Paper No 3222, 1990).

liability protection,[34] asset protection,[35] ability to facilitate finance, such as equity,[36] and compliance costs.[37] Other factors could encompass franchisor and supplier requirements. The prominence of these factors appears to vary, as factors mentioned at a 'high frequency' by advisors can include tax minimisation/tax rate, complexity and compliance costs, asset protection, separation of assets from business risk, income splitting/flexibility in distribution, the requirement for working capital/ability to retain profits, and small business concessions.[38] Less frequently mentioned factors can include succession planning/exiting the business, limited liability, and industry. The factors least mentioned were trends in structure over time and superannuation.[39] Consequently, advisors may consider that some of these factors are more important than others.

Nevertheless, business structure choice can be a difficult decision, even with the support of advisors. In part, this relates to the realisation that there may be no 'perfect' structure, as any decision requires the assessment of different advantages and disadvantages across business structures, and how business structure choice can impact on current and future circumstances. A recent study found that in all but one of the recommendations, a combination of business structures for the one business operation was proposed by advisors.[40] Nearly two-thirds of SME advisors recommended a trading company with shares held by a discretionary trust (referred to as a '*trading company with holding trust*').[41] Approximately one-fifth of advisors recommended a trading discretionary trust with a corporate trustee, whereby the discretionary trust operates the business (referred to as a '*trading trust*').[42] A tax consolidated group with the shares held by a discretionary trust was the third most recommended structure by just over one-tenth of advisors and

[34] Trad and Freudenberg, above n 16, have noted that, in a survey of small businesses, it appeared that asset protection and limited liability are the driving motivations for the choice of business structures, as their aggregated weighted score was 61. However, tax does appear to be a strong consideration. This is because tax characteristics were six of the top 10 factors (3rd, 4th, 6th, 7th, 8th and 9th), and when these weighted averages are aggregated, they amount to 100, exceeding the aggregated average of asset protection and limited liability. In particular, access to the small business concessions was seen as very important (3rd), as well as retaining income at low tax rates (4th).

[35] Freudenberg, above n 16, explored the important considerations regarding the formation of businesses in a survey of 81 advisors. His study found that on average the most important factor was asset protection (8.26 on a 10-point scale), which was seen to be more important than tax benefits/savings (6.84), which ranked 2nd. This could indicate that, while tax is important, it is not the dominant reason for choosing a business structure. Other important factors related to liability exposure: level of risk (4th: 5.96) and limited liability (5th: 5.95).

[36] Ayers et al found that non-tax factors such as the size and the age of the business, the ownership structure and the business risk are all important considerations in choosing the business structure: Benjamin C Ayers, Bryan C Cloyd and John R Robinson, 'Organizational Form and Taxes: An Empirical Analysis of Small Businesses' (1996) 18(2) *Journal of the American Taxation Association* 49.

[37] Brett Freudenberg, 'Advisors' Understanding of Tax Compliance for Choice of Business Form' (2013) 4(1) *Global Review of Accounting and Finance* 1. This study demonstrated that many advisors were not aware of empirical studies demonstrating the difference in compliance cost and the different types of business structures.

[38] Barbara Trad, Brett Freudenberg, John Minas and Craig Cameron, 'Reasons behind SME Advisor Business Structure Recommendations' (2024) 39(1) *Australian Tax Forum* 93 ('Reasons behind SME Advisor Business Structure Recommendations'). High frequency is defined as advisor responses in the range of 75 per cent to 100 per cent.

[39] Ibid.

[40] Trad et al, 'Choice of Australian Business Structures', above n 30.

[41] Ibid.

[42] Ibid. It is suggested the use of a company as a corporate trustee for a trust is a combination of business structures, as by using a corporate trustee several advantages are potentially realised compared to just an individual acting as a trustee. These additional advantages are derived from the attributes of a company. See Trad et al, 'Reasons behind SME Advisor Business Structure Recommendations', above n 38.

is referred to as a '*tax consolidated group*'.[43] Only one advisor recommended a single entity structure, being a trading company with shares held by an individual (referred to as a '*trading company*'). In any event, it can be the case that circumstances change, which can mean the initial business structure is no longer adequate to meet the commercial needs of the business.[44]

Advisors have reported that many SMEs at the inception stage do not choose the most appropriate business structure(s) for their business.[45] This is, in part, due to a lack of adequate engagement with advisors at inception, which may result in unnecessarily complex structures which can, in turn, result in increased compliance costs.[46]

2.2 Factors influencing restructure choice

There are many reasons why a restructure may be considered necessary by advisors and operators of SMEs. These can include facilitating new investors, allowing access to generous tax concessions only available to certain business structures, and to address legacy issues (such as a complicated structure having developed over time due to the purchase of businesses and/or the sale of different business segments).[47] A restructure may also be considered necessary to facilitate a business succession plan, whether by sale to a third party or by passing the business to the next generation.[48]

2.3 Restructuring relief

A deterrent to restructuring is the complexity and the costs that can be involved. The complexity can be due to determining the legal ownership of various assets (and any security creditors might hold over them) and operational licences.[49] Another potential deterrent is the tax impost at the State and federal level when business assets are transferred from the original business structure to the new one.[50] Collectively, such costs have been referred to as 'transaction costs',[51] which if the restructure occurs may adversely impact the business's cashflow and the available working capital.[52] Overall, these transaction costs may be seen as too prohibitive for, or otherwise detract from, the benefits of restructuring a business.[53]

In recognition of how tax may inhibit business restructuring from occurring, the government has implemented tax roll-over reliefs, especially in relation to CGT, such

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[43] Trad et al, 'Choice of Australian Business Structures', above n 30.
[44] Ibid.
[45] Trad et al, 'Small Business Restructure Roll-Over', above n 27.
[46] Ibid.
[47] Mark Giancaspro, Sylvia Villios and Chris Graves, *The Use of Family Trusts in Small Business and Family Enterprise, ASBFEO Final Report* (University of Adelaide, 2019) 63.
[48] Ibid.
[49] Mark Edmonds and Craig Duncan, 'Transaction Costs' (Tax Institute New South Wales Division presentation, 4 September 2013).
[50] This is because technically there can be a transfer of assets from one legal entity to another one, even if the effective economic ownership remains the same.
[51] Transfer costs such as tax liability can be seen as a subset of transaction costs. Transaction costs is an overarching term used to describe the costs involved in changing a business structure, which can include professional fees, government changes, administrative practices, and then tax transfer costs, such as the income tax liability and stamp duty.
[52] Edmonds and Duncan, above n 49.
[53] Giancaspro et al, above n 47, 64.

as those in Subdivisions 122-A, 122-B, and 328-G of the *Income Tax Assessment Act 1997* (ITAA 1997). Each of these provisions is briefly discussed below.

2.3.1 *Subdivisions 122-A and 122-B*

Formal restructure roll-over relief for income tax purposes is available in limited circumstances, namely when the business restructure involves the transfer of a business's assets from a sole trader,[54] a trustee, or partners in a partnership to a wholly-owned company.[55] These two regimes are more focused on allowing for no tax impost when there is no change in the economic ownership and that the contemplation of a business being rolled-over (restructured) is just one aspect of these two roll-overs.

However, these two roll-overs do not apply to a restructure in the opposite order, such as a business from a company to a sole trader, partnership, or a trust. Additionally, these provisions relate to the relief from CGT, but not to other tax consequences such as the disposal of revenue assets.[56] This can be described as the transfer of a 'business', which practically involves the transfer of multiple assets (capital and revenue assets; tangible and non-tangible) involving different legal and business considerations, as well as various tax consequences.

2.3.2 *Subdivision 328-G*

From 1 July 2016, the SBRR was introduced to address in part some of the restrictions of the prior provisions.[57] When the SBRR applies to a restructure of the ownership of the business assets, the relief removes possible CGT liability, as well as the tax consequences for the transfer of trading stock, revenue assets, and depreciating assets.[58]

The SBRR aims to allow small businesses to transfer active assets from one entity to another entity without incurring an income tax liability.[59] Active assets include CGT assets, trading stock, revenue assets and depreciating assets[60] and these must be assets used in the course of carrying on a business, and generally not be generating passive income.[61] The SBRR is available to a small business with an annual aggregated turnover of less than AUD 10 million, known as a small business entity (SBE).[62] As a consequence, the SBRR may not be available to larger SMEs (beyond micro and small).[63]

Entities are eligible if, in the income year in which the transfer occurs, each party to the transfer is either an SBE, an entity that has an affiliate that is an SBE, an entity that is

[54] ITAA 1997, above n 28, Sub-div 122-A.
[55] Ibid Sub-div 122-B.
[56] Revenue assets could include trading stock and depreciable assets. Note that technically depreciable assets are not revenue assets, but the balancing adjustment calculation on their disposal brings them outside the CGT provisions, and either includes an amount as assessable income or an immediate tax deduction, which is a similar outcome to a revenue asset: ibid s 40-285.
[57] Ibid Sub-div 328-G.
[58] Ibid s 328-420.
[59] Ibid s 328-430(1).
[60] Ibid s 328-430(1)(d).
[61] Ibid s 152-40.
[62] Ibid s 328-110.
[63] Note that sometimes an SME might be considered 'medium' size due to employee numbers, when its turnover is more modest.

connected with an SBE, or a partner in a partnership that is an SBE.[64] When the SBRR applies, in general, no income tax liability arises for either party. For assets transferred under the roll-over, the transferor is treated as having received an amount that is equal to the cost of the transferred assets,[65] and the transferee is treated as having acquired the assets for an amount that is equal to the cost of the transferor just before transfer.[66] There are two additional conditions, first, that there is no material change to the 'ultimate economic ownership' of the assets[67] and, second, that the transfers are part of a 'genuine restructure of an ongoing business'.[68]

Industry has acknowledged that the SBRR can be useful for some clients wanting to benefit from a change in business structure.[69] However, the SBRR has been criticised in relation to its limited application; for instance, the SBRR does not apply to restructures to facilitate succession planning and does not permit a sole trader to restructure to a trading company with a holding discretionary trust.[70]

This article provides new insights to the understanding of these issues by analysing the factors which may inhibit SMEs from adopting the business structure recommended by advisors. This is important, as while advisors may have a preferred business structure for their SME client, there may be inhibitors to the advisor's recommendations being realised.

