Submission to Treasury

31 July 2026

Introduction

On 8 July Treasury released a consultation paper seeking submission in response to the proposed changes, announced in the recent Federal Budget, to increase in the minimum tax on discretionary trusts to 30 percent (Consultation Paper).

Master Builders takes this opportunity to respond to the Consultation Paper.

Master Builders opposes the reforms.

The imposition of a minimum 30 percent tax on discretionary trusts could be characterised as one of the most significant changes to Australia's taxation arrangements since the introduction of the GST.

However, unlike the current reforms, the move towards the adoption of the GST was accompanied by substantial public education, transitional support, lead time and government assistance to help businesses adapt. It is disappointing that in contrast the Government appears to assume that businesses can rapidly alter long-standing ownership structures with minimal disruption to ongoing operations.

The reforms will destabilise the long standing, legal and accepted use of discretionary trusts forcing businesses, particularly small businesses to weigh the costs and benefits of retaining existing arrangements that offer asset protection, protect family businesses and mitigate against the risks associated with other structures against the consequences of diminishing income.

Equally, there are risks to clients and homeowners whose recourse to secure rectification work via state based regulatory consumer protection arrangements is undermined due to a restructure of a business whose hand has been forced by a Federal Government decision.

Consequences: Costly, broad ranging and jeopardise consumer protection

Cost impacts cannot be addressed with 'rollover relief'

Master Builders has worked with members to develop a case study to demonstrate the costs of the proposed reforms under different scenarios ranging from maintaining a trust arrangement despite the increased tax to a complete restructure. For a small construction family owned business with a taxable income of $400,000 the business is looking at **tax increases of up to 70 percent plus an ongoing yearly expense of between ~$21,000 – $67,500 and a one of restructure cost of between $82,000 – $175,000 that could take a up to a year to complete.**

Attachment A sets out these scenarios in further detail.

Many Master Builders members complain that projects they'd like to proceed lack financial viability. The feasibility of projects is determined by the cost of building them, the price paid by the client – and the timing of financial flows on both sides of the ledger.

These proposals will only add to that costs and impose substantial complexity and uncertainty on businesses without contributing to the delivery of new housing, infrastructure or economic growth.

This is in a sector already operating under significant commercial pressure. At the same time the industry is expected to address Australia's housing shortage and reach the Housing Accord Target. Our central projection is that about 996,000 new homes will end up getting started over the five years of the Accord – a shortfall of around 204,000 homes.

Undermines consumer protection

To restructure from a discretionary trust to a company structure not only imposes a significant amount of red tape, cost and complexity on a business but it may jeopardise the ongoing viability of a building business particularly those in the residential building industry and serve to undermine regulatory consumer protection frameworks.

Each jurisdiction has its own regulatory arrangements with respect to the carrying out of residential building work. This includes mandatory contractual requirements, licensing, financial and insurance requirements.

All of these obligations are linked to the entity that holds the builders license and enters into the building contract. Once that entity no longer exists, as is the case with a restructure, the license, insurance, good will and financial standing disappear with it. As such, a builders livelihood is intrinsically linked to the business structure under which they operate.

Similar implications arise for commercial building projects that rely on contractual arrangements to set out rights and responsibilities; once restructured, one of the contracting parties no longer exists raising complex legal questions should a party seek to enforce their rights. Even security of payments laws that provide rapid adjudication of payment disputes between businesses may be rendered useless when the contracting party is deregistered.

Broad impacts cannot be underestimated

These reforms will only serve to place yet another handbrake on business growth, certainty and investment, particularly for the building and construction industry within which analysis indicates that 1 in 5 businesses which are small businesses with turnover of less than $10 million, are established through a trust arrangement. We also note that many more trusts are utilised as shareholders of trading companies in the industry who would also be impacted by these changes, meaning the practical reach of the proposal will extend well beyond businesses that trade directly through a trust.

Taxation policies significantly affect business dynamism particularly in the building and construction industry, they muffle demand for building and construction projects, make delivering new building and construction projects more expensive and make it too costly for businesses to undertake productivity-enhancing capital expenditure.

The Government should be focused on making improvements to tax settings in a way that rewards businesses for investing not adopting polices that serve to undermine business success and growth.

