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THE REAL ESTATE INDUSTRY

# **Submission on the Minimum Tax on Discretionary Trusts – Exposure Draft Legislation**

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Submitted to:  
Treasury

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## About REIA

The Real Estate Institute of Australia (REIA) is the national peak body representing the real estate profession and has advocated for policies supporting a well-functioning and sustainable property industry since 1924.

REIA's members are the State and Territory Real Estate Institutes, through which REIA represents real estate agencies and professionals across Australia.

The real estate profession is predominantly made up of small and medium-sized businesses. Many agencies are independently owned, family-operated businesses with close connections to the communities they serve.

REIA advocates for a strong and professional real estate sector, an efficient and equitable taxation system, improved housing supply and affordability, and regulation that is proportionate, practical, and capable of being implemented by small businesses.

## Introduction

REIA welcomes the opportunity to respond to the exposure draft legislation implementing a minimum tax on discretionary trusts.

The elective regime is a constructive response in concept to concerns about forced restructuring. However, close examination of the exposure draft indicates that it is unlikely to provide a safe or commercially workable option for many real estate and property businesses.

The proposed regime still leaves small businesses without a safe or commercially practical pathway. A business must either:

- remain in its discretionary trust and be subject to the minimum tax;
- make an election that fixes beneficiaries and distributions indefinitely; or
- undertake a complex restructure that may attract transfer duty and substantial commercial costs.

## Recommendations

REIA does not support the introduction of a minimum tax on discretionary trusts and recommends that the Government not proceed with the measure.

Discretionary trusts are lawful and long-established business structures used by real estate agencies and other small and family businesses for asset protection, succession planning, business continuity, and commercial risk management. The proposed minimum tax would penalise the choice of a legitimate business structure, impose substantial compliance and restructuring costs, and reduce the flexibility businesses need to respond to changing family and commercial circumstances.

The measure should also be considered in the context of the broader Budget tax changes affecting property investment, including the announced changes to negative gearing and capital gains tax. The cumulative effect risks weakening investment, business confidence, and the capacity of the property sector to support housing supply.

Existing integrity provisions already address personal services income, private company distributions, and other forms of inappropriate income diversion. Any identified avoidance should be addressed through targeted integrity and compliance measures rather than a broad minimum tax affecting genuine operating businesses.

**The recommendations below are made in the alternative, should the Government decide to proceed with the reform.**

### **Recommendation 1: Apply the minimum tax at the beneficiary level**

Under the exposure draft, the trustee of a minimum tax trust would be assessed and liable for the minimum tax under proposed section 101AA of the *Income Tax Assessment Act* (ITAA) 1936. A non-corporate beneficiary may receive a non-refundable offset under proposed section 101AF, while a corporate beneficiary would not be entitled to the offset.

This approach creates additional complexity, particularly for groups containing multiple trusts. Each trust may be required to calculate its minimum tax income, pay tax, issue beneficiary notifications, and pass offsets through successive levels of the group.

This is especially difficult for property businesses that use separate trusts to hold assets, undertake projects, or manage commercial risk. Income and expenditure may arise at different stages of a project, and each trust may have to determine its position before the broader group's final outcome is known.

REIA recommends that the minimum tax instead be applied at the beneficiary level. Where a beneficiary receives a discretionary trust distribution, the beneficiary would be subject to a minimum 30 per cent rate on that distribution, with credit for tax already paid. Where the beneficiary's tax on the distribution is already at least 30 per cent, no additional tax should arise.

This approach would:

- align the tax with the person or entity receiving the economic benefit;
- reduce duplication through chains of trusts;
- avoid the loss of otherwise unused non-refundable offsets;
- remove the pressure to restructure legitimate businesses;
- avoid state and territory transfer duty arising solely because of the Commonwealth reform; and
- allow businesses to retain structures established for asset protection, succession, and commercial risk management.

## **Recommendation 2: Grandfather existing trusts or exempt active small businesses**

If a beneficiary-level model is not adopted, discretionary trusts in existence before commencement should be permanently grandfathered.

Businesses established these structures lawfully and have made long-term decisions about ownership, succession, finance, contracts, asset protection, and risk management on that basis. Existing businesses should not be forced to choose between a higher ongoing tax burden and a costly, complex, and uncertain restructure.

Grandfathering would provide certainty to existing businesses while allowing businesses established after commencement to make an informed choice about their structure under the new taxation arrangements.

Alternatively, a permanent exemption should apply to genuine active small businesses with aggregated annual turnover of up to \$10 million. This would align with the expanded small business threshold adopted for other Commonwealth tax concessions and reflect the scale of businesses likely to face disproportionate compliance and restructuring costs.

