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Minimum tax on trusts another masterclass in inept tax reform

The release of the minimum tax for discretionary trusts legislation is the latest instalment following the radical tax changes announced in the 2026 federal budget.

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In what has been the pattern with all legislation since the May announcements, the new rules:

1. Were clearly finalised well before the misleadingly and deceptively named 'consultation' process finished.

2. Add material complexity to an already outrageously complicated regime.

3. Are almost certain to be rushed through into law without any further changes, other than reserving the right for ministerial amendment as and when deemed necessary to protect the revenue.

4. Pay passing lip service to any suggestions the new rules may have defects – not least of which the fundamentally flawed Excluded Election Trust regime, which is said to be an innovative solution to allow taxpayers to avoid state based stamp duty costs on restructuring, but will in fact still trigger stamp duty in many states (even ignoring the likely breach of duties for any trustee that attempts to opt in to the concept).

Subject to the detailed review the dense new provisions mandate, seven headline issues taxpayers and their advisers will need to consider are set out below.

1. The headline changes to the changes proposed

In contradiction to the budget announcements, the draft legislation makes at least three material changes, namely:

(a) A 30 per cent minimum tax on certain discretionary trust income will now not apply until 1 July 2028.

(b) The three-year restructuring roll-over will apply from 1 July 2027 to 30 June 2030 – however, it is now subject to a four-year clawback period.

(c) An elective (the aforementioned Excluded Election Trust) regime will permit existing discretionary trusts to avoid the minimum tax by effectively 'locking in' nominated beneficiaries to set fixed distribution proportions.

2. The EET

The EET is said to be designed to enable taxpayers to avoid stamp duty costs, without stating whether this objective may trigger state-based anti-avoidance rules.

The theory is that by opting into the EET – by making a one-time-only election to fix all future income and capital distributions from a trust – taxpayers avoid:

(a) Full restructure costs.

(b) Double taxation on using a corporate beneficiary.

(c) State stamp duty.

(d) Commercial disruption, not least of which the inability to access specialist professional advice due to the enormous strain that will be placed on an already at-capacity adviser community.

The utility of the EET regime, however, appears at best marginal, for a range of reasons including:

(a) In many states, stamp duty will still be triggered.

(b) Opting into the regime will likely be a breach of trustee duties.

(c) The regime contains some of the harshest integrity provisions seen, even compared to existing draconian rules such as family trust elections. In particular, if a trustee makes distributions inconsistent with the nominated percentages, the EET is automatically revoked and can never be remade. Further, the beneficiaries are effectively treated as never having been presently entitled, and the trustee becomes taxable on all trust income at the top marginal rate plus Medicare in that year - while the minimum 30% then applies in all future years.

(d) Other than narrow exceptions (for example on death or divorce), no adjustments can be made, even if a nominated beneficiary is suffering financial or personal relationship misadventure, moves overseas or has any change in life circumstances (including loss of capacity).

(e) Any beneficiary must be a potential beneficiary of the relevant trust as at 1 July 2028, virtually mandating that every existing trust will need to have its deed comprehensively reviewed and where necessary amended, before this date.

(f) While corporate beneficiaries (or 'bucket companies') can be nominated (and thereby avoid the double taxation attack that otherwise is imposed on discretionary trusts), any such company must not have any discretionary elements affecting member rights (that is, only one class of share can be on issue, such that where 'alphabet shares' exist granting directors the ability to choose which class receives dividends these companies are prohibited from being nominated.

3. The fixed trust conundrum remains

The new rules expressly state the intention to address longstanding concerns with the fixed trust definition for tax purposes.

The approach adopted, however, appears to lack any greater certainty than existing Tax Office publications (which have caused considerable confusion for most taxpayers and advisers over many years), while conveniently ignoring that for any existing discretionary trust wishing to convert to a fixed trust there will almost certainly be stamp duty triggered, as well as material trust law barriers.

Furthermore, no attempt has been made to address a range of standard situations whose treatment is unclear under the current rules, for example:

(a) Unit trusts

(b) Hybrid trusts

(c) Trusts with broad amendment powers

(d) Trusts with appointor powers

(e) Trusts with guardian powers

In a sentence, the draft legislation provides broad concepts rather than any actual detail on what is a fundamental issue under the new regime.

4. The discretionary trust rollover

Arguably, the restructuring rollover is broader than what had been flagged. However, it is still unlikely to be practically available in the vast majority of situations.

The rollover applies regardless of business size and is not limited to active businesses; that is, investment trusts can also access it.

However, several limitations remain.

First, all required assets generally need to be transferred by 30 June 2030. Failure to complete may result in loss of relief for all assets.

Second, only one transferee entity is permitted, materially undermining any asset protection (eg contagion risk) and estate planning objectives.

Third, the newly announced four-year clawback provisions, focused on preserving fixed economic outcomes after restructuring, directly contradict promises of ensuring no anti-avoidance style restrictions would be imposed.

Fourth, and arguably most importantly, the legislation expressly states that state taxes and duties remain unaffected.

5. Testamentary Trusts

As previously flagged by the government, despite budget paper indications to the contrary, genuine discretionary testamentary trusts are generally excluded from the minimum tax.

There do, however, remain material risks under the new rules due to the arguably perverse limitations for what the revenue perceives are egregious (although as yet undefined) tax planning steps. With the new rules conveniently avoiding how a structure that can only be created on death could ever be chosen for a dominant tax-planning purpose, this carve-out should be viewed with trepidation by taxpayers and advisers.

Furthermore, despite submissions flagging the completely unfair treatment of children under the age of 18 losing one or both parents, post-death testamentary trusts appear to be subject to the minimum tax regime. hereby guaranteeing at least one form of additional death tax introduced by the new rules.

6 Excluded income

Some types of income of discretionary trusts will be excluded from the 30 per cent minimum tax regime, including:

- Primary production income
- Testamentary trust income
- Charity distributions
- Exempt entity distributions
- Vulnerable minor income
- Withholding-tax income

To the extent a trust is not a single purpose trust, each source of income will need to be separately tracked for tax purposes.

7. And the one true certainty: compliance costs will increase exponentially

While the new rules are already creating material uncertainty, one aspect is completely clear: the additional compliance costs borne by taxpayers. That is, at a minimum, the new regime will require trustees and their advisers to consider each of the following issues well before 1 July 2028:

- Trustee notifications
- Beneficiary notifications
- Offset calculations
- Election monitoring
- Company ownership monitoring
- Anti-avoidance rules
- Rollover reporting
- Future integrity measures, including any unilaterally announced by the minister
- Stamp duty

These issues are in addition to whatever each trust deed provides, trust law and existing taxation of trusts issues such as:

- Division 6
- Section 100A
- Part IVA
- Division 7A
- Unpaid present entitlement (or UPE) rules
- Family trust elections

- Interposed entity elections, section 99 trust residency
- Family trust distribution tax
- Trust loss rules
- Income injection test
- Control test
- Pattern of distributions test
- Capital gain streaming
- Franked dividend streaming

- Division 6AA
- Corporate beneficiaries
- Small business CGT concessions
- Non-resident beneficiary rules
- Qualified person rules
- GST
- Land tax
- Foreign person surcharges