Further, we cannot forget that these reforms are to be delivered within a context of worsening productivity.

Over the past decade, no industry has performed worse than construction when it comes to productivity. The effects of this have been grim: ever deteriorating housing affordability, insufficient volumes of new home building and delays in the delivery of new homes. The poor performance of construction productivity means that it costs more to create the vital infrastructure that we need. As a result, government capital and infrastructure budgets don't stretch as far. One of the most problematic aspects of weak construction productivity is the way it infects other parts of the economy and erodes a potential homeowners buying power.

Recommendations

The bottom line is that the cost of building and construction work will increase as a result of these reforms. Whether it's due to restructuring costs, other licensing and administrative costs or diminishing returns businesses will look to recoup these expenses for their clients and homeowners.

Given the lack of early consultation and the truncated nature of this consultation such matters have not been fully assessed posing unquantifiable risks to industry, consumers and housing affordability.

On that basis alone the reforms should be abandoned or otherwise delayed.

However, if the Government continues to pursue this reform, Master Builders recommends:

1. **Grandfathering arrangements:** The minimum 30 per cent tax arrangements should only apply to discretionary trusts entered into after commencement i.e. 1 July 2028. This removes the unenviable choice for small businesses between higher tax burden vs costly and risky restructure. This also mitigates against a range of direct, and unintended consequences for the building and construction industry should these reforms progress.

2. **A permanent small business carve out:** Small businesses with a turnover of up to $10 million should be exempt from the changes to the tax arrangements. This mirrors the recent changes captured by the *Treasury Laws Amendment (Tax Reform No. 1) Bill 2026* that increased the turnover threshold for the existing small business 50 per cent active asset CGT reduction from $2 million to $10 million.

3. **Narrow definition of discretionary trust:** Treasury should adopt a narrow and precise definition of discretionary trust. Many commercial trusts contain powers or discretions that may technically prevent them from being fixed trusts, even where the arrangement does not present the perceived integrity concerns targeted by the proposal. A broad definition could inadvertently capture unit trusts, business succession structures, family investment structures and other commercial arrangements that should not be treated in the same way as ordinary discretionary family trusts.

4. **A formal regulatory impact assessment must be conducted:** That assessment should quantify the number of affected trusts, trust-owned businesses and trust-shareholder private company groups in the building and construction industry and across the SME economy more broadly. The analysis should also cover state and territory building licensing, home warranty insurance, statutory warranties, consumer protection, security of payment rights, tender prequalification, finance covenants and the treatment of historical regulatory records following a restructure.

Why the current arrangements are important

The unique nature of the building and construction industry including its long complex supply chains and reliance on independent contracting to accommodate its cyclical nature, coupled with a high proportion of small businesses, and a significant regulatory environment means that the business arrangements and operational frameworks adopted across the sector are a key and fundamental consideration.

Once established, these frameworks are difficult to change due to taxation, state and territory-based licensing, contracting and insurance requirements just to name a few.

At its core the industry must be allowed to operate in a flexible way to account for the realities of running a construction business, particularly given the level of risk, income variability, and the ongoing need to reinvest in the business.

Any government intervention must factor in these realities so that, an industry already under substantial pressure, is not further undermined.

The industry is built on both incorporated and unincorporated business structures including sole traders, partnerships, incorporated company structures and trust arrangements. All arrangements are legitimate and legally accepted and there are a variety of reasons as to why some will prefer one arrangement over another. Those operating businesses should have the freedom to choose the structure that best suits their current and future needs.

Taxation arrangements should not penalise the use of one corporate structure over another.

Various state and territory building regulation also rely on a business structure to administer consumer protection frameworks. There are also consequences for restructuring in terms of obligations and remedies in relation to commercial building and construction arrangements and consequences for securing vital insurances the industry relies on.

A discretionary trust is a legal structure in which a trustee holds assets or income for the benefit of a defined group of beneficiaries. The defining feature is discretion: the trustee decides each year how the trust's income is allocated among beneficiaries. There is no fixed entitlement — the trustee exercises judgment based on the circumstances of the business and each beneficiary's circumstances and in accordance with any requirements under the Trust Deed.