The exemption should cover trusts that:

- directly operate an active business;
- hold shares or ownership interests in an associated active business;
- hold assets used predominantly in an associated active business; or
- form part of a genuine small business group.

Appropriate integrity requirements could ensure the exemption does not apply to predominantly passive investment arrangements. However, the requirements should recognise that legitimate real estate businesses commonly use separate entities to operate the business, hold ownership interests, protect assets, and manage commercial risk.

## **Recommendation 3: Amend the electable regime**

The electable regime requires a trust to nominate beneficiaries accounting for 100 per cent of its income and capital, in the same fixed proportions, and maintain those proportions each year. The election may exclude a trust from the minimum tax, but it does not necessarily create fixed entitlements under trust law. Depending on the trust deed, amendments or other legal steps may be required, potentially creating separate tax and transfer duty consequences.

The Commonwealth tax election cannot be assumed to authorise conduct that is not permitted by the trust deed or applicable trust law. Nor should a trustee be placed in

a position where complying with fiduciary duties or responding to changed circumstances causes automatic revocation and punitive tax consequences.

The nomination can generally only be changed following a beneficiary's death or a qualifying relationship breakdown. This does not adequately accommodate common events such as births, incapacity, retirement, succession, residency changes, or changes in business ownership.

The consequences of non-compliance are also disproportionate. If the nominated proportions are not followed, the election is automatically revoked, the trustee may be taxed on the trust's entire net income at the top marginal rate plus the Medicare levy, and the minimum tax applies in later years.

REIA recommends broader permitted changes, separate income and capital proportions, a reasonable correction period, Commissioner discretion, and consequences limited to the income affected by a breach. Treasury should also clarify how the election will operate under state and territory trust and duty laws.

#### **Recommendation 4: Provide comprehensive rollover and transfer duty relief**

The Commonwealth rollover provides relief from certain immediate income tax consequences, but it is subject to significant limitations. Generally, all required assets must be transferred to one transferee by 30 June 2030, continuity and residency requirements must be met, and the choice is irrevocable. Failure to complete the restructure may result in earlier relief being reversed.

Proposed section 126-450 of the Income Tax (Transitional Provisions) Act 1997 confirms that GST, fringe benefits tax, state and territory duties, and other taxes continue to apply. An income tax rollover is therefore not a cost-free restructure.

A real estate business may still need to transfer assets, obtain new or amended registrations, novate agency and property management agreements, obtain third-party consents, establish new banking and trust account arrangements, update insurance and business records, and obtain professional advice.

#### **Stamp Duty**

The Explanatory Materials state that the election is expected to limit restructuring costs, including stamp (transfer) duty. However, duty outcomes depend on the jurisdiction, assets, trust deed, legal steps undertaken, and available concessions.

Stamp duty also varies materially between jurisdictions and depends on the assets transferred, the legal steps undertaken, continuity of beneficial ownership, and the available exemption or concession.

Material uncertainty remains across jurisdictions. Even where a specific restructuring concession may be available, including under Queensland's small business restructuring provisions, eligibility is conditional and may not cover every legal step, asset, or transaction required to implement an excluded election trust (EET) election or broader restructure. Victoria and other jurisdictions may offer more limited relief depending on the structure and assets involved.

The Commonwealth should secure coordinated state and territory guidance and duty relief before commencement. Businesses should not be required to elect or restructure until the duty consequences of the Commonwealth reform are known and appropriate relief is operational.

### **The rollover period must be extended**

The rollover is available for transfers made between 1 July 2027 and 30 June 2030. A trust that makes an EET election cannot subsequently use the rollover. This creates an unreasonable risk.

A trust may enter the electable regime in 2028–29, comply for several years, and then need to change its beneficiaries or distributions because of a legitimate family or business event. By that time, the rollover may have expired. The election therefore risks delaying, rather than avoiding, the cost of restructuring.

REIA recommends rollover relief should be available on a standing or indefinite basis to trusts affected by the minimum tax. At a minimum, it should remain available for three years after an EET election is voluntarily or automatically revoked. Legal, accounting, valuation, financing, and other reasonable costs incurred because of the reform should also be eligible for an appropriate write-off.

### **Recommendation 5: Clarify the definition of fixed trust**

REIA supports greater certainty in the definition of fixed trust but recommends that the definition focus on material discretion over economic entitlements.

