

14 April 2016

Mr Tom Reid
Division Head
Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Reid

Re: Increasing Access to Company Losses

We are writing to provide our strong support for the draft legislation giving effect to the Government's intention to relax the rules governing access to past business losses.

In circumstances where there has been a change of ownership, current legislation limits access to past losses to nearly identical businesses. This can have the effect of dampening entrepreneurship by discouraging firms from pursuing new ventures and seeking fresh capital injections.

Larger, more diversified businesses have an enhanced ability to more flexibly offset losses following change of ownership. In contrast, a small business is more limited in its ability to offset carry forward losses. This can have the inadvertent effect of locking a small business into the same product lines and methods of operating that caused the losses. Amending the law through a similar business test corrects this imbalance.

Allowing small firms to seek new capital injections, innovate and diversify into new markets, while retaining access to their past losses, will create a more agile small business sector. Small businesses are often cash-poor and have less diverse income streams in comparison to well-established businesses. A reluctance to surrender access to past losses can deter these businesses from seeking opportunities. Similarly, family enterprise inevitably undergoes ownership change over time and the draft legislation provides greater flexibility for these businesses.

Liberalising the law governing access to past losses will encourage entrepreneurship and help loss-making firms trade their way out of difficulties by allowing them to pursue more profitable opportunities. This effect is further enhanced by applying the similar business test for other purposes in the tax legislation where the same business test currently applies.



Australian Government



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We also wish to signal our agreement with the expansive drafting used, such as in the proposed subsection 165-211:

“without limiting the matters that may be taken into account...”

That subsection also uses language such as “the extent to which” and “whether any changes... are changes that would reasonably be expected to have been made to a similarly placed business”. This form of drafting permits the legislation to apply without undue limitation to specific circumstances that are not necessarily currently imagined. If interpreted and applied appropriately, this form of drafting can provide for a more flexible, sensible operation of the law particularly in the face of innovation and technological change.

If we can please be of any further assistance, please do not hesitate to contact me or my Deputy, Dr Craig Latham.

Yours sincerely

Kate Carnell AO

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