About one in five construction businesses (20.1 per cent) are structured as Trusts. Latest data for 2023-24 show that 90,373 construction industry Trusts operated during that financial year. It is likely that the number of construction industry Trusts has grown to just over 93,000 by the end of June 2025. This direct count does not include the numerous private company groups in which trusts are used as shareholders of trading companies, meaning the exposure of the sector is likely to be materially greater than a count of trading trusts alone.

For small business, the discretionary trust has been a long-established structure used for asset protection, succession planning, risk management, and flexibility in managing the often-variable income that comes with trading on one's own account.

Trusts are said to offer a better structure for holding assets than companies because they legally separate “ownership” from “control”. The assets in a trust are owned by the trustee or trustees, and while a beneficiary (in the case of family trusts, that’s usually a family member or an investment company) can get a financial benefit, they have no fixed entitlement to one in the way that a shareholder in a company has.

Further, anybody suing the beneficiaries of a trust cannot seize the Trust's assets because there is no individual ownership to claim. It also shields the assets from a beneficiary who might want to go against the trustees' wishes; the beneficiary doesn't own anything to sell.

That makes trusts a powerful tool for families that want to keep assets safe to meet operational requirements and, when the time comes, pass on through generations.

A trust deed is the legal document that governs a trust. Each one is unique and can be written in such a way as to give trustees great flexibility, or to restrict what they do. It is regulated only by common law. The collective of trustees has to make the decisions. It protects the heritage of the company and the financial status of the company. A company structure, with shareholders, doesn't do that.

This is especially important in the building and construction industry, which is a high-risk operating environment. Defect claims can arise years after work has been completed, personal guarantees are common, project cash flows are uneven, and business owners are often required to commit family wealth to support working capital, bonding, insurance and finance requirements. For many builders, discretionary trusts are not primarily tax planning tools, they are risk management and succession planning tools designed to separate trading risk from family wealth while supporting long-term continuity of the business.

Response to the Consultation Paper

Problematically there are implementation matters not addressed in the Consultation Paper.

Most significantly the paper does not adequately address the interaction between the proposed changes and state-based building regulation frameworks. Those matters are central to whether a building business can continue operating if it is forced to restructure. These are dealt with in detail further on in this submission.

Further claims that the reforms will not affect a significant proportion of businesses, including a minimal number of small businesses are grossly underestimated. Based on Master Builders assessment, with 1 in 5 construction businesses are set up as a trust, that equates to approximately 94,532 construction businesses. These businesses have a turnover of less than $10 million essentially making them small businesses. As we have noted earlier the number of trusts acting as shareholders of companies would be significantly more.

This sits at odds with Treasury's estimates that less than 15 per cent of all active small businesses operate through a discretionary trust structure[1].

By Master Builders assessment a significant proportion of business operating in Australia will be impacted by the proposed reforms. A robust cost/benefit analysis would deliver greater clarity with respect to these impacts.

[1] Treasury Discussion Paper: Minimum tax on discretionary trusts

Master Builders also questions the legitimacy of the stated key objective of the reforms which is to create more 'fixed and transparent economic outcomes'. In practice this means that the reforms would prevent income splitting and stop bucket company accumulation.

The proposed reform assumes that discretionary trusts are currently able to divert personal income with insufficient constraint. That assumption overlooks two existing regimes.

Firstly, the Personal Services Income (PSI) Rules ensure that where a trust's income is mainly a reward for one individual's personal efforts, the PSI rules attribute that income back to the individual regardless of how the trustee distributes it. The trust has no discretion. The tax outcome is the same as if the trust did not exist.

Secondly, where private companies are used within trust structures Division 7A of the Income Tax Assessment Act 1936 prevents private company profits from being extracted tax-free through payments, loans, forgiven debts, or interposed entities. It already applies to trust-company arrangements.

Viewed together, the PSI and Division 7A regimes show that Australia's tax law already distinguishes between legitimate business structuring and impermissible income diversion. If there are compliance concerns in specific sectors or fact patterns, the more proportionate response is better administration and targeted refinement of existing integrity rules — not a broad new minimum tax that captures ordinary small business arrangements. We note that the government has yet to act on long standing proposals to reform division 7A.

The underlying reform motivator i.e. fixed and transparent economic outcomes also appears to be based, inappropriately, on the assertion that income earned through a small business discretionary trust can be treated as though it were equivalent to the salary of a single employee. That comparison is false.

