HIA Submission

Minimum tax on discretionary trusts

Exposure draft legislation

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Executive Summary

Minimum Taxation of Discretionary Trusts

The Housing Industry Association (HIA) opposes the proposed minimum tax on discretionary trusts and the associated Excluded Election Trust (EET) regime.

The Government has consistently identified housing supply, productivity growth and small business investment as national priorities. HIA is concerned that the proposed reforms work against each of these objectives by increasing costs, complexity and uncertainty for the small businesses responsible for delivering Australia's housing supply.

For many residential builders, trusts are not simply a tax structure. They are an integral part of how family-owned businesses manage risk, invest in business assets and plan for the future.

HIA member research indicates that approximately 60 per cent of members operate through trust structures. This suggests the impact on the residential building industry will be significantly broader than any assumption that the proposal affects only a small subset of businesses.

For residential building businesses, discretionary trusts are commonly used to:

- manage commercial and legal risk;
- support succession planning and intergenerational business ownership;
- hold business premises and other long-term assets;
- maintain business continuity; and
- provide flexibility to respond to changing family and commercial circumstances.

The proposal creates a no-win outcome for many businesses operating in the residential building industry with their only choice to :

- remain in a discretionary trust structure and be subject to the minimum tax;
- undertake costly and disruptive restructuring; or
- opt into the EET regime and relinquish many of the commercial flexibilities that underpin the use of discretionary trusts.

At best none of these outcomes improve productivity, increase housing supply or encourage business investment and at worst they force businesses to wind up or close.

In light of these concerns, HIA makes six broad observations on the proposal.

1. Housing Supply Should Be a Primary Policy Consideration

Australia faces an ongoing housing supply challenge.

Small and medium-sized residential builders are central to delivering the homes Australia needs. Policies that increase costs, compliance obligations and business uncertainty ultimately reduce the capacity of those businesses to invest, grow and deliver housing.

Every policy affecting the residential building industry should be assessed against a simple question:

Will this help builders build more homes?

The proposed minimum tax on discretionary trusts clearly does not satisfy this test.

2. The Proposal Fails to Recognise the Commercial Role Trusts Play in Residential Building Businesses

The proposal appears to be based on an assumption that discretionary trusts are primarily used for taxation purposes.

For many residential builders, this does not reflect commercial reality.

Trusts are not simply a tax structure. For many builders, they are an integral part of how family-owned businesses manage risk, invest in business assets and plan for the future.

The reforms therefore affect far more than taxation outcomes. They affect the way many residential building businesses are organised, operated and passed on to the next generation.

3. The Proposal Creates Significant Restructuring Costs

The Consultation Paper acknowledges that businesses may seek to restructure in response to the reforms and proposes limited rollover relief to facilitate those changes.

This acknowledgement is important.

If businesses are expected to alter longstanding legal and commercial arrangements solely because of a retrospective tax measure, Treasury should undertake and publish a comprehensive cost benefit assessment of the associated costs, including:

- legal fees;
- accounting advice;
- valuation costs;
- licensing impacts;
- home warranty insurance impacts;
- contract novation costs; and
- state taxes and duties, including stamp duty.

These are real economic costs that could otherwise be directed towards productive investment, business growth and housing delivery.

4. The EET Regime Does Not Resolve the Underlying Problem

While the EET regime is presented as an alternative pathway, it requires businesses to surrender many of the characteristics that make discretionary trusts valuable.

The flexibility to adapt to changing business, family and commercial circumstances is one of the fundamental reasons builders utilise discretionary trust structures.

The EET replaces that flexibility with fixed beneficiaries and fixed entitlements. For many residential builders, the EET does not provide a genuine alternative due to the variable nature and unforeseen conditions in operating a construction business.

It simply delays future restructuring decisions while creating additional compliance obligations and uncertainty.

5. The Proposal Risks Creating New Economic Distortions

Good tax policy should be efficient, simple, certain and economically neutral.