3. Research Methodology

The scope of this research is limited to SME advisors' perceptions and not the perceptions of SME operators. The advisors were selected based on their engagement and knowledge in relation to the Australian SME sector. However, the validity of this research is based on the knowledge of the advisors. Thus, the aim is to deliver an accurate representation of the advisor perceptions, by exploring the factors that may inhibit SMEs from implementing the business structures recommended.

3.1 Case study design

An experimental case study design was utilised to answer the following research question:

> 'Are there any inhibitors for the adoption of the recommended structure?'

Case study was selected as the most appropriate design for this research. Case studies are the most common method in social science studies,[71] and they can offer a rich explanation of circumstances.[72] It was considered that an experimental case study would provide more accurate insights into what advisors may consider inhibitors when

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[64] ITAA 1997, above n 28, s 328-430(1)(b). This means that an entity holding assets for an SBE may be eligible for this roll-over, even though that entity is not carrying on a business.
[65] Ibid s 328-450.
[66] Ibid s 328-455.
[67] Ibid s 328-430(1)(c).
[68] Ibid s 328-430(1)(a).
[69] Crowe Horwath, Submission to the Board of Taxation Review of Small Business Tax Concessions (20 July 2018) 3 <https://taxboard.gov.au/consultation/small-business-tax-concessions#submissions>.
[70] Trad et al, 'Small Business Restructure Roll-Over', above n 27.
[71] Robert K Yin, *Case Study Research: Design and Methods* (Sage Publications, 2nd ed, 1989) 5.
[72] Robert S Kaplan, 'The Role for Empirical Research in Management Accounting' (1986) 11(4-5) *Accounting, Organizations and Society* 429.

recommending business structures. Essentially, these case studies were real-life examples of scenarios where advisors were asked to provide their recommendations as to the ideal business structure. The advisors were then asked whether they perceive any inhibitors for their client in adopting the recommended structure. The scenarios were developed by the researchers based on the results obtained from the literature.[73]

There were six sets of business scenarios developed (refer to a short summary in Table 1). These six scenarios were effectively doubled to 12, as each of the six business scenarios was either a new or established business. The first set of six scenarios was to ascertain what an advisor would recommend if approached by a new SME client considering setting up a business structure, and why (the 'new SME'). The second set of six scenarios was about an established SME business, and asked the advisor, in retrospect, whether they would have recommended a different business structure, and why (the 'established SME').

Each scenario was considered by four advisors. For example, with Scenario One (an orthodontic business), four advisors considered the 'new' business, and four advisors considered the 'established' business. With these four repetitions of each case study, 48 SME advisors were required. Overall, multiple cases were generated to examine, compare, and gain a deeper understanding of SME advisors' perceptions.

3.2 Advisor selection

This research involved 48 advisors (accountants or lawyers) who advise and engage with SMEs. Before contacting advisors, university ethics clearance for the research was obtained, and included such caveats as anonymity and the ability of advisors to withdraw at any time.[74]

[73] Barbara Trad, Brett Freudenberg, Craig Cameron and John Minas, 'Not in Isolation: The Rationale for a Combination of Business Structures in Australia' (2023) 51(3) *Australian Business Law Review* 162.
[74] Full Research Ethics Clearance: GU Ref No: 2020/555.

Table 1: SME Scenario Overview

SME Scenario	Short overview of business	Established business structure
One	Involved an orthodontic and a dental business that has been operating as one business since 2000, with an annual turnover of $1.97 million, and 10 employees. Business Assets: Building $1.9 million; plant and equipment $1.7 million. Personal Assets: House and land owned jointly by Peter and Debbie $2.5 million; cars $125,000. Business creditors: Bank loan on building $920,000. Personal creditors: Bank loan on house $615,000; cars: $62,000. The business is owned by a couple (an orthodontist: Peter and a dentist: Debbie) who have two adult children. The children are not in receipt of any income. The couple are contemplating selling the business in 10 years' time prior to their retirement. There is no need for new equity and the business can grow using profit with no need for unrelated investors.	Family discretionary trust with a company trustee
Two	Involved a web design business with an annual turnover of nearly $1 million, with no employees. Business Assets: Plant and equipment $35,000. Personal Assets: Charlie: car $45,000; Jane: house $850,000, car $40,000. Business creditors: Landlords $2,000 monthly lease (12-month lease). Personal creditors: Car and home loan of $590,000. The owner is a 53-year-old man (Charlie) who is married to a stay-at-home mother (Jane). They have three children over the age of 18. Their children are university students who are not in receipt of any income. There is no need for new equity nor finance, with no need for unrelated investors.	Partnership
Three	Involved an electrical service business, with a turnover of $500,000 and two employees. Business Assets: Plant and equipment $45,000. Personal Assets: Paul: car and boat $85,000; Lynette house & car $660,000. Business creditors: Business loan $25,000. Personal creditors: Paul personal loan $35,000; Lynette home loan $420,000. The owner (Paul) is 35 years of age, and his wife (Lynette) is a stay-at-home mother. They have two children under the age of 18. There is no need for new equity and the business can grow using profit with no need for new investors. There is a preference not to have unrelated investors.	Sole proprietorship
Four	Involved a medium-size business manufacturing human heart valves. Its turnover is $20 million, it has 80 employees. Business Assets: Intangible asset - patent $10,000,000; plant and equipment $6,000,000. Personal Assets: House: $950,000 (as joint tenants); car: $95,000. Business creditors: Bank loan: $6,000,000. Personal creditors: Bank loan: house: $205,000 and car: $40,000.	Trading company owned by asset-holding company (known as Happy Heart Pty Ltd), which is then owned by a family discretionary trust

	The owner is 45 years old, a heart surgeon, who lives with his partner, and has no children. There is the need for new equity and the need for public investors in the future.	(known as Cardio Family Discretionary Trust)
Five	Involved a small business with an annual turnover of \$2.6 million, with 12 employees. The business involves importing and selling furniture. Business Assets: Warehouse \$1.3m; plant and equipment: \$70,000; inventory: \$650,000. Personal Assets: Boat \$60,000. House owned by wife worth \$850,000. Business creditors: Bank \$750,000; suppliers \$900,000. Personal creditors: Bank loan: \$43,000. The owner is 60 years old, married, with two adult children. There is potential for a divorce in the future. In the future his son Matthew will have equity in the business, but there is no need for unrelated investors.	Family discretionary trust (individual as trustee)
Six	Involved a small bridal gown business, with an annual turnover of \$6.1 million, and 25 employees. Business Assets: Goods \$900,000; machinery \$400,000. Personal Assets: Building \$1.5m; house and car \$750,000. Business creditors: Bank loan \$950,000; Suppliers \$250,000. Personal creditors: Bank loan: \$400,000. The owner is 55 years old, female, and single. There is a likely need for new equity including from unrelated investors in the future. The business profits are likely to be reinvested in the business.	Company

*Values are stated in current market value. The full scenarios are detailed in: Barbara Trad, Brett Freudenberg, John Minas and Craig Cameron, 'Reasons behind SME Advisor Business Structure Recommendations' (2024) 39(1) *Australian Tax Forum* 93.

To recruit advisors, convenience sampling and snowball sampling were used. Convenience sampling was used to contact both professional and personal contacts of the research team using email and LinkedIn. Snowball sampling techniques were applied to those contacts, as potential advisors were encouraged to share the invitation to participate in the research with their own networks. Advisors were also recruited by contacting representatives of professional bodies. In addition, there was a mass email distribution seeking potential advisors sent to various accounting and law firms using their website contacts. Criteria for selecting the advisors included that they must be engaged/knowledgeable with the SME sector, have at least five years' experience, and be aware of the issues that challenge SME businesses.

An overview of each advisor's current profession, number of years in their profession, state of residency, current position, clients' business size, frequency of advice per year, and area of practice is presented in Table 2 (Appendix). The advisors included 29 accountants, 15 lawyers, two tax advisors and two business consultants. Thirty-three of the 48 advisors had over 15 years' experience in their profession, nine advisors had 10 to 15 years of experience, and six advisors had five to 10 years of experience.

There were 31 advisors (65 per cent) who lived in Queensland, and five advisors from each of Victoria, New South Wales and Western Australia. Of the remaining advisors, one was from Tasmania and one from South Australia.

Advisors indicated that they engage with a range of business sizes. Four advisors indicated that their clients include micro-to-medium size businesses (AUD 500,000–<100 million), nine advisors indicated that their clients include micro-businesses (AUD 500,000–<2 million), one advisor serviced micro to small businesses (AUD 500,000–<5 million), 17 advisors serviced small businesses (AUD 2 million–<5 million), two advisors serviced small to medium businesses (AUD 2 million–<100 million), and 15 advisors indicated that they provide services to medium businesses (AUD 10 million–<100 million). When the advisors were asked how regularly they provide business structure advice per year, the majority (27 advisors) commented that they provide advice more than 20 times per year, four advisors give advice 11 to 20 times, six advisors give advice six to 10 times, six advisors advise two to five times, and five advisors give advice once per year. Over three-quarters of those advisors (78 per cent) who reported giving advice more than 20 times per year serviced small and medium firms.

Given the advisors' years of experience and the frequency of their advice to SMEs, this provides a substantial level of assurance as to the expertise of the advisors, and their ability to provide considered insight about this subject.

3.3 Interview design

The qualitative data collected and analysed in this study was via in-depth interviews, which consisted of structured, semi-structured and open-ended questions and were conducted by the researchers. Interviews of 45 minutes to 55 minutes in duration were conducted online, via Zoom or Teams, approximately one week after the scenarios were emailed to advisors.

After ascertaining the advisors' recommended structure, advisors were asked whether there were any inhibitor(s) for the adoption of their recommended structure. The key questions for the purpose of the research reported in this article are:

- *Do you think there could be any inhibitors for the adoption of your recommended structure? If so, what are they?*
- *Is there anything to reduce these inhibitors?*

Data analysis occurred after all interviews were conducted and transcribed. The qualitative data were analysed in three stages: initial reflexivity,[75] pattern coding,[76] and data representation.[77] The inhibitors for adopting the recommended structure are presented in the following section.

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[75] Initial reflexivity involved reflecting on the interview itself and on the notes taken during the interviews.
[76] Jaber F Gubrium et al (eds), *The Sage Handbook of Interview Research: The Complexity of the Craft* (Sage Publications, 2nd ed, 2012). Pattern coding was used to develop categories and sub-categories relevant to the research question. To code the data, content analysis techniques were employed, in which similar content was identified from the transcribed interview scripts.
[77] Svend Brinkmann, *Qualitative Interviewing: Understanding Qualitative Research* (Oxford University Press, 2013).

