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Why Treasury has got it wrong with its death tax by stealth (a masterclass in marketing miscalculation)

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Anecdotally, and on the basis that actions speak louder than words, it appears the Federal Government and Treasury are running the following playbook:

(a) Step 1: Push through attacks on 'the rich' (a nebulous phrase, which captures anyone not employed by #BigGov and non-left voters) before Christmas 2026 – regardless of how incongruous it makes the 'consultation' process;

(b) Step 2: Market 'huge tax breaks for ordinary Australians' (read: any swinging voters) from Budget night 2027 onwards; and

(c) Step 3: Trust (no pun intended) the process that a sufficient number of required voters remember point 2; and will have forgotten point 1 by election day in May 2028.

With many of the changes – for example; the outrageous attack on taxpayers who have held the same asset for 41 years losing their pre-CGT status which seems already long forgotten – the marketing plan will likely work.

With the death tax by stealth, being the changes to the testamentary trust regime, the marketing strategists may have slightly misread the situation.

Every Australian adult should write and sign a valid will and then review it regularly (spoiler alert: a disturbing percentage never complete all three steps before death).

Whether a lawyer or AI is engaged; testamentary trusts will be considered – generally on multiple occasions over many years. This consideration is not simply by the willmaker, it will almost involve a range of advisers, family, friends and other sage specialists (located via the pub, sporting grounds, BBQs, closed FaceBook discussion groups, TikTok etc).

Everyone involved in the process, every time, will be reminded of the underhanded death tax imposed by the 2026 Budget.

And based on the legislation introduced into parliament last week (apparently already being attacked by professional politicians as 'not going far enough') the reminder to taxpayers of the attack on every Australian taxpayer when their closest are at their most vulnerable will be omnipresent.

That is, every taxpayer (and all those around them) who considers their estate plan, will be reminded every time they do – and their chosen beneficiaries will be reminded on death and every year thereafter, of the 2026 death tax for at least one (and possibly many more) of the following 15 reasons, namely:

1. The drafting of the legislation goes well beyond anything previously foreshadowed and makes an already complicated set of provisions extraordinarily complex for no apparent policy benefit. Remember: the only way a testamentary trust can arise is if someone dies (meaning that the suggestion of widespread manipulation is bordering on unhinged hysteria).

2. At a threshold level, anything other than a complete exclusion of testamentary trusts from the minimum tax regime appears inconsistent with the Government's repeated messaging that it does not intend to introduce a form of death tax. This rhetoric is difficult to process given the proposed provisions are likely to affect ordinary wage-earning Australians more severely than any other segment of the community.

3. The apparent complete disregard of the baby boomer generation, who in an increasing number of cases are enduring diminishing mental capacity, creates an array of risks for all involved (given the ability to update a will is predicated on the willmaker meeting a substantive level of cognition).

4. There appears to be the ability for the Tax Office to prohibit any testamentary trust from sitting outside the 30% (or generally more accurately once the Medicare tax is factored in, 32%) minimum tax if any steps are taken to comply with the new rules, with no objectively announced rules as to what will and will not be permissible.

5. For reasons unexplained, no attempt has been made to replicate the 'innovative' concept available to non-testamentary trusts of the 'excluded election trust' (for example, allowing testamentary trustees to elect that specified beneficiaries or distributions are not subject to the minimum).

6. No attempt has been made to allow an apportionment or tracing approach so that only distributions to beneficiaries considered offensive are subject to the minimum tax.

7. The (seemingly ever growing) risk that a will may be altered due to challenges, and amendments of, wills through court orders, family provision settlements and other post-death arrangements have been ignored.

8. Providing a simple and universal definition of when a testamentary trust is "established" has been actively ignored. For example, if establishment occurs only when the trustee resolves to establish or commence administering the trust, some trustees may, subject to wider asset-protection and trust law considerations, be able to address what the Government is now deeming to be offending provisions in a will after the willmaker's death.

9. No attempt has been made to align the integrity rules in the legislation with standard anti-avoidance provisions by requiring a dominant purpose, or at least one of the principal purposes, of obtaining the relevant tax outcome.

10. An extreme level of residual power has been granted to the Tax Office on a subjective basis (that is, the exercise of that power is not subject to any objective criteria).

11. No safe harbours have been created for genuine misunderstandings of the exceptionally complex new rules.

12. No substantive attempt has been made to clarify the intended treatment of a range of related testamentary structures, including post-death testamentary trusts and trusts established to receive superannuation death benefits (each of which are only relevant in horrendous situations where a parent has died suddenly leaving infant children in financial distress).

13. The draconian, and presumably unintended consequences, of the 2018 Budget amendments that essentially prevent spouses who establish testamentary trusts under their respective wills from arranging for the surviving spouse's estate to pass to an existing testamentary trust set up under the will of the first spouse to die continue to be ignored.

14. It is generally acknowledged that the specialists in the estate planning arena were at workflow capacity well before the 2026 Budget changes due to a convergence of issues such as an ageing population, the already extreme complexity of the rules (particularly concerning tax and stamp duty), burnout of longstanding advisers and a lack of interest from younger advisers. The combination of significant increased demand and the further departure of disillusioned specialists from the industry have only two consequences; increases in both implementation delays and pricing. Neither bodes well for the 'ordinary' Australians these changes are being marketed as protecting.

15. Ultimately (as flagged in earlier pieces) a death tax attack which is either malicious or incompetent (or indeed both) is un-Australian. Not something you would imagine a material percentage of voters would need be reminded of incessantly and in perpetuity.