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Budget changes trigger triple taxation exposure for trust assets on death

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

One of the most significant impacts from the new rules for trusts following the Budget has been on traditional "second-to-die" strategies, a legal specialist said.

Matthew Burgess, director of View Legal, said the 2026 budget has triggered a renewed debate over proposed changes to Australia's trust taxation rules and has largely focused on prospective reforms such as the attack on future testamentary discretionary trusts imposing a minimum 30 per cent tax rate.

However, Burgess said it is the impact on "spousal planning" which is going to be under increasing pressure.

"Historically, it has been common for a surviving spouse to direct assets into a testamentary discretionary trust under their will, allowing income to be streamed tax-effectively to children and grandchildren," Burgess said.

"Under the revised rules, however, this approach can result in the loss of concessional tax treatment for minors where the assets were not originally derived from the first deceased estate. This effectively imposes an additional layer of tax, reshaping outcomes that had long been considered settled."

He added that in some cases, the effect is like a "quasi death duty"; not through an explicit tax on the estate itself, but through the erosion of expected tax outcomes across generations.

Burgess said compounding the issues with these changes is the interaction with Australia's separate family trust election (FTE) regime, an area already known for its complexity.

"Where a trust seeks to access benefits such as franking credits, it will often need to make an FTE and nominate a 'test individual'. Crucially, at least according to the ATO, that individual must be alive at the time of the election," he said.

"This creates a structural tension for TDTs, which by definition only come into existence upon death. The misalignment in FTE settings or family group definitions can expose trusts to Family Trust Distribution Tax (FTDT), currently imposed at the top marginal rate."

He continued that the risk is not theoretical, noting high-profile disputes, including one involving a prominent South Australian family (founders of Thomas Foods International), have highlighted how technical FTE missteps can trigger FTDT liabilities exceeding $13 million.

"Although such cases attract attention due to their scale, advisers emphasise that the underlying issues are far more widespread," he said.

Ultimately, any family using discretionary trusts, and particularly testamentary discretionary trusts, is potentially affected. The challenge lies in the cumulative effect of multiple rules: the limitation on concessional treatment for minors, the constraints on asset flows between estates and trusts, and the strict boundaries imposed by family trust elections."

Furthermore, Burgess said, the combined effect of these measures may also produce outcomes resembling double, or even triple, taxation in certain scenarios.

"For example, strategies that previously relied on distributing income to a corporate beneficiary, often referred to as a 'bucket company', can now interact unfavourably with the revised rules, reducing or eliminating the anticipated tax efficiency," he said.

"The result, advisers say, is a landscape in which previously orthodox planning techniques may no longer achieve their intended outcomes and in some cases, may trigger unintended tax liabilities. It may be if the proposed changes are implemented as announced that the last remaining planning opportunity is promoted by author Douglas Adams, namely 'spending a year dead for tax purposes'."