4. RESULTS

4.1 Inhibitors

Table 3 (Appendix) provides an overview of a frequency analysis of the inhibitors identified by advisors for the adoption of their recommended business structure. The data are categorised according to 'new' and 'established' businesses, and for each advisor the relevant scenario, recommended structure and inhibitors are identified.

4.1.1 Overall observations

CGT and stamp duty were identified most often as an inhibitor (35 per cent of advisors), followed by establishment costs (27 per cent), client understanding (23 per cent) and complexity and compliance cost (17 per cent). Other inhibitors mentioned less frequently related to land tax (4 per cent), leases (4 per cent), bank accounts (4 per cent), and employees (4 per cent). However, nearly one-fifth (19 per cent) of advisors thought there would be no inhibitors for their recommended structure being adopted, although most advisors in this category advised on the 'new' business scenarios (discussed below).

Some of the advisors who recommended a combination of business structures for the one business referred to the complexity of implementing multiple structures for one business. This included client understanding of the multiple structures for the one business operation, when compared to one structure (such as A25, Scenario One, Est.). Advisor A48 noted that a tax consolidated group with shares held by a discretionary trust may be complex for a non-businessperson to understand. For example, there are restrictions under the *Corporations Act 2001* (Cth) as to when owners can take money out of the company, namely by means of dividends or by entering into a loan agreement (A48, Scenario Six, New).

Given the significant transfer costs such as CGT, stamp duty and administrative costs that may inhibit changing a structure, many advisors stressed the importance of setting up the structure correctly from the beginning:

> The best advice I've ever heard, it's a constant, is set it up right because if they try and change it later, it's going to be more costly (A44, Scenario Five, New).

Advisor A31 commented about their own business structure. With hindsight, they would have implemented a company structure instead of a unit trust; however, there would be a significant cost involved in changing his business structure now:

> The challenge that we've got, we can spend a lot of money in terms of structuring, so we can get the Rolls Royce structure, but I don't know his limitation. [the cost] is an inhibitor because dealing with the Tax Practitioner Board, if I have my time again and I didn't have a business partner, I wouldn't set up with a unit trust, I would have gone with a company structure, but with the cost in trying to change my structure now, changing the bank account, look at the capital gains tax, change the registration with the CPA [Certified Practising Accountant], with the cost involved in changing down the track, it is too much, I would've been better off getting it right in the first instance (A31, Scenario Two, New).

The results are now analysed according to established and new businesses scenarios, as there appear to be distinct trends.

4.1.2 Established businesses

Over two-thirds of advisors in the established business scenarios considered that CGT (67 per cent) was an inhibitor, followed closely by stamp duty (62.5 p cent).[78]

However, the stamp duty cost depends on the State in which the business is located. While some States in Australia, such as Queensland, levy stamp duty on transfer of assets, other States, such as Victoria and New South Wales, do not apply stamp duty on the transfer of business assets:

> Queensland still levies duty on business assets, so, there is a stamp duty issue. I think Queensland has recently put in some exemption for moving a business into a company, but I'm not sure if it covers trusts because I'm practising in New South Wales. So, in New South Wales, we wouldn't have that issue because we don't levy duty on business assets (A29, Scenario Two, Est.).

For those businesses operating across multiple States, stamp duty can be a real problem, as such cost could inhibit SME owners from restructuring. For instance, a study in South Australia identified that business owners may not restructure if it involves a tax cost.[79] Business operators need to be aware of the stamp duty and land tax[80] liabilities that may arise when restructuring:

> So, as any change of structure, if it involves property, you should always be careful about changing structures with clients. So, the client should be aware of implications of stamp duty and/or tax, and as well as, if you hold a property in the trust in New South Wales in particular, they pay higher land tax. So, I make sure we tell our clients the implications of those costs. Asset protection is on one side, but these costs are hidden costs which people don't realise at the beginning. So, we are very transparent about those issues (A41, Scenario Five, Est.).

Advisor A42 (Scenario Five, Est.) noted that, in addition to CGT and stamp duty costs, there are administrative costs such as change of ownership, setting up new bank accounts, as well as updating business agreements including employment contracts and leases. It is these additional administrative inhibitors that can also make a restructure problematic, even though they were identified less frequently in responses (4-8 per cent of advisors with established business scenarios).

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[78] The term 'stamp duty' is used given its historical prominence, even though modern reference is 'duties'.
[79] Giancaspro et al, above n 47, 63.
[80] Australian Taxation Office, 'Getting Started as a Not-for-Profit – State and Territory Taxes and Duties' (last updated 12 November 2018) <https://www.ato.gov.au/non-profit/getting-started/in-detail/induction-package/induction-package-for-not-for-profit-administrators/?page=8>. Land tax is an annual tax levied by State or Territory governments, except in the Northern Territory, on property that is above the land tax threshold. Restructuring may cause an entity to go over the relevant threshold and then be liable for land tax.

4.1.3 New businesses

The two most frequently mentioned inhibitors for the new business structure being adopted related to establishment costs (29 per cent) and client understanding (29 per cent). A similar percentage of advisors (29 per cent) thought there would be no inhibitors for their recommended business structure being adopted.

Some advisors considered that the costs of setting up a combination of business entities may deter clients from proceeding with the advisor's recommendation. This is understandable given that, when starting a business, finances may be limited and various costs are involved, including advice and registration. Advisor A20 acknowledged client reluctance with adopting a recommended business structure due to costs:

> My ideal structure for trading is a company but my ideal structure for asset protection is trust. So, I don't often win, I've got to be objective there and I always have considerable costs for some clients, some clients don't want to spend $5,000 at the beginning to set up (A20, Scenario Five, New).

This finding is consistent with previous research, which found that business structure advice may not be sought prior to commencing the business due to financial restrictions and/or attitudes.[81] The advisors' concerns in this study are also supported by Australian research that found nearly 30 per cent of people setting up a business in Australia sought no advice or information.[82]

The third most identified inhibitor for new businesses related to complexity and compliance costs (17 per cent). Transfer costs was not frequently identified by advisors for the new businesses (CGT: 4 per cent, stamp duty: 8 per cent). No advisors discussed the following factors as potential inhibitors for new businesses adopting their recommended structure: land tax, leases, and/or employees.

4.1.4 Comparing established and new businesses

The results demonstrate that new and established businesses have different inhibitors for adopting business structures. For example, the transfer cost of CGT is more frequently mentioned as an inhibitor for established businesses compared to new businesses (67 per cent vs 4 per cent), along with stamp duty (62.5 per cent vs 8 per cent). The difference may be explained by the fact that an established business may own valuable assets, and changing a business structure would likely involve the legal transfer of these assets, with associated transfer costs.[83] This is supported by the finding that 29 per cent of advisors for new businesses considered that there were no inhibitors for the business structure recommended by them. Unlike established businesses, new

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[81] OECD, *Taxation of SMEs in OECD and G20 Countries*, OECD Tax Policy Studies No 23 (OECD Publishing, 2015); Mark Pizzacalla, 'Developing a Better Regime for the Preferential Taxation of Small Business' (PhD thesis, Monash University, 2014) 42; Margaret McKerchar, 'Understanding Small Business Taxpayers: Their Sources of Information and Level of Knowledge of Taxation' (1995) 12(1) *Australian Tax Forum* 25; Ian G Wallschutzky and Brian Gibson, 'Small Business Cost of Tax Compliance' (1993) 10(4) *Australian Tax Forum* 511.

[82] Robyn Rutley, Sophia Elliott and Rachelle Tatarynowicz, 'Small Business Engagement Research', *Australian Taxation Office* (TNS Social Research Consultants, 2016).

[83] A taxpayer is generally only liable for CGT on the realisation of the gain, generally the transfer of assets, if CGT Event A1 has occurred; the availability of a roll-over may allow the taxpayer to defer the realisation of a capital gain.

businesses will not generally have significant assets and represent a 'blank slate' for the advisor to recommend an appropriate structure, without the inhibitor of transaction costs. Overall, the results suggest that transfer costs such as CGT and stamp duty are an inhibitor for established SMEs from restructuring.

For new businesses the most frequently cited inhibitor was client understanding which was higher than established businesses (29 per cent vs 17 per cent). This suggests that with new businesses it is essential to ensure that the client understands what the business structure entails. It may also suggest that with established businesses the advisor may consider their clients have a greater understanding about business structures. This observation is supported by business tax literacy research which demonstrates higher business tax literacy for those businesses who have been operating longer.[84] Two other inhibitors identified in the research are similar for both new and established businesses: the initial establishment costs of setting up a business (29 per cent vs 25 per cent) and the complexity in adopting multiple structures (17 per cent vs 17 per cent).

Overall, advisors perceived that there are inhibitors from enabling SMEs to alter their business structure to the recommended structure – which in most circumstances in this study was a trading company with holding trust.[85] These transaction costs are concerning, as they mean SMEs may be using less than ideal business structures for their needs. This demonstrates the importance of setting up the structure correctly at the inception stage, otherwise the costs may not justify the benefits of the restructure and/or the SME client may not have the financial capacity to incur the costs. In addition to transfer costs such as CGT and stamp duty, advisors identified other administrative costs such as change of ownership, setting up new bank accounts, and updating business agreements including employment contracts and leases.

The following section is an analysis of the potential techniques, as reported by SME advisors, to reduce these inhibitors to restructuring.

4.2 Reducing inhibitors

During the interview advisors were asked '*Is there anything to reduce these inhibitors?*'. The results are discussed below in terms of overall observations, followed by an analysis of the established businesses and then the new businesses.

4.2.1 Overall observations

Reducing inhibitors for business restructures are techniques which advisors perceived as beneficial in assisting their clients to implement what they considered an appropriate business structure. For those advisors who perceived that there were inhibitors that may prevent SMEs from restructuring, they were asked whether there was anything to reduce these inhibitors. A variety of perspectives were expressed by advisors, and their frequency is presented in Table 4 (Appendix).

Overall, for all advisors that reported inhibitors (both established and new scenarios) the three most frequently mentioned techniques used to reduce inhibitors were client education (30 per cent), explaining the benefit of advice (30 per cent) and Division 152

[84] Melissa Belle Isle, Brett Freudenberg and Tapan Sarker, 'The Business Tax Literacy of Australian Small Businesses' (2022) 37(1) *Australian Tax Forum* 65.