Rather than reducing distortions, the proposal increases the cost of one business structure in order to encourage migration towards others.

The result is likely to be costly restructuring activity that generates no increase in productivity, business investment or housing supply.

HIA is concerned that the reforms risk creating new distortions while failing to demonstrate a clear economic benefit.

6. Treasury Should Demonstrate That the Benefits Exceed the Costs

The proposed reforms are expected to raise significant additional revenue.

However, they are also expected to:

- increase compliance costs;
- change business behaviour;
- encourage restructuring;
- increase reliance on professional advisers; and
- create additional administrative complexity.

Treasury should clearly demonstrate that the expected fiscal and integrity benefits outweigh the economic costs generated by these outcomes.

HIA recommends that Treasury assess the proposal against the fundamental principles of good tax policy: efficiency, neutrality, simplicity and certainty.

If the Government's own analysis concludes that the reforms will increase compliance costs, require restructuring relief, import state taxes and create additional complexity, Treasury should clearly demonstrate that the expected benefits exceed those costs before proceeding.

For the residential building industry, this proposal is not simply a tax on discretionary trusts. It is another tax on the businesses building Australia's homes.

Detailed Comments on the Exposure Draft

The Excluded Election Trust (EET) Does Not Preserve Existing Business Structures

The Exposure Draft presents the Excluded Election Trust (EET) regime as a practical alternative for discretionary trusts seeking to avoid the proposed minimum tax.

HIA does not agree.

The EET effectively requires businesses to surrender the very characteristics that have historically made discretionary trusts attractive and commercially useful.

Residential building businesses utilise discretionary trusts because they provide flexibility to adapt to changing circumstances. The EET replaces that flexibility with a regime requiring:

- fixed beneficiaries;
- fixed percentages of income;
- fixed percentages of capital;
- mandatory annual conferral requirements; and
- ongoing compliance with strict eligibility criteria.

The proposal therefore transforms a discretionary arrangement into something that more closely resembles a fixed trust.

The EET does not preserve existing business structures. It fundamentally changes them.

For many residential builders, electing into the EET will represent the beginning of a transition away from the flexibility that currently supports business operations.

The consequence is that many businesses will still face future restructuring, succession or ownership challenges despite opting into the regime.

In HIA's view, the EET does not resolve the policy problem created by the reforms. It merely postpones it.

Cash Flow and Income Timing Impacts

The residential building industry operates differently from many other sectors of the economy.

Cash flow and profitability often do not align neatly within a financial year. Builders regularly contend with:

- progress payments;
- retention monies;
- delayed settlements;
- contractual disputes;
- work in progress;
- defects and rectification periods; and
- shifting project timeframes.

Under existing discretionary trust arrangements, trustees can make distribution decisions close to the end of the financial year when a clearer picture exists regarding actual cash receipts, business liabilities and working capital requirements.

This flexibility is a practical tool that supports sound financial management.

The EET framework removes this discretion.

Fixed entitlements must be maintained regardless of the timing of cash receipts or future business requirements.

This creates a significant risk of mismatches between taxation outcomes and business cash flow.

For small and medium-sized builders operating on tight margins, these mismatches may directly affect business viability, cash reserves and investment decisions.

The Government has repeatedly stated that it wants businesses to invest, expand and build more homes. Reducing cash flow flexibility runs contrary to that objective.

Family Business Succession and Structural Flexibility

Many residential building businesses are family enterprises.

They often operate across multiple generations, with ownership and management arrangements evolving over time. Business succession rarely follows a predictable path.

Circumstances regularly arise where:

- children join the business;
- family members leave the business;
- ownership interests change;
- new partners are introduced;
- retirement plans evolve; or
- businesses restructure in response to commercial requirements.

Discretionary trusts accommodate these changes. That flexibility is one of their defining characteristics.

The EET assumes a level of permanence that does not reflect how family businesses operate in practice.

The proposed framework offers limited flexibility for changing family and commercial circumstances and imposes severe consequences where compliance requirements are breached.