A trading business conducted through a discretionary trust commonly derives its income from more than the personal services of one individual. Its earnings may reflect:

- Accumulated goodwill and client relationships built over many years
- Reputation and brand
- Internally developed systems and processes
- Staff capability and employment relationships
- Business premises, plant and equipment
- Working capital deployed at risk
- The commercial risk undertaken in operating the enterprise

An employee is remunerated for labour alone. A small business owner accepts insecure revenue, overheads, capital risk, and often lower personal remuneration to build and sustain an enterprise. Where income is in substance employee-like, the PSI rules already exist to attribute that income appropriately. The proposal's error is in treating all trust business income as if it necessarily had the same character as wages.

Taxing trust income as if it were wages ignores the fact that the income actually compensates for capital, risk, and enterprise value, not labour alone.

In essence the tax increase becomes a penalty for utilising long standing, legitimate and well known mechanisms for arranging ones business affairs.

The assumption that company structures necessarily produce more fixed and transparent economic outcomes is not supported by commercial reality. In a company, directors determine remuneration, dividends may be retained, groups may introduce different share classes and profits may be reinvested indefinitely. Different legal structures provide different mechanisms for allocating economic benefits, each of which is already subject to specific tax integrity rules. A discretionary trust should not be treated as inherently less transparent merely because trustees have commercial discretion within the terms of the trust deed.

The final objective is clearly to raise revenue, the budget papers indicating that the proposed changes will generate approximately $3.6–4 billion per year. Clearly a fiscal choice is being made, not one that has any relation to 'transparent economic outcomes' and by doing so simply imposes a disproportionate share of government revenue on businesses, particularly small businesses operating under a long standing and legitimate arrangement

Impact on the Building and Construction Industry

While the complete impacts of the reforms cannot yet be known, Master Builders summarise both the direct impacts and unintended consequences of the proposed reforms.

Direct impacts

As recognised in the Consultation Paper, the cost of restructure is a significant and direct implication of the proposal.

Not only will business be required to seek accounting and legal advice but stamp duty will likely be payable in most jurisdictions and on most assets (this is elaborated on below).

Other administrative costs associated with establishing a new business structure such as notifying customers, changing marketing and advertising material, registering business names and changing licensing details just to name a few will be required to be funded by the business.

Over the longer term, impacts are much more systemic. By removing protections that support long term business stability, growth is undermined and risk taking becomes unattractive changing attitudes towards investment and growth.

Similarly, by destabilising long term and well established business arrangements small business, including family run small business are at risk and the attractiveness to start a business is reduced.

Finally, diminishing profits by restricting the distribution of legitimate income becomes a barrier to growth and investment, as the risks associated with such decisions may no longer be offset by the rewards. Construction businesses, especially small businesses, already operate in a high risk, low margin environment. Reducing the benefits that can be taken from the businesses, may force experienced operators out of an industry already facing shortages, which will impact the ability to deliver the large and essential pipeline of work across housing and infrastructure.

Pressure on experts and professionals

The uncertainty regarding the impact of these changes is placing pressure on experts and professionals who provide tax, legal and accounting advice. These firms are expected to assess:

- The cost of restructure per business which must be done on a case-by-case basis.
- The costs and benefits of restructuring to a company or other structure.

- The cost and benefits of remaining as a discretionary trust notwithstanding the change to the taxation arrangements.

We understand that this is an incredibly complex task given not only business specific circumstances but also the industry specific circumstances detailed below.

Stamp duty cost

Any restructure of a business will require thought as to stamp duty costs in each state with advice and transaction costs to be factored in. In many States limited to no exemptions are available for transfer of a business from one entity to another. This has not been factored into any costings in relation to the proposed restructure rollover.

Given the capital-intensive nature of the construction industry, discretionary trusts frequently hold significant real property, motor vehicles, plant and equipment. Consequently, even where Commonwealth rollover relief is available under any future restructuring measures, state and territory transfer duties may represent a significant barrier to restructuring. For many construction businesses, the primary duty exposure is likely to arise from commercial real property and motor vehicles rather than goodwill or plant and equipment.