[85] Trad et al, 'Choice of Australian Business Structures', above n 30.

CGT concessions (30 per cent). The less frequently mentioned techniques were: Subdivision 328-G SBRR (14 per cent), Subdivision 122-A (11 per cent), no change in property ownership (8 per cent), fewer entities (6 per cent), Division 115 CGT 50 per cent discount (3 per cent) and Subdivision 122-B (3 per cent). A strategy that appeared to be consistent between established and new scenarios was explaining the benefits of advice to the client (29 per cent vs 36 per cent). Otherwise, the trends are quite distinct between established and new scenarios. For example, client education was only mentioned by 14 per cent of advisors in established scenarios compared with 57 per cent in new scenarios. Given the differences between new and established scenarios, they are discussed separately below.

4.2.2 Established businesses

The strategies recommended by advisors to reduce or defer the inhibitors for established business scenarios (in descending order) were: Division 152 CGT concessions (43 per cent); explaining the benefits of advice (29 per cent); Subdivision 328-G SBRR (24 per cent); client education (14 per cent); no change in property ownership (14 per cent); Division 115 (5 per cent); Subdivision 122-A (5 per cent), and Subdivision 122-B (5 per cent). No advisors mentioned fewer entities (0 per cent).

Previously it was identified that CGT and stamp duty costs could inhibit SMEs from restructuring. However, a common view amongst advisors (mainly in the established businesses) was that, while there are some tax concessions which may apply to remove the CGT, there would generally be no relief from stamp duty when restructuring. These concessions pertaining to reducing the burden of CGT costs are discussed below.

Accessing small business CGT concessions (Division 152 and/or Division 115)

To lessen the burden of the transfer costs of restructuring, advisors (eg, A2, Scenario One, Est.; A6, Scenario Two, Est.; A21, Scenario Six, Est.) identified and described potential CGT roll-over or small business CGT concessions.[86] For example, A22 suggested using Division 152 for restructuring:

> As an established business is an active asset, shares are active assets, and the building is an active asset, I'm assuming that she runs the business more than 15 years, stamp duty will be my only issue, because the CGT small business roll-over relief doesn't work for stamp duty unfortunately, that gives you income tax relief … you'll get that GST free when you transfer the business assets. So, there will be stamp duty on the shares when you'll transfer that from her to a discretionary trust, that will be the big one (A22, Scenario Six, Est.).

Interestingly, Division 152 was mentioned more frequently than the formal restructure relief provisions, such as Subdivision 328-G (24 per cent), Subdivision 122-B (5 per cent) and Subdivision 122-A (5 per cent). The use of Division 152 of the ITAA 1997 as a pseudo roll-over relief for business restructures has been observed in previous research,[87] even though this use may not be entirely consistent with the legislative intention for its enactment, which focused more on the sale of a business rather than its

[86] ITAA 1997, above n 28, Div 152.
[87] Giancaspro et al, above n 47, 64; Trad et al, 'Small Business Restructure Roll-Over', above n 27.

restructure.[88] However, it should be acknowledged that one of the reasons for a restructure could be to better facilitate a future sale or succession planning of the business.[89] This use of Division 152 as a pseudo roll-over relief from restructure transfer costs may account for its high tax expenditure cost.[90] While advisors might find this as an effective way of mitigating the potential transaction costs for a restructure, it has been observed that this practice may create uncertainty, and the potential application of Pt IVA of the *Income Tax Assessment Act 1936* (the general anti-avoidance provision).[91]

It appears that there is uncertainty when using formal restructure roll-over relief, such as the SBRR. While some advisors considered that there could be formal restructure roll-over relief, or some small business exemptions for restructuring the business, others argued that the application of such restructuring roll-over relief is uncertain and that any restructure involving property could potentially have significant costs in stamp duty (depending on the State legislation) and CGT, and such costs could be a major impediment for clients to restructure:

> If we were to change the structure, it may incur CGT depending upon whether there was any roll-over available, so, there may be a roll-over available here, but it's a little bit difficult to know whether the (subdivision) 328-G roll-over would apply (A6, Scenario Two, Est.).
>
> There are small business exemptions on restructuring the business, but you will have to make sure they apply, and that you are fine with those because if they don't apply, potentially you are going to be up for a potential CGT implication. So, if you don't plan it properly, you could get transfer duty, CGT and both of those can be significant (A42, Scenario Five, Est.).

Many advisors observed that multiple CGT concessions could be used in conjunction with each other to reduce, if not, eliminate the tax burden. For example, the owner may be entitled to a 50 per cent CGT discount under Division 115, and then another 50 per cent reduction using Division 152 (known as the active asset reduction), with the remaining 25 per cent of the capital gain being subject to tax.[92] Provided there are available funds, this remaining 25 per cent could then be potentially rolled into superannuation using the small business CGT retirement concession (A9, Scenario Three, Est.).[93]

While most of the advisors who commented about transfer costs stated that there could be some relief from CGT when restructuring, all agreed that there could be stamp duty consequences for restructuring an established business. For instance, A2 argued that the future tax savings need to outweigh the transfer costs:

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[88] Board of Taxation, *Review of Small Business Tax Concessions: A Report to the Treasurer* (March 2019) ('*Review of Small Business Tax Concessions*').
[89] Trad et al, 'Small Business Restructure Roll-Over', above n 27.
[90] Board of Taxation, *Review of Small Business Tax Concessions*, above n 88.
[91] Board of Taxation, *Review of CGT Roll-Overs: Consultation Paper* (December 2020) 49.
[92] ITAA 1997, above n 28, Div 115.
[93] The retirement concession allows for a lifetime limit of AUD 500,000 to be contributed to superannuation: ibid Div 152. However, such a contribution could be problematic, as with a restructure there is generally no external money coming in, so funds to make the superannuation contribution would need to be found elsewhere.

> The two biggest inhibitors: one would be the capital gains tax to transfer that from the current structure to the new one, there would be CGT which will be potentially solved through small business CGT concessions, but then stamp duty would be your big issue. So, the cost to transfer would be quite significant and there has to be some sense of real tax benefit over the next few years to justify that (A2, Scenario One, Est.).

The tax costs associated with a restructure can be minimised for small business entities through the CGT roll-over relief provisions, as demonstrated by A22 in Scenario Six (Est.) with respect to the transfer of the shares of the business and the building from the owner to a discretionary trust. However, not all clients in the scenarios could access the concessions, because the business did not meet the requirements of a 'small' business.[94]

Accessing small business restructure roll-over relief (Subdivision 328-G)

Advisors discussed the SBRR as a mechanism to relieve SME clients from the CGT consequences of restructuring. For example, one advisor referred to the application of such roll-over relief to transfer the business property to a new trust because the business's annual turnover was less than AUD 10 million (A25, Scenario One, Est.). However, accessing the SBRR relief can come with uncertainty for advisors. The concern is that if a business intends to restructure assuming it can satisfy the conditions for roll-over relief, and the Commissioner of Taxation objects to such restructure, there might be significant CGT costs incurred:

> The problem is, if they say no, and you want to object, what are you objecting to? You know there's no law there, there's the Commissioner, and it sort of happened in South Australia, there's some case law where that's gone south in the courts, just said there's nothing there to object to, it's completely discretionary (A17, Scenario Five, Est.).

This highlights the ambiguity about the application of the SBRR and how its limited application may mean that established businesses either do not restructure or try to utilise other concessions.[95]

Benefit of advice and client education

Some advisors noted how it was important for them to explain the benefit of the restructure advice to the client (29 per cent), which relates to client education (14 per cent). Advisor A14 observed that:

> Explaining the benefit and the risk that is mitigated will make it worth it, because with a company with this value and this level of turnover, you would want the structure to be set up right and you probably talk [the client] through it, explaining the benefits and the cost savings in other areas to try to overcome those inhibitors (A14, Scenario Four, Est.).

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[94] The size of the businesses in the scenarios ranged from micro, small to medium businesses. This means for the scenarios that involved 'medium' sized businesses, access to 'small' business concessions could be problematic. However, this would depend upon how 'small' is measured for the relevant concession. See Appendix.

[95] For a more detailed exploration of the SBRR, see Trad et al, 'Small Business Restructure Roll-Over', above n 27.

To overcome the inhibitors, advisors may explain to the clients that the benefit of adopting a correct structure outweighs the initial costs of setting up a business structure. Such discussions may ensure that the client implements the most appropriate business structure from the start. Conducting a cost-benefit analysis is a technique to overcome these inhibitors because there is a cost to later restructure, as well as ongoing compliance costs – and the advisor needs to justify to the client that the benefits outweigh these costs (A5, Scenario Two, Est.). This is consistent with the Scholes and Wolfson's theory of balancing tax and non-tax costs in the selection of a business structure.[96] Advisors need to ensure that their clients have an adequate understanding of business structuring so that they can evaluate this trade-off. Advisor A30 stated that seeking professional advice is valuable, although the initial costs could be a burden, but 'that [it] will pay for itself down the track' (A30, Scenario Two, Est.). However, a fear about costs may mean that a client is reluctant to approach an advisor.

No change in property ownership

Another method to reduce transfer costs identified by advisors was undertaking a partial restructure without changing the ownership of valuable assets that would otherwise trigger CGT and/or stamp duty (14 per cent):

> Just don't change the property holdings, leave it as is, because even if you change it to a corporate trustee, it'll still cost you stamp duty unless there are some provisions in a particular State. Each State has its own standard exemption rules, I'm not sure about certain States, they allow certain standard exemptions if it's only change of structure. But in New South Wales, definitely, it would cost this client a lot in stamp duty (A41, Scenario Five, Est.).

This non-transfer of assets might then be combined with a tax consolidation strategy:

> He has got some [intellectual property] assets, so having the patent being so valuable, given that the patent is a CGT asset; from the perspective of having CGT discount, it may be worthwhile having that held by a separate discretionary trust. But if we are talking about restructuring this current business, I would leave it there, it's probably not worth crystallising a capital gain to transfer it. ... I would form a tax consolidated group, with the holding company there. … If you talk about shifting the patent out, tax is going to be your biggest issue, and potentially stamp duty (A38, Scenario Four, Est.).