Commercial and widely held investment vehicles should be expressly excluded in primary legislation rather than relying on expectations stated in explanatory materials or on future ministerial instruments. This should include MITs, AMITs, registered managed investment schemes, ordinary commercial unit trusts, employee share trusts, bare trusts, and other regulated or widely held vehicles that do not present the income-splitting concern targeted by the reform.

Limited administrative, governance, unit-issue, investment, and classification powers should not cause an otherwise commercial trust to be treated as discretionary unless those powers permit a material redirection of economic benefits between beneficiaries.

## Regulatory Impact on Real Estate

An Accent Research survey jointly commissioned by five property and construction peak bodies, including REIA, provides useful evidence of the potential impact on the real estate profession. Respondents were recruited through online panels and through the memberships of the Property Council, REIA, and Master Builders Australia.

The survey included 1,195 business owners, including 112 real estate businesses. Questions directed to real estate businesses using discretionary trusts generally had an unweighted base of 81 respondents.

Results were weighted using Australian Bureau of Statistics business population benchmarks. The subgroup results should be interpreted conservatively, but the findings are consistent and material.

### **Real estate businesses are predominantly small businesses**

Among real estate respondents:

- 43 per cent were owner-only businesses;
- 36 per cent employed between one and four people;
- 18 per cent employed between five and 19 people;
- 48 per cent had annual revenue below \$500,000; and
- a further 29 per cent had annual revenue between \$500,000 and \$2 million.

These businesses do not generally have internal legal, taxation, or restructuring teams. They must obtain external professional advice and meet the resulting costs from existing business cash flow.

### **Trusts are embedded in real estate businesses**

Among real estate respondents:

- 35 per cent used a discretionary trust to operate or conduct the business;
- 32 per cent used one to hold shares or an ownership interest;
- 21 per cent used one to hold land, property, or other business assets; and
- 8 per cent used one to ring-fence development projects from risk.

Among real estate businesses using a discretionary trust, 91 per cent said the trust arrangements were very important to the ownership or operation of the business. A further 5 per cent said they were somewhat important.

These structures are not incidental tax arrangements. They are embedded in business ownership, succession, asset protection, and risk management.

## **Transfer duty is a major restructuring barrier**

Among real estate trust users:

- 32 per cent were unaware that transferring assets from a discretionary trust could attract state or territory duty;
- 47 per cent ranked transfer duty as one of their three main restructuring barriers;
- 28 per cent ranked transfer duty as their largest barrier;
- 43 per cent could not estimate their potential duty liability;
- 40 per cent estimated a duty liability of \$50,000 or more;
- 19 per cent estimated a liability of \$250,000 or more; and
- 10 per cent estimated duty of at least \$1 million.

No real estate respondent using a discretionary trust selected “none” when asked to estimate the duty arising from a restructure.

## **The broader tax burden is already affecting the sector**

Sixty-eight per cent of real estate respondents said their overall tax burden had increased over the preceding five years.

Among those reporting an increase:

- 80 per cent said it had reduced profitability; and
- 62 per cent said it had reduced business confidence.

Eighty-three per cent of real estate respondents agreed that a minimum tax of 30 per cent on discretionary trusts would make it harder for small and medium businesses to invest, grow, create jobs, and deliver housing. Sixty-nine per cent strongly agreed.

The results demonstrate that the reform will affect genuine small businesses and could further weaken confidence, investment, and employment across the property sector.

## Conclusion

REIA does not support the introduction of a minimum tax on discretionary trusts and recommends that the Government not proceed with the reform.

Discretionary trusts are lawful and long-established structures used by real estate agencies and other small and family businesses for asset protection, succession planning, business continuity, and commercial risk management. The proposed minimum tax would penalise legitimate business structures, impose substantial compliance and restructuring costs, and reduce the flexibility businesses need to respond to changing family and commercial circumstances.

The exposure draft does not provide small businesses with a safe or commercially practical pathway. The electable regime remains inflexible and uncertain, while the Commonwealth rollover does not address transfer duty or the broader commercial and administrative costs of restructuring.

If the Government nevertheless proceeds, REIA recommends applying the minimum tax at the beneficiary level through a creditable withholding mechanism. If that approach is not adopted, existing trusts should be grandfathered, or genuine active small businesses with aggregated annual turnover of up to \$10 million should be permanently exempt.

Businesses should not be required to make permanent structural decisions until the complete legislative package has been released, its impacts have been properly assessed, and the outstanding tax, trust law, transfer duty, and implementation issues have been resolved.

REIA welcomes further consultation with Treasury on the impact of the proposed reforms on real estate businesses and the broader property sector.



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