THE AUSTRALIAN

Labor's death tax on trusts forces millions to redraft wills: estate lawyers

Nurses, teachers and aged-care workers are among millions caught in a budget trap that lawyers say will force a national will-redrafting exercise.

JULIE-ANNE SPRAGUE Wealth Editor

Jim Chalmers and Anthony Albanese are accused of forcing millions of Australians to pay lawyers to redraw their wills to avoid Labor's death tax.

Millions of Australians will be forced to redraw their wills to escape Labor's "death tax" after the Albanese government ignored industry advice on its controversial trust changes due to pass by the end of the year, leading estate lawyers have warned.

As the Greens leave open the door to supporting Labor's legislation, tabled in parliament this week, lawyers sounded the alarm on a "trap" laid in the proposed laws that would force millions of people to redraw their wills in order to avoid the fresh taxes.

Jim Chalmers has insisted his reforms will not significantly affect testamentary trusts, which are excluded from Labor's planned 30 per cent minimum tax if its beneficiaries are limited to individuals, charities and special disability trusts.

But several lawyers – who would stand to benefit enormously over the next year as clients pay to redraw estates – argued testamentary trusts would still be affected.

Activated upon a trust-holder's death and used widely to protect vulnerable people and children, many testamentary trusts also include corporations or family trust structures and as such are likely to fall outside the Treasurer's carve-out. Under the proposed laws, those with trusts would need a new will if they wanted to secure the exemption.

View Legal co-founder Matthew Burgess accused the government of embarking on an ideological wealth war that would have major unintended consequences for hardworking and ordinary Australians. He said Labor was being "malicious or incompetent".

"Either one of those is not a great outcome for ordinary Australians," Mr Burgess said.

"We have never had this situation in 30 years where a government has just completely overlooked consultation. It is unbelievable what they are doing. They have made things so complex and put it in place with such short time frames. It's un-Australian.

Mr Albanese and Dr Chalmers in question time this week. Picture: Martin Ollman / NewsWire

“If anyone has a proper testamentary trust, they will definitely have to change it. No competent lawyer would structure the trust any other way.”

STEP Australia national policy committee deputy chair and estate lawyer Kimberley Martin said that, despite multiple meetings with Treasury officials, the government ignored pleas to either grandfather existing wills or to levy the tax when distributions were actually paid to trusts or companies.

“What has eventuated is, in fact, worse,” Ms Martin said.

“The government has turned an anti-avoidance measure into a nationwide business-restructuring and will-redrafting exercise. Every testamentary trust that has been drafted in the past 30-plus years is going to need to be redrafted because for many testamentary trusts we include related companies and related trusts as potential beneficiaries because there was no harm in doing so.”

Ms Martin said about 90 per cent of the wills she had drafted contained testamentary trusts, which were broad in scope for maximum flexibility. The vast majority of the wills were not held by wealthy Australians.

“Most of these people who are creating these testamentary trusts are nurses, are teachers, are your aged care workers,” she said. “They are trying to provide for their young families, for their children living with disability and so on. These are not people who are trust moguls or people who have lots and lots of money.”

Criticism over the poor design of Labor’s legislation and the potential side effects comes after Dr Chalmers succumbed to demands to adjust other elements of his tax reforms, revealing on Wednesday the retirement living and aged care sectors would be excluded from negative gearing changes.

Anthony Albanese promised the government would dump the death tax by excluding testamentary trusts from its 30 per cent minimum tax, but experts argued the design of Labor’s carve-out would still mean many Australians were hit with the tax if their loved one no longer had the mental capacity to redraft their will.

“For those who cannot amend their will because of medical issues, such as dementia or illness, they will be stuck with the government’s new tax without any way to escape it,” Ms Martin said.

Mr Burgess said restructuring wills needed to start “immediately”.

“This is because a will-maker needs to be alive and with full testamentary capacity at the time they sign a new will,” Mr Burgess said.

He said the minimum tax applied if testamentary trusts were not restructured was actually 32 per cent because the Medicare levy would also be applied.

“Any adviser condoning a deferral in updating wills until there is certainty about the new regime may be at risk of claims in professional negligence,” he said.

Rofe and Co principal Rachael Rofe said that because a testamentary trust started at death, not when the will was signed, existing wills were caught.

She said there was a simple way the government could provide the exemption without forcing thousands of people to pay lawyers to redraft their wills.

“There was a really simple way to do this and that is to tax the slice of income that goes to a company or trust, or lose the exemption,” Ms Rofe said. “But it has been written so that most existing wills won’t qualify (for the exemption).”