To alleviate the possible transfer cost, another advisor dealt with this in Scenario Five (a trading family discretionary trust owning the building, the owner is the trustee) by transferring all the business assets into a company and by leaving the significant asset, the warehouse, in the established structure:

> Now what you might end up doing is transfer all of those assets of the business into a company, and then potentially leave the warehouse where it is, and that becomes the discretionary trust that owns the warehouse, and you don't have to deal with the transfer issue, you still have the warehouse in the discretionary

[96] Myron S Scholes and Mark A Wolfson, *Taxes and Business Strategy: A Planning Approach* (Prentice Hall, 1992).

> trust, but the rest of the business is in a separate structure (A42, Scenario Five, Est.).

While this may minimise the transaction costs, it is questionable whether the desired asset protection will be fully achieved.[97]

Using Subdivision 122-A

Subdivision 122-A of the ITAA 1997 provides CGT roll-over relief for a sole trader or a trustee on the disposal of business assets to a company, in which the business owner then owns all the shares in the company.[98] This provision was referred to by A38 (with respect to Scenario Four, refer Table 1).[99] Advisor A38 suggested incorporating a holding company by using the Subdivision 122-A roll-over (between Happy Heart and the Cardio Family Discretionary Trust) to then form a tax consolidated group (with Cardiac Biological Valve, Happy Heart and Hold Co). This was followed by the transfer of the shares in Cardiac Biological Valve from Happy Heart to Hold Co, therefore eliminating tax liability on the whole restructure. This demonstrates how Division 122 can be applied to reduce some of the transfer costs to enable a restructure to occur, although its availability depends upon the factual circumstances.[100]

Using Subdivision 122-B

Subdivision 122-B is a roll-over provision which allows a partnership to dispose of assets by a partner to a wholly owned company.[101] Advisor A29 suggested (Scenario Two, Est.) that there is a choice of using small business CGT concessions or using Subdivision 122-B to move from a partnership to a company, and this depends on the client's needs. They further commented that the advisor assesses all the potential approaches to minimise the transfer costs. Using roll-overs may offer the business owner a cost base transfer, or alternatively if the small business CGT concessions are utilised they may get a step-up in cost base. This demonstrates how advisors can be proactive in determining whether a concession is available or not, including some that are not technically for restructuring but are used as a pseudo restructure relief to reduce the overall tax burden.[102] Additionally, the consideration is not just the immediate possible tax impost but also other tax advantages, such as an increased cost base, or a lower possible future tax cost. Additionally, Subdivisions 122-A and 122-B have limited application given they only apply to certain business structures.

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[97] The reason that the asset might be at risk could be because it is held by the same entity conducting the business, and thereby business creditors could sue. Also, if the asset is held by an individual then that individual might be exposed to business risk and be sued, or the asset might become part of a property settlement in the advent of a divorce. For a discussion about asset protection, see Trad et al, 'Reasons behind SME Advisor Business Structure Recommendations', above n 38.

[98] ITAA 1997, above n 28, Sub-div 122-A.

[99] Note advisor A40 in respect of the new scenario four also mentioned Subdivision 122-A.

[100] However, a transaction cost that may be incurred is the advisor's fees in providing advice on the application of Subdivision 122-A.

[101] ITAA 1997, above n 28, Sub-div 122-B.

[102] For a more detailed explanation of this phenomenon, see Trad et al, 'Small Business Restructure Roll-Over', above n 27.

4.2.3 New businesses

Client education and benefit of advice

For clients with new businesses, advisors were of the strong opinion that to mitigate the inhibitors encountered by SMEs in implementing an ideal business structure, important strategies were client education (57 per cent) and for advisors to explain the benefits of the advice (36 per cent). The advisors' focus on education and the need for advice is consistent with arguments that the Australian tax system is too complicated for SMEs to navigate, and this may lead to high compliance costs for this sector.[103] Complexity and compliance costs have been identified as a significant factor influencing advisors' recommended business structure for SME clients.[104] The findings may raise concerns as to the extent to which business owners are equipped to face challenges with business structuring, and whether they are competent in comprehending the different types of business structures and/or in meeting their legal and tax obligations. This lack of 'business structure literacy' may mean SMEs are not proactive in seeking advice to alter structures. Research has demonstrated that small business owners who have more sophisticated business structures of trusts and/or companies may have higher small business tax literacy.[105]

Advisors expressed that client education is paramount in overcoming some of the complexity associated with business structures, especially at the inception stage of the business. The importance of implementing a correct structure at the commencement of a business and the benefit of receiving professional education was highlighted by A31 (Scenario Two, New):

> I think having the conversation of what I've just said and explaining it to them. Try to simplify it to them, those are the boxes, and if we do this right in the first instance that would actually save money down the track. You want to get it right, there is nothing worse than getting the structure incorrect in the beginning and then trying to fix it.

Client education was a consistent theme during interviews, particularly with the new scenarios. For example, A3 (Scenario One, New) stressed the importance of educating the client by clearly explaining the structure through a diagram and ensuring that the clients understand the structure. This view was echoed by A44 (Scenario Five, New) who argued that by educating the client and explaining the benefit of protecting the assets against the claim of suppliers and creditors, as well as the flexibility of income distribution, the benefits of a trading company with holding trust may outweigh the cost of implementing the structure. Advisor A20 (Scenario Five, New) stressed the importance of educating clients to overcome some of the complexity associated with the structure, and to convince business owners that paying an accountant will be a worthwhile investment over time through reduced tax and other benefits. Advisor A48 (Scenario Six, New) employed the approach of explaining to the clients the advantages and disadvantages of the business structure, and of providing the clients with

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[103] Review of Business Taxation (John Ralph, chair), *A Tax System Redesigned: More Certain, Equitable and Durable* (1999) Overview, 105 (Review of Business Taxation); Board of Taxation, *Review of Tax Impediments Facing Small Business: A Report to the Government* (2014) 68.
[104] Trad et al, 'Reasons behind SME Advisor Business Structure Recommendations', above n 38.
[105] Belle Isle et al, above n 84.

professional advice so that the clients can focus on the business activities. A similar approach was expressed in the prior discussion by A14 (Scenario Four, Est.).

Client education was viewed by advisors as minimising the risk of SME clients making mistakes in relation to the business structure. Business operators needed to be competent in understanding and dealing with business structures ('business structure literacy'), especially trusts, to overcome some of the inhibitors to restructuring the business:

> If they manage it properly, even if they say they have no real understanding, they need to have a real understanding of how this works, it's their structure, it's their income. So, they need to educate themselves enough to understand what's happening, because if there's an audit and they get asked direct questions, they need to be able to say they understand it, and they can make decisions as to how they want to distribute from the trust or what they want to do, but that's what they have to do to overcome the risks (A36, Scenario Three, New).

In particular, education may minimise the risk of errors by SME operators in relation to tax and asset protection.

A key finding from this research is that cost may prevent a new SME from seeking advice about an appropriate business structure (29 per cent of advisors with a new business scenario). It has been identified that cost can be a major factor that inhibits seeking advice at the inception stage of a business.[106] The importance of having an advisor who understands business structures, and who may assist the business owner to navigate the complexity of the structure, was highlighted by A16 (Scenario Four, New). Another relevant point was raised by A19 (Scenario Five, New) that business structure advice requires a comprehensive approach involving an accountant, lawyer and business manager who keeps timely records and promptly attends to advice. For example, if the company is at risk of insolvency, contacting an insolvency practitioner early on or receiving legal advice is crucial.

According to A7 (Scenario Two, New), seeking advice regularly, ensuring the client's understanding of the structure, and complying with administrative and legal requirements should be used with any business structure:

> I think he said he's going to speak to his advisor once a month, so that's probably a good thing. So, the client understanding, and making sure the administrative and legal formality are complied with from time to time, that's probably the case with any structure.

The advisors' responses reveal the need for ongoing advice from various advisors. However, SMEs may be reluctant to meet with advisors, and when SME clients do meet with advisors it may be more about tax compliance work (such as completion of tax returns), rather than management and/or broader business advice.[107] The research findings demonstrate that SME clients may not be using the ideal business structure at

[106] Trad et al, 'Small Business Restructure Roll-Over', above n 27.
[107] Sue Yong and Brett Freudenberg, 'Perceptions of Tax Compliance by SMEs and Tax Practitioners in New Zealand: A Divergent View?' (2020) 26(1) *New Zealand Journal of Taxation Law and Policy* 57.

the inception stage, or they do not apply the business structure to maximise the benefits, because they fail to obtain comprehensive advice.

Fewer entities

Complexity and compliance costs are two significant challenges for SMEs, and implementing a combination of structures for one business may lead to increased complexity and compliance costs.[108] To reduce the complexity and to mitigate the compliance costs associated with multiple entities, some advisers suggested having fewer entities (14 per cent):

> Well, you could have only one business trust instead of two, and you could have the building owned by the same business trust. You can have the building owned by the corporate entity; you can have that in the trust that runs the corporate beneficiary. You could also have the same one owning the building. That way you can reduce the number of trusts you've got. So, obviously doing all these, has a stamp duty cost … and so that might be cost prohibitive. So other than that, you can put it all in one entity to reduce the costs, the compliance cost, and the cost of maintenance (A27, Scenario One, New).

The trade-off between fewer entities and asset protection was echoed by A44 (Scenario Five, New) who said that some individuals may choose an individual trustee rather than a corporate trustee as an approach to mitigate the cost of registering and maintaining an additional entity. Although appointing an individual trustee may reduce costs, this should be balanced against any risks related to asset protection. Despite the complexity and compliance costs, most advisors appear to recommend multiple entities for the one business.[109]

4.3 Discussion

The inhibitors perceived by advisors for SMEs to restructure their business include transfer costs (CGT and stamp duty), establishment costs, client understanding, and complexity and compliance costs. Due to inadequate advice at inception, some SMEs may not have implemented the most appropriate business structure.

Significant transfer and administrative costs reported by advisors provide an explanation for the factors that may inhibit SMEs from restructuring. Research reveals that advisors perceived that most SMEs had not implemented appropriate business structures when commencing their business.[110] This may indicate the need for some of those SMEs, during their business lifecycle, to restructure their business to fully realise commercial benefits. Further, advisors indicated that transfer costs associated with restructuring an established business can be a major inhibitor to restructuring. It is these costs that may adversely impact the working capital of the business and cause business owners to feel 'trapped' with inappropriate structures.