According to ATO data, the approximately 90,000 businesses structured as a trust hold approximately $122.3 billion in non-current assets (otherwise known as long term assets). Of those around 13,500 did not hold any assets at all. This suggests that the average construction industry trust had approximately $1.6 million in non-current assets.

If a construction company had to transfer their business assets ownership from a discretionary trust to a company for restructuring purposes, some of these assets may be dutiable according to the laws in the particular state or territory of business.

As a result, business owners need to consider how their business will be taxed moving forward but also the cost implications of a restructure, and the transfer duty consequences that may arise when assets are moved from a trust to another entity.

The duty implications of a trust restructure vary significantly across Australian jurisdictions and depend largely on the nature of the assets being transferred. Most states and territories no longer impose duty on the transfer of goodwill, intellectual property, or plant and equipment, although Queensland and Western Australia continue to impose duty on certain business assets. Conversely, transfer duty generally continues to apply to real property in all jurisdictions, while motor vehicle duty typically applies whenever a vehicle is transferred into a new legal owner's name. Consequently, a discretionary trust that owns commercial property, residential property, or a fleet of vehicles may face materially different duty outcomes compared with a trust that holds only goodwill and equipment.

The accompanying table provides a high-level overview of the asset classes that may attract duty in each state and territory. Relief provisions may be available in some cases, particularly where a transaction forms part of an eligible corporate reconstruction or where beneficial ownership remains substantially unchanged. However, the availability of these concessions depends on the specific legislative provisions in the relevant jurisdiction and the structure of the trust itself. Early consideration of transfer duty exposure is therefore critical when evaluating any potential trust-to-company restructure.

Duty by Asset Type and Jurisdiction

State/ Territory	Duty on Business	Duty on Motor Vehicles	Duty on Plant & Equipment	Duty on Real Estate Commercial	Duty on Real Estate Residential
NSW	No	3%-5%	No	Up to 5.5%	Up to 5.5%
VIC	No	Up to 6.4%	No	Up to ~6.5%	Up to ~6.5%
QLD	Yes – up to 5.75%	~2%-4%	Yes – up to 5.75%	Up to 5.75%	Up to 5.75%
WA	Yes – up to 5.15%	2.75%-6.5%	Yes – up to 5.15%	Up to 5.15%	Up to 5.15%
SA	No	Up to 4%	No	Approx. 5.5%	Approx. 5.5%
TAS	No	3%-4%	No	Up to 4.5%	Up to 4.5%
ACT	No	2.5%-4.5%	No	Up to ~5%	Up to ~5%
NT	No	~3%	No	Around 5.95%	Around 5.95%

Every state and territory provides a range of legislative exemptions, concessions and relief mechanisms designed to prevent duty from impeding genuine commercial reorganisations.

These commonly apply where there is little or no substantive change in the underlying economic ownership of assets, such as corporate reconstructions, changes of trustee, deceased estate transfers, or certain transfers between related entities. However, relief is not automatic and generally requires strict compliance with statutory eligibility criteria. The availability of relief depends on the relevant jurisdiction, the nature of the assets being transferred, the legal structure of the transferring and receiving entities, and whether beneficial ownership is considered to have changed. Accordingly, any proposed restructure must be assessed on a jurisdiction-by-jurisdiction basis before implementation.

Jurisdiction Analysis

Jurisdiction	Likely Exemption Availability	Assessment
Queensland	High / Most likely exemption available	Queensland has a specific small business restructuring exemption that may apply to discretionary trust-to-company restructures where continuity requirements are satisfied.
NSW	Low to Moderate	Corporate reconstruction relief exists but generally targets corporate groups rather than discretionary trust-to-company transfers.
Victoria	Low	Corporate reconstruction concession generally does not accommodate discretionary trusts as members of a qualifying corporate group.
Western Australia	Moderate	Relief may be available in limited circumstances; detailed transaction analysis required.

South Australia	Moderate	Business assets often not dutiable, but land transfers remain a key consideration.
Tasmania	Moderate	Relief may be available depending on ownership continuity and transaction structure.
ACT	Moderate	Outcome depends on specific exemption provisions and assets being transferred.
NT	Moderate	Duty concerns mainly arise where land is involved.