In effect, the proposal forces businesses to choose between maintaining flexibility for future generations and maintaining access to concessional tax treatment. For family-owned builders, that is not a practical choice.

Working Capital Management

Residential construction is a highly cyclical and capital-intensive industry. Builders often retain profits within a business structure to:

- fund future projects;
- manage economic downturns;
- finance growth;
- provide working capital buffers; and
- support employment during periods of fluctuating demand.

Corporate beneficiaries are frequently used as part of these arrangements.

Under the proposed framework, the treatment of corporate beneficiaries appears to disadvantage legitimate business structures used to retain capital and manage risk.

Particular concerns arise regarding:

- the absence of comparable offset treatment;
- the potential for effective double taxation;
- limitations on companies with more complex share structures; and
- the impact on retained earnings used to support project delivery.

The proposal risks capturing ordinary commercial arrangements that have no income-splitting objective.

HIA submits that Treasury should adopt a look-through or group-based approach that appropriately recognises genuine business structures and avoids double taxation outcomes.

The Hidden Cost of Restructuring

One of HIA's principal concerns is the extent to which the proposal encourages businesses to restructure solely because of a change in tax treatment.

Trusts are often deeply embedded within the ownership and operational arrangements of residential building businesses.

Changing those arrangements is neither simple nor cost-free. Businesses may incur:

- accounting costs;
- legal costs;
- valuation expenses;
- financing costs;
- contract amendment costs;
- licensing costs;
- insurance costs; and
- state taxes and duties.

Treasury has implicitly recognised these costs through the proposal for transitional rollover relief. The question that remains unanswered is whether the expected benefits of the reform outweigh those costs.

Importantly, none of these restructuring costs increase housing supply. Instead, they consume capital that could otherwise be invested in productive business activity.

Residential Building Industry Impacts

Licensing

Building businesses are subject to licensing regimes that are often linked to a particular legal entity.

Where restructuring is required, businesses may be forced to:

- apply for new licences;
- pay additional fees;
- provide updated financial information;

- satisfy regulator requirements; and
- operate subject to new licence conditions.

In some jurisdictions, these processes can take months. This creates uncertainty and business disruption that extend well beyond taxation.

Contracting

Residential building contracts cannot generally be transferred without agreement from all relevant parties.

Businesses may therefore be required to:

- maintain existing structures for years while projects conclude;
- operate parallel entities;
- execute deeds of novation;
- transfer approvals and permits; and
- renegotiate commercial arrangements.

These costs are significant, particularly for smaller businesses.

Home Warranty Insurance

Changes to entity structures may also affect eligibility for home warranty insurance.

Businesses may be required to:

- reapply for facilities;
- provide detailed financial information;
- satisfy revised eligibility requirements; and
- operate with reduced capacity limitations.

The cumulative impact of these requirements may reduce industry capacity and the ability of builders to deliver new housing.

Transitional Relief and Stamp Duty

HIA welcomes Treasury's recognition that businesses may need to restructure and that transitional relief is therefore necessary.

However, the proposed relief arrangements appear incomplete. In particular, the proposal does not adequately address:

- state and territory stamp duty;
- future restructures arising after the relief period expires;
- succession-related restructures;
- business growth and expansion; and
- future loss of EET eligibility.

Many businesses may opt into the EET regime only to discover years later that changing family or commercial circumstances require restructuring.

If rollover relief is no longer available at that point, the cost of restructuring may be substantially higher.

HIA therefore considers that rollover relief should be available indefinitely where restructuring occurs as a direct consequence of these reforms.

The Commonwealth should also work with states and territories to ensure that stamp duty does not become a barrier to necessary business restructuring.

Trustee Liability, Director Liability and Implementation Risks

The Exposure Draft does not provide businesses with a complete picture of the broader reform framework. Significant matters remain unresolved, including:

- PAYG instalment interactions;
- reimbursement rights;
- trustee obligations;
- director liability exposure; and
- the administration of the proposed regime.

