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More of the same with latest missive from Treasury

7 August 2026 by Matthew Burgess, View Legal

Less than three business days after 'consultation' closed on the proposed minimum tax on discretionary trusts, Treasury released a second tranche of amendments claiming to address perceived gaps in the initial tranche of Budget related legislation.

The initial legislation was rushed into law despite widespread concerns raised by advisers, professional bodies and taxpayers. There is little evidence that this feedback in any way influenced the final outcome. Against that backdrop, a further two-week consultation period for highly complex reforms again risks appearing as simply 'box ticking' rather than any genuine interest in considering stakeholder feedback.

More concerning, however, are the substantive policy outcomes.

The latest draft legislation appears capable of imposing a form of death tax in circumstances involving testamentary trusts, including arrangements that have long been regarded as legitimate and desirable estate planning structures. Widows, post-death estate trusts and child maintenance trusts following spousal separation all appear potentially exposed.

These are not aggressive tax planning arrangements. They are structures traditionally used to protect vulnerable beneficiaries, preserve family wealth and provide flexibility following death, incapacity or family breakdown.

If these outcomes are intentional, they represent a significant departure from decades of settled policy supporting testamentary trusts and family protection arrangements, without any explanation as to the perceived mischief to be addressed.

If the outcomes are unintended, they provide compelling evidence of the risks inherent in rushed legislative drafting undertaken without any meaningful engagement with those who advise taxpayers every day.

Either conclusion is troubling for advisers and taxpayers alike.

More details about five key concerns are set out below; with the disclaimer that it is hoped the interpretations gleaned from an initial review of the proposed changes are incorrect.

1. Widow Tax Concerns Extend Beyond Direct Property Transfers

One of the most significant concerns appears to be the continued absence of any meaningful recognition of situations where a surviving spouse inherits wealth indirectly through a testamentary structure rather than by way of an outright transfer.

While public discussion has largely focused on direct transfers of assets between spouses, many modern estate plans deliberately utilise testamentary trusts to achieve outcomes including asset protection, succession flexibility, tax efficiency and protection of vulnerable beneficiaries. On a first reading, it remains unclear whether the proposed rules adequately address these arrangements.

If this concern is not addressed, families who have implemented testamentary trusts in accordance with long-standing professional advice may find themselves subject to outcomes that appear inconsistent with the policy objective of protecting surviving spouses following the death of a partner.

2. Broad Anti-Avoidance Provisions Create Material Uncertainty

A further concern arises from the breadth of the proposed definition of a "scheme" in circumstances involving testamentary trusts.

The drafting appears sufficiently expansive that it may permit the Commissioner to examine virtually any step taken by a willmaker to ensure assets are ultimately held through a testamentary trust structure.

While anti-avoidance provisions clearly have a legitimate role, the current drafting risks creating uncertainty for ordinary families undertaking entirely legitimate estate planning. There is a real question as to whether the provisions, as presently drafted, could effectively grant the ATO an extraordinarily broad discretion to challenge outcomes arising from testamentary trust arrangements that have traditionally been regarded as uncontroversial and fully compliant with both tax and succession law principles.

At a minimum, considerably greater certainty appears warranted if taxpayers are to have confidence that established succession planning strategies will continue to operate as intended.

3. Post-Death Testamentary Trusts Appear Particularly Vulnerable

Another area of concern relates to the treatment of post-death testamentary trust arrangements.

These structures arise not through tax evasion but because families are confronted with tragic and unanticipated events following the death of a parent leaving infant children. Their use is often driven by practical necessities that emerge after a parent has passed away rather than from any pre-meditated tax objective.

If that interpretation is correct, the reforms risk adversely affecting some of the most vulnerable families in the community at precisely the time they are dealing with bereavement and significant personal hardship.

4. Child Maintenance Trusts Also Appear at Risk

Similarly, concerns arise regarding the apparent treatment of child maintenance trusts.

These structures generally arise in highly sensitive family law contexts following relationship breakdowns involving young children. Their primary purpose is ordinarily to provide long-term financial security and certainty for children rather than to achieve aggressive tax planning outcomes.

Any reform measure that inadvertently captures these types of trusts risks undermining established family law and succession planning mechanisms that have historically operated as important protective structures for vulnerable beneficiaries.

Given the limited policy discussion to date, it remains unclear whether this outcome reflects an unintended consequence of the drafting or a deliberate policy position. Either possibility warrants further scrutiny.

5. Consultation Period Raises Questions About Genuine Industry Engagement

Perhaps most concerning from a governance perspective is the consultation process itself.

The issues raised by the proposals are highly technical and sit at the intersection of tax law, succession law, trust law and family law. Many of the potential consequences may not become apparent without detailed review by practitioners, industry bodies and affected taxpayers.

In this context, the consultation period of only two weeks appears extraordinarily limited.

Meaningful consultation requires sufficient time for stakeholders to analyse the legislation, identify unintended consequences and develop constructive alternatives. The complexity and breadth of the proposed measures make it difficult to reconcile a two-week consultation window with a genuine intention to obtain comprehensive industry feedback.

The perception created is that consultation may be occurring as a matter of process rather than as a mechanism for informing policy development. Or more bluntly, that the changes need to be pushed through as quickly as possible to allow sufficient ‘lead time’ for new issues to occupy public conversation before the next federal election.

Conclusion

The concerns identified extend far beyond technical drafting issues. They raise fundamental questions about the treatment of surviving spouses, the future viability of testamentary trusts, the protection of minor children and the effectiveness of the consultation process itself.

At a minimum, there appears to be a compelling case for both an extended consultation period and a comprehensive reconsideration of several core aspects of the proposed framework before any legislation proceeds.

As with the proposed minimum tax on discretionary trusts, 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.