A broad theme which emerged from the analysis is that CGT and stamp duty costs, being transfer costs, are major inhibitors to restructuring an established business. While some advisors perceived there could be some restructure roll-over relief available that

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[108] Trad et al, 'Reasons behind SME Advisor Business Structure Recommendations', above n 38.
[109] Trad et al, 'Choice of Australian Business Structures', above n 30.
[110] Trad et al, 'Small Business Restructure Roll-Over', above n 27.

may reduce or eliminate CGT cost, all agreed that there would be stamp duty cost if there are no relief concessions, which varies across States. However, some concessions are limited to small business entities and therefore not available to those medium businesses. Nevertheless, two divergent and often conflicting views emerged from the interviews – while some advisors indicated that there could be some concessions to relieve the CGT cost, others argued that the application of such concessions are uncertain and limited to small businesses, and that restructuring an established business involving valuable assets could have significant costs in CGT and stamp duty. These contentions are supported by observations of the Board of Taxation which stated that many practitioners identified that the SBRR is unlikely to apply to a restructure involving a combination of business structures – particularly a trading company with holding trust – which advisors consider the most advantageous business structure from both a tax and commercial perspective.[111] It appears that many SME advisors can recommend such a business structure.[112] As currently drafted, the SBRR does not apply to a sole trader converting to this combination of business structures,[113] nor does it apply to inserting a discretionary trust between a shareholder and a wholly-owned company,[114] because there are special rules about continuity of economic ownership for non-fixed trusts.[115] Consistent with the Board of Taxation's observations, concerns were expressed by advisors over unintentional structural issues in terms of applying the SBRR to the business most frequently recommended by advisors – a trading company with holding trust.[116] Furthermore, the inability of applying the SBRR to enable this restructure may inhibit business growth, which is contrary to one of the government's stated objectives for the SBRR.[117] Serious consideration about reforming the SBRR needs to be undertaken.[118]

From an SME advisor perspective, there were various techniques they used to reduce these inhibitors. This included the use of the existing concessions that could mitigate the CGT consequences of restructuring, such as the Division 115 CGT discount, Division 152, and the SBRR. These concessions are a key mechanism to reduce transfer costs as the restructure is not likely to occur otherwise.[119] The advisor discussion also supports the need for certainty on the application of the SSRR relief and its scope. Advisors also advocated for client education and seeking advice at the inception stage to reduce the complexity and the compliance costs associated with adopting a combination of structures, or by simply reducing the number of entities for one business to reduce complexity and compliance cost.

Overall, the analysis reported in this study illuminates factors perceived by advisors as inhibiting SMEs from restructuring and offers a rich description of the techniques which

[111] Board of Taxation, *Review of Small Business Tax Concessions*, above n 88.
[112] Trad et al, 'Choice of Australian Business Structures', above n 30.
[113] Board of Taxation, *Review of Small Business Tax Concessions*, above n 88, Example 1, para 7.53. The SBRR does not apply to small business owners restructuring their business from a sole trader to an operating company owned by a discretionary trust.
[114] Ibid, Example 2, para 7.53.
[115] Trad et al, 'Small Business Restructure Roll-Over', above n 27.
[116] Ibid.
[117] Ibid.
[118] However, there can be contention as to whether the SBRR should be expanded beyond the 'continuity of economic ownership', as such economic ownership is used as an integrity measure for a number of tax provisions dealing with business structures, such as for the 'continuity of ownership' test for the carry forward rules for company losses: ITAA 1997, above n 28, s 165-150.
[119] Giancaspro et al, above n 47, 63.

advisors can use in reducing such inhibitors. The results demonstrate that for established businesses restructuring can be costly and time intensive, requiring the services of an advisor to recommend an ideal structure. The factors that could inhibit an ideal structure from being implemented, for the established SMEs, are the transfer costs mainly related to CGT and stamp duty, whereas for the new SMEs, the inhibitors are the advice and establishment costs. This can mean SME owners may adopt an inappropriate business structure, and then later encounter the same issues experienced by an 'established' business trying to restructure, with the potential of prohibitive transaction costs as described above.

The findings from this study are used to inform and formulate two recommendations set out in the next section.

5. RECOMMENDATIONS AND FUTURE RESEARCH

5.1 Recommendations

There are two recommendations formulated, focusing on advice and the restructuring provisions.

5.1.1 Incentivise advice

Previously, it has been argued that there is a need for incentives to encourage SMEs to seek advice at the inception stage of their business, which could be in the form of a tax rebate.[120] The findings from this research provide further evidence of why this initial advice about business structures is important.

Understanding the different types of business structures can be difficult and complex for a person wanting to start a business. This may raise concerns as to the extent to which business owners are equipped to face such challenges, and whether they can fully comprehend the different types of business structures, and/or meet their obligations in respect of the structures. The business structure affects the tax impost on the businesses' income and deductions, as well as the legal obligation to stakeholders including creditors, clients, employees, and government agencies such as the Australian Taxation Office (ATO) and the Australian Securities and Investments Commission (ASIC).

The legal complexity and consequences of business structures requires advice and education, especially at the inception stage of the business. Advisors in the study noted that the lack of extensive advice at the inception of a business was due to the initial cost of advice. In starting a business, funds can be limited, cash flow is critical and business owners may not be able to meet many of the unbudgeted costs that can impact cash flow and increase risk of business failure. Simply put, paying for a structure set-up and advice may be too onerous for the new SME business operator.

A unique finding, and a clear theme which emerged from analysing the interview data from the case study, was the importance of setting up the structure correctly at the inception stage of the business to avoid the cost and the complexity of changing the structure in the future, or the detrimental consequences of continuing to operate with an inappropriate structure. This would support the importance of advice as a preventative measure at the inception of the SME to minimise these risks. For this reason, and to

[120] Trad et al, 'Small Business Restructure Roll-Over', above n 27, 143.

address the initial cost of advice, the Australian government could consider incentives to encourage SMEs at the inception stage to seek advice. For example, a tax offset (or inflated tax deduction)[121] to lower the cost of advice could be implemented. This could be aimed particularly at small businesses, as it is these businesses that could grow into medium (and large) businesses. In fact, a tax offset was one of the recommendations put forward by the Small Business Association of Australia, targeted at supporting and growing the capacity of Australian small businesses.[122]

Furthermore, a similar advice tax offset has been previously mooted for small business operators.[123] Seeking advice at the inception stage, and education about the implemented business structures and their obligations, are most likely to result in beneficial outcomes to business owners, the tax system, and to society overall. While there are currently some free services in place offered by government agencies (including the ATO) and business organisations to assist business owners to develop their skills,[124] the introduction of a tax offset may complement and encourage the use of these programs, as well as being a strong 'signal' to business owners of adopting good business habits.

A tax offset could be framed to assist SMEs in the crucial first three years of business operation. This three-year period could equip business owners with critical information and education concerning the implemented business structure and their obligations. For instance, in the first year of setting up a business, a tax offset could be offered, capped at AUD 5,000, for advice. The rebate for the first year could also include education concerning the implemented business structure and the obligations in terms of the structure. In the second year, a tax offset, capped at AUD 3,000, could be considered for further consultations concerning the appropriateness of the implemented business structure, and the business owner's competence in relation to understanding the structure and their obligations. A rebate of AUD 2,000 for the third year would be beneficial for further consultations and education related to the business structure if these were needed. In addition to business structure advice, business owners may seek advice in relation to business administration, managing cash flow, regulatory compliance, and tax compliance (including income tax, goods and services tax (GST), and superannuation). It is hoped that a period of three years of education and advice would be a good start to equip business owners towards achieving long-term commercial goals.

Eligibility for the rebate could cover advice from members of registered professional bodies and may require business owners to undertake a series of specific modules of study. These modules could be offered by professional bodies and provide education in accordance with each year that the offset is claimed. Furthermore, the Institute of

[121] An inflated tax deduction could be set at 150 per cent or 200 per cent. This would mean that if a business spent $1,000 on eligible professional advice, the tax deduction (depending upon the inflation percentage) would be inflated to either $1,500 or $2,000.

[122] Small Business Association of Australia, *Capacity Building: Tax Reforms to Assist Australian Small Businesses* (Small Business Association of Australia, 2019).

[123] Brett Freudenberg, Binh Tran-Nam, Stewart Karlinsky and Ranjana Gupta, 'A Comparative Analysis of Tax Advisers' Perception of Small Business Tax Law Complexity: United States, Australia and New Zealand' (2012) 27(4) *Australian Tax Forum* 677; Yong and Freudenberg, above n 107.

[124] One such approach could be the National Tax Clinic Program which sees universities providing free services to the community (including small and micro businesses) through student tax clinics. See Brett Freudenberg, Colin Perryman, Kristin Thomas and Melissa Belle Isle, 'The Griffith Tax Clinic' (2020) 22(2) *Journal of Australian Taxation* 64.

Certified Bookkeepers, in its submission to the Board of Taxation, recommended that the eligibility for such tax offset could involve having an agent sign off on a Business Induction Program.[125] This type of tax expenditure early in the inception stage of a business might be better targeted than having tax concessions that apply later in the business cycle, which generally is how the small business tax concessions are currently drafted.[126] It is argued that by this stage, these concessions might be retrofitting, or fixing a problem that could have been prevented earlier.[127] To reduce tax expenditure costs for the government, existing small business concessions may be reduced or removed, as recommended by the Board of Taxation.[128]

5.1.2 Enhance restructuring provisions

The ability for established businesses to restructure needs to be considered. No structure is perfect, and circumstances can change. To facilitate the restructuring of an established business, certainty about the application of the concessions is essential. Otherwise, SMEs will continue operating with inappropriate structures, or potentially incur significant transfer costs which may jeopardise their working capital. The trade-off between the benefits of restructuring and the significance of transfer costs may remain a difficult decision for SME operators and advisors.

It appears that the factor of 'life cycle' of the business can influence the business structure.[129] For instance, it is common, when commencing a business, to start as a sole proprietor or as a partnership because owners may perceive less risk given that they are conducting most of the work and will be more assured of the work being done. However, when the business grows and needs to engage other workers, limited liability can then become a concern. For this reason, business owners may restructure to a trading company with holding trust (a common combination of structures), as a company structure may provide the owners with limited liability. Restructuring may not pose an issue if there are no valuable assets held in the business structure, but restructuring an established business involving valuable assets can be an issue because of the transfer costs (CGT and transfer stamp duty). At present, the SBRR does not apply to such a restructure to a trading company with holding trust.[130] This may result in SME operators adopting a less than ideal business structure, whereby the business and assets are exposed to financial risks, or alternatively the SME employs a partial restructure with valuable assets left in the original structure or large transaction costs are imposed even though the economic ownership is similar.