Businesses are therefore being asked to make potentially irreversible decisions without understanding the full legal consequences.

This creates substantial uncertainty and raises important procedural fairness concerns. HIA submits that all consequential provisions should be released and consulted upon before legislation proceeds.

Compliance Burden and Productivity Consequences

The residential building industry already operates within one of the most heavily regulated environments in the Australian economy.

Businesses must navigate an increasingly complex taxation framework, and the proposed reforms introduce additional compliance obligations, including:

- beneficiary monitoring;
- trustee notifications;
- offset calculations;

- election management;
- ownership monitoring; and
- additional reporting requirements.

Every additional obligation consumes management time, professional adviser costs and business resources.

At a time when Australia is focused on improving productivity, the Government should avoid introducing additional compliance layers that create cost without contributing to economic output.

Member Case Study: Practical Impacts on a Residential Building Business

The concerns outlined throughout this submission are not theoretical.

HIA members have reported significant concern regarding the practical implications of the proposed minimum trust tax and the Excluded Election Trust (EET) regime.

One member, a family-owned residential building business operating through a structure commonly used throughout the industry, provided the following feedback.

The group employs approximately 15 staff and subcontractors, constructs around 40 homes each year and has operated through the same discretionary trust-based structure for more than 20 years.

The structure was established to support asset protection, succession planning, family ownership and commercial risk management rather than to obtain a tax rate below 30 per cent.

The member's primary concern is the uncertainty created by the proposal. The business is now being asked to review long-standing ownership arrangements without knowing:

- whether the proposal will ultimately proceed in its current form;
- how trustee and director liability provisions will operate;
- how state taxes and duties may apply;
- whether future restructuring may be required;
- whether future changes in family circumstances can be accommodated; and
- how the EET regime may affect long-term succession planning.

The member advised that simply understanding the available options will require accounting, legal and taxation advice costing several thousand dollars per trust.

Where multiple shareholder trusts exist within a group, advisory costs alone could readily exceed $10,000 to $25,000 before any structural decisions are made.

Importantly, the member noted that the cost is not limited to professional fees.

As the owner of a residential building business, every hour spent meeting with accountants, lawyers and advisers is an hour that cannot be spent running the business, managing staff, overseeing projects or delivering homes.

The member advised that since the proposal was announced, increasing amounts of management time have been directed towards understanding the reforms, reviewing ownership structures and assessing alternative courses of action.

Rather than being on construction sites, meeting with clients, supervising subcontractors or identifying opportunities for business growth, attention has been diverted towards understanding proposed tax changes that may ultimately require significant restructuring.

The member's concern is that these costs extend beyond the invoices issued by professional advisers.

For a small business owner, there is also a substantial opportunity cost. Time spent reviewing trust deeds, considering succession implications, assessing restructuring options and obtaining taxation advice is time that would otherwise be spent building homes, employing staff, training apprentices and investing in the business.

The member identified three possible responses.

Remain in the Existing Structure and Pay the Minimum Tax

The trust could retain its existing structure and become subject to the minimum tax.

While the individuals ultimately receiving distributions are generally already paying tax at rates above 30 per cent, the proposal introduces a further layer of tax payments, offset calculations and compliance obligations.

The member's concern is therefore not simply the tax rate itself but the additional cash flow burden, administration and complexity imposed on an otherwise ordinary business structure.

Elect into the Excluded Election Trust Regime

The trust could elect into the Excluded Election Trust regime.

However, doing so would require fixed beneficiary entitlements and significantly reduce the flexibility that presently allows the business to respond to changing circumstances.

The member noted that business succession rarely follows a predictable path. Children join the business, family members retire, ownership interests change and commercial requirements evolve over time.

The flexibility to adapt to those changes is one of the primary reasons discretionary trusts are used.

The proposal requires businesses to make effectively permanent decisions about future ownership and income distribution despite not knowing what those future circumstances may be.