Real property assets (both commercial and residential) generally have the highest likelihood of attracting duty when transferred as part of a restructure. By comparison, goodwill and plant and equipment generally do not attract duty in most jurisdictions, although Queensland and Western Australia continue to impose duty on certain business assets.

Asset-by-Asset Practical Assessment

Asset	Duty Risk Assessment
Goodwill	Usually no duty outside Queensland and Western Australia.
Plant & Equipment	Usually no duty outside Queensland and Western Australia.
Motor Vehicles	Duty often applies on transfer unless a specific exemption is available.
Commercial Property	Highest duty risk; exemptions are critical.
Residential Property	Highest duty risk; exemptions are critical.

While opportunities for relief exist, they are generally more limited than those available for restructures within established corporate groups. As a result, businesses should not assume that a proposed trust-to-company restructure will qualify for a duty exemption without detailed analysis of the relevant legislation and the ownership arrangements before and after the restructure.

However, some jurisdictions have introduced specific small business restructuring concessions that can apply to discretionary trusts transferring assets to a company, provided strict conditions are satisfied. Queensland currently has one of the clearest statutory exemptions for this type of restructure.

Worked example: A construction company based in NSW has $1.6 million in non-current assets. Their assets are split across property for development purposes, vehicles, and plant and equipment (tools and machinery).

Asset	Amount	NSW Tax
Property:	$1 million	$39,412
Vehicles:	$250,000	$11,700 (no luxury tax surcharge, or EV discount)
Plant and equipment:	$250,000	$0
Good will:	$100,000	$0
TOTAL	1,600000	$51,112

Due to the different taxes across jurisdiction, a business with the same assets can have a significantly different tax outcome. The table below shows the total taxes. A business in Victoria would have to pay around $65,000 in duty, but a similar business in the ACT would pay $25,000 less, Queensland would pay $20,000 less, and NSW $15,000 less.

Australian Duty Comparison – Detailed Breakdown

Rank	Jurisdiction	Total Duty	Property Duty	Vehicle Duty	Business Asset Duty
1	Victoria	$65,500	$55,000	$10,500	$0
2	Western Australia	$58,865+	$42,615	$16,250	Review required
3	South Australia	$58,830	$48,830	$10,000	$0
4	Northern Territory	$57,000	$49,500	$7,500	$0
5	NSW	$51,012	$39,412	$11,600	$0
6	Tasmania	$50,185	$40,185	$10,000	$0
7	Queensland	$45,525	$38,025	$7,500	$0 (Asset dependent)
8	ACT	$40,500	$30,500	$10,000	$0

Unintended consequences and costs

Business restructure in the building and construction industry has a range of consequences that have not yet surfaced.

Operational and implementation burden

The practical burden of restructuring extends well beyond ordinary legal and tax advice.

Businesses may need to obtain financier consent, satisfy new licensing and financial eligibility requirements, update regulatory registrations, renegotiate or novate contracts, establish new supplier and customer accounts, complete AML/KYC and probity checks, obtain new insurance approvals and re-enter tender or prequalification systems. These steps involve real commercial cost, timing risk and management distraction that are not addressed by income tax rollover relief.

Licensing implications

To carry out residential building work across the country a builders licence or registration is required. This licence or registration is your 'ticket' to carry out residential building work and conduct a residential building business.

Those operating in a sector of the building and construction industry that require a licence/registration will be required to secure a new licence in the new entity's name imposing cost and time obligations and jeopardising existing business arrangements. This is a significant cost in new licensing and structuring fees before operation can legally commence. There will be a necessary delay in the processing of the applications, affecting the continuity of the business. It is an offence for a new entity to operated unlicenced with significant legal implications for works done.

Generally, you cannot transfer a licence from one business structure to another. Therefore, within the current context, if a business decided to restructure to a company from a discretionary trust the builder would need to establish a new corporate entity and as such apply for a new company licence and cancel the old licence /registration.

There are a number of consequences that flow from this change:

- Time and administration cost associated with applying for a new licence with the resultant impact on the continuity of the business.
- Financial implications in terms of licence fees that are applicable.
- History of performance in the industry is wiped out, for example, when conducting a license check, the new entity would have recent date for commencement of their licence, with no history recorded/transferred from the previous licence. This removes an important consumer protection and undermines the 'hard won' reputation of those who have been performing good work..
- It is a legal requirement that all advertising and promotional material include current license details, as such a change of entity and licence will require that all of this material be changed.
- Contractual arrangements are jeopardised (see below).
- Warranty insurance arrangements must be secured under the new license (see below).

