

## SBCGTintegrity

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**From:** Frederick John Morgan <[f.john.morgan@vicbar.com.au](mailto:f.john.morgan@vicbar.com.au)>  
**Sent:** Monday, 19 February 2018 8:27 PM  
**To:** SBCGTintegrity  
**Subject:** Enquiry about: Improving the integrity of the small business CGT concessions [submissions about Draft Bill]

**Categories:** Saved

Commonwealth Treasury  
Canberra

Dear Sir or Madam,

### **Enquiry about: Improving the integrity of the small business CGT concessions [submissions about Draft Bill]**

1. Thank you for taking submissions.
2. My submission is in regard to the wisdom of including the 'object entity' condition in proposed in new s152-10(2)(c)&(d) of the ITAA97.
3. Can I direct you to the article I wrote, on this Bill, on my Trust's website: 'Tax Technical' ([www.taxtechnical.com.au](http://www.taxtechnical.com.au)). The article can be found at: <http://taxtechnical.com.au/draft-treasury-laws-amendment-measures-bill-2018-small-business-cgt-concession-integrity-measures-on-sale-of-shares-or-units-see-through-active-assets-test-new-taxpayer-requirement/>
4. My submission to this Committee, is that this measure is objectionable in that it does not deal with any identifiable mischief, whilst upsetting long standing asset protection practices.
5. My editorial comment, on this Part of the Bill, carries the gist of my submission to your enquiry. It is as set out below.

#### **EDITORIAL COMMENT** – there is much to say about the new 'object entity' requirement.

1. It is objectionable, as it is an incursion into long practised 'asset protection' strategies, without being justified by any identifiable mischief.
2. It might have been satisfactory, to have required the object entity, to either satisfy the \$6m net assets test (which it effectively had to, already), or be a 'small business entity' (including the requirement to carry on business, immediately before the relevant CGT event).
3. But, requiring an object entity, to carry on business, would appear to preclude a related entity leasing, or licensing, the valuable assets, to a liability prone business, for rent, fees or royalties. It would seem to many, that this does not amount to 'carrying on a business'.
4. A shareholder/unitholder might be prepared to sell the shares in Business Co. and sell the actual (valuable) assets out of Property Co/Trust (to avoid this new problem). But that can make it difficult for the taxpayer, to access the untaxed profit, from Property Co/Trust, without further tax (effectively clawing back the concession – which was the problem that lead to all the concession provisions, that allow shares and units, to be sold, in the first place).
5. These changes will be retrospectively enacted with insufficient detail, at the time they were announced, to now have retrospective effect (especially if the measure is objectionable in the way described here).

6. Professor Bob Deutsch, writing as Senior Tax Council, for the Tax Institute, has identified this requirement as objectionable, for the same reasons (see the Institute's weekly email publication, to members: *The Vine*, #5, 16 February 2018).
7. The only ameliorating consideration could be the Commissioner's recently expressed view that, for a company, the range of activities that constitute 'carrying on a business', is wider than for an individual, and will commonly include mere leasing of property to someone else. This was in his draft ruling: TR 2017/D7, which was initially expressed to be for the purposes of the same test, which was relevant for the staged reduction in company tax, under s23AA of the *Income Tax Rates Act 1986* ([TT article1](#)). Later, however, he issued a fresh draft, which was expressed to apply generally ([TT article2](#)). This ruling was always going to be a 'two edged sword'.

6. It may be relevant, to your enquiry, to know my qualification to make this submission. I am a lawyer who has practiced in tax law for over 30 years (and for further details, see: [www.FJMtax.com](http://www.FJMtax.com)).

Kind regards,

**F John Morgan**  
Barrister at Law  
Nationally Accredited Mediator

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