

Treasury's taxation of trusts consultation ends before it begins

Before adding yet another layer of complexity to an already convoluted area of tax law, Treasury should step back and undertake the comprehensive review that key stakeholders, being taxpayers and specialist advisers, have been calling for over many years, writes Matthew Burgess.

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For many Australian families, business owners, and investors, discretionary trusts are not novel tax-planning arrangements. They are long-established structures implemented in accordance with laws enacted and maintained by successive federal governments over many decades.

If Treasury genuinely intended to equitably reform the taxation of trusts, the starting point would be a comprehensive examination of why it is appropriate to materially alter the taxation outcomes of existing arrangements that were lawfully established and, in many cases, primarily motivated by considerations extending well beyond taxation. Asset protection, succession planning, business continuity, and family wealth management have long been central reasons for using trusts, as attested to by all stakeholders (other than those responsible for generating consolidated revenue).

Unfortunately, the recently released consultation paper on the proposed minimum tax for discretionary trusts appears to bypass that fundamental discussion.

Consultation in name only?

Effective tax reform requires meaningful engagement with those who operate, administer and advise on the affected structures. That engagement should include genuine consultation with practitioners, trustees, businesses, and families who will bear the practical consequences of any change.

By definition, it would last months at a minimum.

Against that backdrop, the decision to provide only three weeks for submissions (during the winter school holiday period and immediately following the end of the financial year) raises questions about the integrity of the process and, in particular, whether Treasury is genuinely seeking collaborative policy development, as opposed to simply 'ticking the consultation box'.

More bluntly, the timing and scope of the process create the impression that the consultation exercise is directed more towards validating a predetermined outcome than facilitating substantive debate about the future of trust-related taxation.

Equally concerning is the apparent reluctance to consider broader reform of Australia's trust taxation framework. Successive governments have promised comprehensive reviews of trust taxation. Yet the current proposal appears focused solely on introducing an additional revenue measure without addressing the structural complexities that have plagued the regime for decades.

Complexity upon complexity

Australia's trust taxation rules are already among the most complex areas of the tax law.

Trust advisers and trustees must navigate the interaction of multiple complex regimes, including:

- Division 6 of Part III of the Income Tax Assessment Act 1936.
- The High Court's decision in FC of T v Bamford.
- The family trust election regime.
- Division 7A.
- Section 100A.

Each of these regimes is complex in its own right. Collectively, they create a framework that is difficult for taxpayers and advisers to understand, administer, and comply with.

The consultation paper provides little explanation as to why existing integrity measures are insufficient or why additional rules are necessary.

Absent clear evidence that the current integrity framework has failed, the policy justification for introducing a new minimum tax regime appears extremely weak.

Indeed, rather than improving the taxation of trusts, the proposal risks adding another layer of complexity, increasing compliance costs, and further undermining confidence in a system that many taxpayers already view as excessively complicated.

A few questions that Treasury has not yet answered

Perhaps the most significant concern is that the consultation paper appears to overlook several threshold policy questions.

Where did broader trust reform go?

For many years, policymakers have explored broader approaches to entity taxation and trust reform. The consultation paper does not explain why these earlier reform pathways have effectively been abandoned.

Before introducing a minimum tax regime, Treasury should clearly articulate why previous reform models are no longer being pursued and how the current proposal fits within any long-term vision for trust taxation.

Why leave existing problems unresolved?

Many longstanding deficiencies in the trust taxation regime remain unaddressed.

The focus should arguably be on simplifying and modernising existing provisions before creating additional obligations for taxpayers and advisers. Adding new complexity without addressing existing complexity rarely produces good policy outcomes.

Trust law still matters

One of the more surprising omissions from the consultation paper is the lack of consideration given to trustee obligations.

Trustees are not free to act as they please. They owe fundamental fiduciary duties to beneficiaries, developed through centuries of equitable principles and judicial authority.

Any proposal that contemplates rollover relief or restructuring opportunities for discretionary trusts must grapple with a basic question: in what circumstances can a trustee properly exercise their powers to facilitate such transactions?

Ignoring this issue creates a significant gap in the analysis. Tax policy cannot be developed in isolation from trust law.

What about state taxes?

The proposed restructuring and rollover measures are also difficult to evaluate without considering state and territory duties.

In many cases, a restructuring that is tax-neutral at the federal level may still trigger substantial duty liabilities. If corresponding state-based relief is unavailable, the practical value of federal restructuring concessions may be minimal.

Meaningful reform therefore requires coordinated engagement between the Commonwealth and the states. Without such coordination, many of the proposed measures may prove commercially impractical.

Testamentary trusts deserve better

The proposals relating to testamentary trusts are particularly concerning, not least of which is that it is only a few weeks since the proposed budget changes were announced to be 'unwound'.

For generations, testamentary trusts have played a critical role in Australian succession planning. They are commonly used to achieve legitimate objectives, including:

- Protecting vulnerable beneficiaries.
- Safeguarding family wealth.
- Managing intergenerational succession.
- Providing asset protection.
- Facilitating long-term family governance.

Any changes affecting testamentary trusts should therefore be approached with considerable caution.

The consultation paper does not appear to adequately weigh the broader consequences that may flow from disrupting established estate planning arrangements. Increased complexity for families, executors, trustees, and advisers may ultimately outweigh any projected revenue benefits.

A better way forward

There is a strong argument that a minimum tax on discretionary trusts is the wrong starting point for trust reform.

A more coherent approach would involve:

- A comprehensive review of the taxation of trusts as a whole.
- Simplification of existing complex provisions.
- Increased certainty for taxpayers and advisers.
- Meaningful consideration of state and territory tax interactions.
- Consultation focused on long-term structural reform rather than incremental revenue measures.

Trusts have been a fundamental component of Australia's legal and commercial landscape for generations. Reform must be driven by careful policy analysis, meaningful consultation, and a genuine commitment to simplification.

At present, the proposed minimum tax regime achieves none of those objectives.

Before adding yet another layer of complexity to an already convoluted area of tax law, Treasury should step back and undertake the comprehensive review that key stakeholders, being taxpayers and specialist advisers, have been calling for over many years.

Only then can trust taxation reform be both principled, effective, and enduring.