Furthermore, it is a concern that the SBRR does not apply to a sole trader restructuring to a trading company with holding trust, which can be the preferred business structure

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[125] Institute of Certified Bookkeepers, Submission to the Board of Taxation Review of Small Business Tax Concessions (17 July 2018) 4 <https://taxboard.gov.au/consultation/small-business-tax-concessions#submissions>.

[126] For example, Division 152 really only applies for a mature business, especially when a sale of the business is occurring.

[127] For example, using Division 152 as a pseudo restructure roll-over relief to reduce the transaction costs to restructure to a more appropriate business structure.

[128] Board of Taxation, *Review of Small Business Tax Concessions*, above n 88.

[129] Trad et al, 'Small Business Restructure Roll-Over', above n 27.

[130] There is also Subdivision 122-A which provides access to the CGT roll-over relief by a sole trader or a trustee on the disposal of business assets to a company, in which the business owner then owns all the shares in the company. This requires the shares to be owned by the business owner not by a trust.

recommended by SME advisors.[131] It is important for the SBRR relief to allow for this restructure, particularly if advisors consider that such a combination is the most ideal business structure for SMEs. This structure could offer limited liability and access to the lower company tax rate, with the discretionary trust as a shareholder offering an extra layer of asset protection, as well as some flexibility with income splitting among beneficiaries. Therefore, to promote and assist small businesses to adopt a preferred structure, it is recommended that the scope of such roll-over provision be extended to restructuring that involves trading companies owned by discretionary trusts. Concerns about revenue leakage and integrity could be addressed by limiting the availability of relief to discretionary trusts that have made family trust elections. It is acknowledged that 'medium' SMEs would not be able to access the SBRR, and for this reason future research and deliberation about extending the SBRR to all SME operators is worthy of consideration.

5.2 Limitations of research and future research

The study reported in this article is subject to several limitations. The interview sample was skewed towards SME advisors based in Queensland compared to other States – 31 out of 48 advisors (65 per cent) lived in Queensland. Although there may be some jurisdictional differences such as stamp duty, the SME environment (and its associated issues) is relatively consistent across States. For example, business structure and tax regulation are similar or the same in each State. However, it needs to be acknowledged that there may be some regional trends, with some firms recommending certain structures, or having alternative positions on the interpretation of the tax law. While this might be the case, the advisors in this study did come from a broad range of firms. While there was a selective distribution of the scenarios to the advisors amongst accountants and lawyers, and according to regions, several lawyers had indicated a willingness to participate in the study, but after a scenario was allocated to them, they no longer wanted to participate. As a consequence there were more accountants than lawyers, and Scenario Four (new) was only considered by Queensland advisors.

While there was a variety of case studies, including different industries, there were only six scenarios used. It could be that alternative client scenarios may generate other factors.[132] A limitation of the hypothetical business scenarios is that advisors are likely to require extra information about the clients when seeking to restructure their business – more than the one page of information provided in the scenarios. For instance, some advisors required more background documentation, asset registers, general ledgers, profit and loss statements and balance sheets, signed financial statements, income tax returns, all leases and licences of any properties owned by the trustee, Business Activity Statements (BAS), Running Balance Account (GST, PAYG and income tax) and any recent market appraisals of the property by a registered valuer. To address this limitation, the interviewer clarified any issues raised during the interviews. If advisors asked for more information or clarification, the lead researcher (the interviewer) ensured that these were consistent between interviews.

[131] Trad et al, 'Choice of Australian Business Structures', above n 30.

[132] Another limitation was that due to COVID-19 restrictions, all the interviews were conducted online, instead of in person. It is considered that this has not posed any significant impact for the interviews or for data collection. In fact, the online interviews aided the conduct of the research in that it reduced costs and enabled the collection of data from a richer sample of advisors.

Stamp duty was identified as a particular transaction cost that could be problematic to mitigate and which might stop assets from being transferred as part of a restructure. Stamp duty on business transfers was supposed to be removed after five years from the introduction of the GST,[133] but due to fiscal constraints the political motivation for this reform appeared to stall. However, the Queensland government introduced an exemption for small business restructures, which is available for small business owners who restructure their business on or after 7 September 2020 by transferring assets from a sole trader, partnership or discretionary trust structure to a company structure.[134] Under this exemption business owners may be eligible for either a full or partial duty exemption on the transfer, but this is limited to entities with less than AUD 5 million turnover.[135] However, it is not clear to what extent this would apply to a discretionary trust holding shares in a trading company. Future research could focus on how stamp duty is an inhibitor of business growth, and potentially consider its removal or replacement.

Research could also be conducted on the application of the SBRR relief, as advisors can be reluctant to use it.[136] The research could test to what extent advisors are aware of this provision, as well as an analysis of the cases where the application of SBRR was sought. This relief is important as it could aid the ability for SMEs to restructure. Future research could also survey SME owners, as the unit of study, about their considerations relating to their initial adoption of business structures and what their considerations are about restructuring. This could include the extent SME owners understand their business structure in terms of both regulatory and tax implications, referred to as business structure literacy. Additionally, research could consider if there are differences, between the different sizes of micro, small and medium businesses, in terms of the inhibitors for business structuring. Future research could also test the inherent conflict for advisors who recommend complex business structures that could result in greater initial fees and ongoing annual fees for advisors, and whether the advantages for clients outweigh these additional costs.

Research could also consider some themes that were not mentioned frequently to prompt advisors as to their relevance or not. This might explore such issues as the personal services income provisions, non-commercial losses, payroll tax and franchisor requirements.

6. CONCLUSION

Selecting an appropriate business structure is a complex task, with a range of possibilities. Once chosen, this will have varying implications for a business and the way it operates, including legal obligations and how tax is imposed. John Taylor's research revealed different tax outcomes and uncertainty, particularly for companies and trusts. For SMEs at inception, they may not adopt the most ideal business structure, or due to changing circumstances their structure may no longer be suitable. This can mean that at some point during the business life cycle there could be a need for the SME to restructure.

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[133] Australian Treasury, *Tax Reform: Not a New Tax, a New Tax System* (1998).

[134] Queensland Revenue Office, 'Exemption for Small Business Restructures' (last updated 31 July 2024) <https://qro.qld.gov.au/duties/investors/business/restructure/>.

[135] Ibid.

[136] Trad et al, 'Small Business Restructure Roll-Over', above n 27.

This article reported on a case study that sought to provide insights into the factors that may inhibit SMEs from implementing the ideal business structure recommended by advisors. The results indicate that advisors considered transfer costs (CGT and stamp duty) as a frequently mentioned inhibitor to restructuring an established business; other factors were administrative costs and complexity of adopting multiple entities for the one business. In addition, advisors offered techniques aimed at reducing such inhibitors and assisting SMEs in restructuring their current business, or in implementing a new structure at the inception stage. The advisors suggested that some of the existing concessions could assist in alleviating the burden of transfer costs, such as the SBRR, but there were some criticisms about the uncertainty of its application. Stamp duty may be another significant transfer cost in the absence of concession, which is dependent on the State the business operates in. Client education, seeking advice, and reducing the number of entities adopted by a single business were some of the techniques used by advisors to lessen the burden of complexity and compliance costs. These results highlight the importance of setting up the business structure correctly from the inception stage to avoid the complexity and costs of later restructuring.

It is hoped that these findings assist SMEs to appreciate the benefits of obtaining advice in terms of implementing a business structure at the inception stage, that may prevent the need to restructure. The findings could also assist the government in implementing policy changes to the taxation of business structures, which could assist the SME sector to realise the benefit of adopting an ideal business structure, a structure that maximises business opportunities and minimises the risks for SMEs.

7. APPENDIX

Table 2: Demographics of SME Advisors

Code	Scenario considered	Type of advisor	Advisor Years	State	Current position	Clients' business size ($)	Frequency of advice /year	Area of practice
A1	One est.	Accountant	>15	Victoria	Partner/Principal	10m–<100m	>20	Specialist tax consultant
A2	One est.	Accountant	>15	Queensland	Partner	500,000–<2m	2–5	Taxation and business advisory services
A3	One new	Accountant	10–15	Queensland	Director	500,000–<2m	>20	Tax advice
A4	One new	Lawyer	>15	Victoria	Partner/Principal	10m–<100m	6–10	Private taxation and succession
A5	Two est.	Lawyer	>15	Queensland	Principal	2m–<5m	1	Tax advice/tax disputes
A6	Two est.	Accountant	>15	Queensland	Partner	10m–<100m	>20	Income tax, FBT and superannuation
A7	Two new	Lawyer	>15	Queensland	Partner	10m– <100m	>20	Tax restructuring
A8	Two new	Lawyer	>15	Queensland	Partner	5m–<10m	11–20	Commercial transaction
A9	Three est.	Accountant	>15	Queensland	Partner	10m– <100m	>20	Corporate tax
A10	Three est.	Lawyer	10–15	Queensland	Partner	500,000–<2m	>20	Commercial litigation and insolvency
A11	Three new	Accountant	>15	Queensland	Principal	500,000–<2m	>20	Specialist tax advisor
A12	Three new	Accountant	>15	Queensland	Partner	2m–<5m	>20	Business and taxation advisor
A13	Four est.	Accountant	10–15	Queensland	Partner	10m–<100m	6–10	Tax advisor
A14	Four est.	Accountant	5–10	Queensland	Senior	500,000–<2m	2–5	Accounting for small businesses
A15	Four new	Accountant	>15	Queensland	Principal	10m–<100m	>20	SME structuring
A16	Four new	Accountant	>15	Queensland	Partner	10m–<100m	>20	Corporate and international tax
A17	Five est.	Lawyer	>15	Queensland	Partner	10m–<100m	>20	Taxation and restructuring of SMEs
A18	Five est.	Accountant	>15	Queensland	Partner	500,000–<100m	>20	SME tax advisor
A19	Five new	Accountant	>15	Queensland	Partner	10m–<100m	6–10	Business advice tax strategy
A20	Five new	Accountant	>15	Queensland	Partner	2m–<5m	2–5	Tax advisor
A21	Six est.	Lawyer	10–15	Western Aust.	Partner	5m–<10m	>20	Tax lawyer
A22	Six est.	Accountant	5–10	Queensland	Senior	5m–<10m	1	Tax and business advisory
A23	Six new	Lawyer	>15	Queensland	Partner	5m–<10m	>20	Tax advisory, structuring, commercial
A24	Six new	Accountant	10–15	Western Aust	Principal	500,000–<5m	2–5	Tax and business advisor
A25	One est.	Lawyer	>15	Qld (all states)	Sole Practitioner	2m–<5m	>20	Family/SME business structuring
A26	One est.	Tax advisor	5–10	Western Aust.	Manager	5m–<10m	11–20	Tax consulting on transactions
A27	One new	Accountant	>15	Victoria	Partner	500 k to <100m	1	Accounting and taxation
A28	One new	Accountant	>15	Victoria	Partner	10m–<100m	>20	Tax technical area
A29	Two est.	Lawyer	>15	NSW	Special Counsel	10m–<100m	>20	Taxation and Superannuation