Restructure the Business

The alternative is to restructure ownership arrangements entirely. The member advised that such a restructure may require:

- legal advice;
- accounting advice;
- independent valuations;
- lender approvals;
- financing reviews;
- licensing amendments;
- contract novations;
- home warranty insurance reassessments;
- regulatory approvals; and
- consideration of state tax consequences.

For a business of this size, professional costs alone could readily exceed $20,000 to $50,000.

The member further noted that where a business owns development land or interests in landholding entities, state duty liabilities could potentially exceed the accounting and legal costs associated with the restructure itself.

As a result, businesses may incur significant advisory costs simply to determine whether restructuring is commercially viable.

Additional Valuation and Compliance Costs

The member also highlighted interaction with broader taxation reforms. Private business groups are already assessing the implications of recent capital gains tax changes and the potential need to establish asset values as at 30 June 2027.

Unlike listed companies, private residential building companies do not have readily observable market values. Valuations may need to consider:

- development land;
- work in progress;
- future projects;
- business profitability;
- goodwill;
- debt arrangements; and
- other business assets.

For groups containing multiple entities, valuation costs alone could amount to tens of thousands of dollars.

These costs arise despite there being no intention to sell the business and no increase in productive economic activity.

A Cost Without a Housing Benefit

The member's fundamental concern was that none of these costs contribute to building additional homes.

Instead, they divert capital and management resources away from construction activity and towards compliance, taxation advice and legal restructuring.

The member's view was that the proposal leaves businesses choosing between higher taxation, reduced commercial flexibility or costly restructuring while creating ongoing uncertainty regarding future ownership, succession planning and investment decisions.

The experience outlined above reflects the broader concerns raised by HIA members throughout consultation on the proposed reforms.

For residential building businesses, the proposal extends well beyond taxation outcomes. It requires businesses to reconsider ownership structures, succession arrangements and future investment decisions while absorbing significant advisory, compliance and restructuring costs.

Importantly, none of these costs contribute to the delivery of additional housing.

At a time when governments are seeking to increase housing supply, improve productivity and encourage investment, HIA is concerned that the proposal will instead divert scarce business capital and management resources towards compliance and restructuring activities that provide no corresponding economic benefit.

Conclusion

The feedback received from HIA members highlights an often overlooked consequence of the proposal.

The economic impact is not limited to additional taxation or professional fees. It also includes the diversion of management time away from productive activity.

Residential building businesses are not tax specialists. Every hour spent reviewing trust deeds, consulting advisers, assessing restructuring options or managing compliance obligations is an hour not spent supervising projects, employing tradespeople, training apprentices or delivering homes.

The proposal therefore imposes both a financial cost and a productivity cost.

At a time when governments are seeking to increase housing supply and improve productivity, HIA is concerned that the reforms will require thousands of residential building businesses to redirect capital and management attention away from construction activity and towards navigating uncertainty, compliance and structural change.

For the residential building industry, this proposal is not simply a tax integrity measure. It is another cost imposed on the businesses building Australia's homes.

Recommendations

HIA recommends that the Government:

1. Withdraw the proposal in its current form.
2. Undertake and publish a comprehensive cost-benefit analysis.
3. Grandfather existing discretionary trusts carrying on active trading businesses.
4. Alternatively, exempt active trading businesses from the minimum trust tax regime.
5. Introduce significantly greater flexibility within the EET framework, including greater flexibility to accommodate family succession, changing ownership arrangements and evolving commercial circumstances.
6. Ensure rollover relief remains available where future restructuring occurs as a consequence of the EET regime, succession planning requirements or loss of EET eligibility.
7. Secure comprehensive state and territory stamp duty and landholder duty relief for restructures undertaken as a consequence of the reforms.
8. Release and consult on all consequential trustee liability, director liability and administrative provisions before any legislation is finalised.
9. Undertake a formal assessment of the interaction between the proposed regime and state taxation systems, including fixed trust requirements and land tax provisions.
10. Assess this proposal against the Government's broader stated policy objectives of increasing housing supply, improving productivity and encouraging business investment.