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Minimum tax on trusts: Ideology-driven reform by belligerent bureaucrats

16 October 2026 by Matthew Burgess, View Legal

The government's new 30 per cent minimum taxation of trusts regime is far more than a change in tax rates. For advisers and their clients, the real consequences may lie in the choices that must be made before 1 July 2028 – or perhaps sooner.

The legislation for the new minimum tax on discretionary trusts has now been introduced into Federal Parliament.

As with every instalment since the May 2026 budget announcements, the approach is familiar, namely:

1. announce a radical policy;

2. run a misleading and deceptively branded "consultation" process;

3. largely (or completely) ignore industry submissions;

4. introduce dense legislation creating further complexity; and

5. reserve broad powers to fill in the missing detail later by ministerial instrument.

Subject to the detailed review the legislation demands, three headline issues are already clear.

1. The changes to the changes

The legislation confirms:

(a) the 30 per cent minimum tax applies for income years starting on or after 1 July 2028;

(b) restructuring rollover relief applies to transfers from 1 July 2027 to 30 June 2030;

(c) the rollover requires all relevant assets to be transferred to one transferee;

(d) the chosen transferee cannot preserve material discretionary elements for the statutory four-income-year integrity period; and

(e) an existing trust may instead make the previously flagged one-time-only Excluded Election Trust (EET) election and lock nominated beneficiaries into fixed proportions.

In other words, taxpayers face three choices:

1. elect and largely surrender discretion – at the risk of breaching a range of trustee obligations and triggering stamp duty;

2. restructure and accept transaction and integrity risks; while also at the risk of breaching a range of trustee obligations and triggering stamp duty; or

3. retain the trust and accept the 30 per cent minimum-tax overlay, together with a range of capricious other rules (including the widely publicised double taxation for any decision to make trust distributions to a corporate beneficiary (or bucket company)).

Simple! At least according to the Treasurer.

And, unsurprisingly, a number of state Treasurers appear to be "reserving their rights" in relation to the stamp duty consequences of making an EET election.

2. The EET: discretion without the discretion

The EET regime has been widely marketed by the government as an alternative to restructuring.

The trustee nominates the beneficiaries, or limited eligible charitable classes, who may benefit. The nomination must allocate 100 per cent of income and the newly introduced concept by the Bill of "non-income earnings" between them in fixed proportions. Any later corpus entitlement must follow equivalent proportions.

The practical result is straightforward: a discretionary trust can escape the 30 per cent discretionary trust tax if it stops operating like a discretionary trust.

The problems include:

(a) the election is available only for a minimum tax trust existing on 1 July 2028;

(b) nominees generally must have been capable of benefiting under the trust on that date;

(c) superannuation entities and partnerships cannot be nominated;

(d) a company can be nominated only if there are no material discretionary elements affecting member rights;

(e) nominations generally cannot be varied, other than under narrow death and relationship-breakdown rules;

(f) changes affecting a nominated company or its shareholders may automatically revoke the election;

(g) inconsistent income, non-income earnings, payment or corpus outcomes may also automatically revoke the election; and

(h) once revoked, the election cannot be remade.

For most revocations, beneficiary entitlements for the relevant year are treated as never having arisen. The trustee may then be assessed on all net income under section 99A. A payment failure can have an even more remarkable retrospective effect, with the election ceasing at the end of the second preceding income year.

There has been a limited Commissioner discretion to waive breaches for certain inconsistencies introduced; a concession that taxpayers and their advisers should assume would be rarely exercised given the "war on trusts" being waged by #BigGov, Treasury and the Tax Office in unison. Furthermore, there is no equivalent discretion for every automatic-revocation event.

A regime supposedly designed to reduce disruption therefore creates a permanent compliance exercise where an administrative error can become a major tax event; as a point of cross-reference, consider (as one example) the outrageous situation currently faced by all trust operators under the family trust election regime.

3. Yet another form of death tax: Willmakers forced into incurring adviser fees

The introduced legislation includes changes which appear to mean every single testamentary trust will must be reviewed before 1 July 2028.

Initially it was proposed that a minimum 30 per cent tax would apply to testamentary trusts (that is, trusts that can only come into existence on the death of a person under their will).

Widespread criticism of this "death tax by stealth" saw an announced windback.

The difference between the political rhetoric of the windback and reality has, however, been stark ever since.

And now the proposed treatment of testamentary trusts is arguably the most serious sleeper issue in the legislation as released.

In particular, under the legislation, testamentary trusts are not in fact excluded from the 30 per cent tax regime. Instead, the new rules only exclude "qualifying income of qualifying testamentary trusts".

Further, for any testamentary trust "established" (a term conveniently not defined) on or after 1 July 2028, the exclusion applies only if the instrument establishing the trust permits the relevant beneficiary to be:

(a) an individual;

(b) an exempt entity; or

(c) the trustee of a special disability trust.

This drafting approach has a much broader impact than the previous promises that testamentary trusts would be “protected” from the rule changes.

Most modern testamentary trust deeds use wide beneficiary classes. Those classes routinely include:

(a) companies;

(b) related entities, including other testamentary trusts;

(c) family trusts;

(d) corporate beneficiaries; and

(e) other entities introduced to preserve tax, asset-protection and succession flexibility.

Unless every such non-permitted beneficiary is removed before a willmaker dies, it appears what is otherwise currently a standard testamentary trust established from 1 July 2028 risks failing the statutory exclusion.

The practical consequence is unavoidable. That is, every existing will containing testamentary trust provisions must be reviewed and, where its beneficiary class extends beyond individuals, exempt entities and trustees of special disability trusts, will need to be amended before 1 July 2028 if the intended testamentary trust is to qualify for the exclusion.

The costs of such an update are certain to be enormous, assuming willmakers are aware of the issue - and in fact have the testamentary capacity to make the required changes. With an aging population, testamentary capacity is a material risk for many families.

More bluntly, the government's approach is not merely an issue for testamentary trusts drafted after the legislation commences. Any will, regardless of when it was drafted, will be caught if the willmaker dies on or after 1 July 2028.

The legislation also contains anti-avoidance provisions directed at income injection and property transfers into testamentary trusts. Under these rules, the Commissioner may deny the exclusion of a testamentary trust from the 30 per cent tax regime where relevant property entered the trust structure under a “scheme” having the subjectively determined exclusion-seeking purpose.

Despite repeated requests for clarity on the mischief intended by the anti-avoidance provisions (given conceptually identical prohibitions were introduced after the 2018 Federal Budget), no insight has been shared by Treasury. Willmakers and advisers should therefore be extremely concerned about the inclusion of these provisions.