A30	Two est.	Lawyer	>15	NSW	Partner	10m–<100m	6–10	Corporate taxation (inc disputes)
A31	Two new	Accountant	>15	Queensland	Director	500,000–<2m	>20	Taxation and financial statements
A32	Two new	Accountant	>15	Queensland	Partner	500,000–<2m	>20	Taxation and small business advisory
A33	Three est.	Accountant	5–10	Queensland	Manager	500,000–<100m	2–5	Business service and tax
A34	Three est.	Accountant	>15	Tasmania	Sole Practitioner	500,000–<2m	2–5	Small business tax
A35	Three new	Lawyer	>15	Western Aust.	Principal	2m–<5m	6–10	Succession planning
A36	Three new	Lawyer	>15	Queensland	Principal Director	5m–<100m	>20	Tax specialist
A37	Four est.	Advisor	10–15	South	Sub-contractor	2m–<5m	1	Business effectiveness and marketing
A38	Four est.	Accountant	10–15	Victoria	Manager	2m–<5m	>20	Tax advice
A39	Four new	Lawyer	>15	Queensland	Partner	5m–<10m	>20	Estate and succession planning
A40	Four new	Lawyer	>15	Queensland	Partner	10m–<100m	11–20	Legal structuring, tax, asset protection
A41	Five est.	Accountant	>15	NSW	Partner	2m–<100m	6–10	Business structures and cost cutting
A42	Five est.	Accountant	10–15	Queensland	Partner	500,000–<2m	>20	SME strategy, risk and governance
A43	Five new	Accountant	>15	Western Aust	Partner	5m–<10m	>20	Tax and accounting consultant
A44	Five new	Accountant	5–10	NSW	Manager	500,000–<100m	11–20	Income tax for private clients
A45	Six est.	Consultant	5–10	Queensland	Self-employed	2m–<5m	1	Domestic and international tax
A46	Six est.	Accountant	>15	Queensland	Manager	2m–<5m	>20	Tax and business advisory
A47	Six new	Consultant	>15	Queensland	Consultant	5m–<10m	>20	Consulting services to CFOs
A48	Six new	Accountant	10–15	NSW	Manager	10m–<100m	>20	Income tax specialist

Table 3: Inhibitors to Adopting Recommended Business Structure

Status of business	Advisors	Scenario	Recommended Structure			Inhibitors to adopting									
			Trading Co + disc trust	Trading Disc trust + corp. trustee	Consolidated Group held by Disc. trust	None	Est. Cost	Transfer Costs: CGT	Transfer Costs: Stamp Duty	Land tax	Lease	Bank account	Employees	Client understanding	Complexity & compliance costs
Established scenarios	A1	Scenario One	✓					✓	✓						
	A2	Scenario One	✓					✓	✓						
	A25	Scenario One	✓					✓	✓					✓	
	A26	Scenario One	✓					✓	✓						
	A5	Scenario Two	✓				✓								✓
	A6	Scenario Two	✓					✓	✓						
	A29	Scenario Two		✓				✓	✓		✓	✓	✓		✓
	A30	Scenario Two	✓				✓							✓	✓
	A9	Scenario Three	✓					✓	✓						
	A10	Scenario Three	✓											✓	
	A33	Scenario Three	✓	✓			✓								
	A34	Scenario Three	✓			✓									
	A13	Scenario Four		✓		✓									
	A14	Scenario Four			✓		✓								✓
	A37	Scenario Four	✓					✓							
	A38	Scenario Four			✓			✓	✓						
	A17	Scenario Five	✓					✓	✓						
	A18	Scenario Five	✓				✓							✓	
	A41	Scenario Five	✓					✓	✓	✓					
	A42	Scenario Five	✓				✓	✓	✓		✓	✓	✓		
	A21	Scenario Six	✓					✓	✓						
	A22	Scenario Six	✓					✓	✓						
	A45	Scenario Six		✓				✓	✓						
	A46	Scenario Six	✓					✓	✓						
	Total Est		19	4	2	2	6	16	15	1	2	2	2	4	4
	Est. %		79%	17%	8%	8%	25%	67%	62.5%	4%	8%	8%	8%	17%	17%

Status of business	Advisors	Scenario	Recommended Structure			Inhibitors to adopting									
			Trading Co + disc trust	Trading Disc trust + corp. trustee	Consolidated Group held by Disc. trust	None	Establishment Cost	Transfer Costs		Land tax	Lease	Bank account	Employees	Client understanding	Complexity & compliance costs
								CGT	Stamp Duty						
New scenarios	A3	Scenario One		✓			✓								
	A4	Scenario One		✓		✓									
	A27	Scenario One		✓					✓						✓
	A28	Scenario One	✓			✓									
	A7	Scenario Two	✓	✓										✓	
	A8	Scenario Two		✓										✓	
	A31	Scenario Two		✓			✓								✓
	A32	Scenario Two		✓										✓	
	A11	Scenario Three	✓				✓								
	A12	Scenario Three	✓			✓									
	A35	Scenario Three	✓				✓								
	A36	Scenario Three	✓											✓	
	A15	Scenario Four			✓	✓									
	A16	Scenario Four			✓	✓									
	A39	Scenario Four			✓		✓								
	A40	Scenario Four			✓			✓	✓						
	A19	Scenario Five	✓			✓									
	A20	Scenario Five	✓				✓							✓	
	A43	Scenario Five	✓			✓									
	A44	Scenario Five	✓				✓								✓
	A23	Scenario Six	✓												
	A24	Scenario Six	✓												
	A47	Scenario Six	Co.*											✓	
	A48	Scenario Six			✓									✓	✓
	Total New		12	7	5	7	7	1	2	0	0	0	0	7	4
	New %		50%	30%	21%	29%	29%	4%	8%	0%	0%	0%	0%	29%	17%
Overall total (new and established)			30	10	7	9	13	17	17	1	2	2	2	11	8
Overall % (new and established)			62.5%	21%	14.5%	19%	27%	35%	35%	4%	4%	4%	4%	23%	17%

Table 4: Reducing Inhibitors for Business Restructure

Advisors	**Client education**	**Benefit of advice**	**Div 152 CGT Conc**	**Subdivision 328-G SBRR**	**No change to property ownership**	**Fewer entities**	**Subdivision 122-A**	**Div 115 50% discount**	**Subdivision 122-B**
A1 (Scenario One: Est.)			✓	✓					
A2 (Scenario One: Est.)			✓						
A25(Scenario One: Est.)				✓					
A26(Scenario One: Est.)			✓						
A5 (Scenario Two: Est.)		✓							
A6 (Scenario Two: Est.)			✓	✓					
A29 (Scenario Two: Est.)			✓	✓					✓
A30 (Scenario Two: Est.)		✓							
A9 (Scenario Three: Est.)			✓					✓	
A10 (Scenario Three: Est.)		✓							
A33 (Scenario Three: Est.)		✓							
A34 (Scenario Three: Est.)	None reported								
A13 (Scenario Four: Est.)	None reported								
A14 (Scenario Four: Est.)	✓	✓							
A37 (Scenario Four: Est.)	✓								
A38 (Scenario Four: Est.)					✓		✓		
A17 (Scenario Five: Est.)			✓						
A18 (Scenario Five: Est.)	✓								
A41 (Scenario Five: Est.)					✓				
A42 (Scenario Five: Est.)					✓				
A21 (Scenario Six: Est.)			✓						
A22 (Scenario Six: Est.)			✓						
A45 (Scenario Six: Est.)				✓					
A46 (Scenario Six: Est.)		✓							
Total Est	3	6	9	5	3	0	1	1	1
Total Est. % (reporting inhibitors)	14%	29%	43%	24%	14%	0%	5%	5%	5%

A3 (Scenario One: New)			✓						
A4 (Scenario One: New)	None reported								
A27 (Scenario One: New)						✓	✓		
A28 (Scenario One: New)	None reported								
A7 (Scenario Two: New)		✓							
A8 (Scenario Two: New)		✓							
A31 (Scenario Two: New)	✓		✓						
A32(Scenario Two: New)	✓								
A11 (Scenario Three: New)	None reported								
A12 (Scenario Three: New)	None reported								
A35 (Scenario Three: New)	✓								
A36 (Scenario Three: New)	✓								
A15 (Scenario Four: New)	None reported								
A16 (Scenario Four: New)		✓							
A39 (Scenario Four: New)	✓	✓							
A40 (Scenario Four: New)							✓		
A19 (Scenario Five: New)	None reported								
A20 (Scenario Five: New)	✓								
A43 (Scenario Five: New)	None reported								
A44 (Scenario Five: New)	✓					✓	✓		
A23 (Scenario Six: New)	None reported								
A24 (Scenario Six: New)	None reported								
A47 (Scenario Six: New)		✓							
A48 (Scenario Six: New)	✓								
Total New	8	5	2	0	0	2	3	0	0
Total New % (reporting inhibitors)	57%	36%	14%	0%	0%	14%	20%	0%	0%
Overall Total	**11**	**11**	**11**	**5**	**3**	**2**	**4**	**1**	**1**
Overall Percentage (for those reporting inhibitors)	**30%**	**30%**	**30%**	**14%**	**8%**	**6%**	**11%**	**3%**	**3%**
% excludes those advisors who did not report any reducing inhibitors: 2 for Established & 9 for New									