Contractual and consumer protection implications

Should the business choose to restructure there are legal consequences for both contracts on foot and contracts completed, particularly residential contracts.

For contracts on foot the contract will need to be transferred or novated to the new entity. This requires the agreement from the homeowner or the client and legal advice and drafting to ensure the transfer is effective and legally binding.

Such actions can often raise suspicions from clients or homeowners as to why their builder may need this document, why they are restructuring to the extent that it would affect their building project and any other consequences. In these cases, disputes may arise and if a client or homeowner refuses to sign the deed the builder may be forced to terminate the contract and re-enter a new contract; a situation that should be avoided at all costs. It could lead to a variety of unattractive unintended consequences such as a re-negotiation of price and time with the potential to leave both parties exposed.

For contracts completed a question regarding legal rights and obligations arises.

If the original entity that signed the contract still legally exists, it retains the liability. If the original legal entity is dissolved and transferred to a new, entirely different company, the new entity may not inherit the warranty obligations unless they bought the liabilities during the restructure.

For residential building work, in all jurisdictions consumers are afforded protections under a statutory warranty regime which in essences gives a homeowner direct recourse to the builder who carried out the work to rectify defects. For example, under the NSW Home Building Act 1989 section 18B provides that the 'holder of a contractor licence' holds an implied warranty:

a) *that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,*

b) *that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,*

c) *that the work will be done in accordance with, and will comply with, this or any other law,*

d) *that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,*

e) *that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,*

f) *that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.*

In a case of restructure, the licensed entity that carried out the work no longer exists. Therefore, the question arises; if a homeowner seeks to make a statutory warranty claim and the builder no longer exists who can they claim against?

One avenue may be through the various home warranty insurances schemes. These schemes apply to residential building work above a certain contractual value and operate in all jurisdictions except Tasmania. These schemes offer insurance of last resort, i.e. a claim can be made where the builder becomes insolvent, dies, disappears, (or losses of licence due to a tribunal order), except in Queensland that adopts a first resort model under which the homeowner has recourse directly to the regulator being the Queensland Building and Construction Commission.

For models of last resort insurance the hurdle is that a business restructure does not fall within any of the triggers (i.e. the builder has not become insolvent, died or disappeared), so claiming on this insurance is not an option.

A regulatory gap forms that essentially strips a homeowner of an express and implied right to protections against defective work.

Consumer protection obligations are severed jeopardising statutory warranty and insurance claims as the entity that carried out the work no longer exists. This means homeowners with legitimate defective work claims have severely limited options for recourse.

There may be some other legal means to sheet home responsibility to the restructured business but this would, no doubt, be a complex and costly legal task, for example they may still be able to sue individual directors, project managers, or supervisors if they personally breached their duty or recoup costs of rectification from these individuals.

If the proposed reforms encourage businesses to restructure away from the entity that contracted with homeowners, existing consumer protection mechanisms will be weakened. The proposal should not create incentives for business owners to move work, assets or operations into a new structure while leaving historical statutory warranty and contractual obligations attached to an entity that may no longer trade. That outcome would be inconsistent with the policy objectives of state and territory building regulation frameworks.

Similarly for commercial building and construction projects, where all rights, responsibilities and obligations flow from the contract, where the entity that entered into the contract no longer exists, the privity of contract is disturbed and another entity, that was not a party to the original contract cannot sue or be sued. In those cases, should issues arise, and where the contract cannot be relied on, negligence may remain the only legal remedy – a costly and complex legal claim to pursue and defend.

Treated as a 'new' entity

Business viability is jeopardised as any businesses that restructure is treated as a new entity for a range of regulatory and compliance requirements. Starting 'afresh' may jeopardise a building businesses ability to continue trading in the same way and at the same levels as in the past. This will be a significant operational distraction for most businesses in addition to operating their business day to day.

Most often, businesses, particularly small businesses in the building and construction industry have a solid history of performance, with a significant number of years in operation with an equal number of projects delivered to establish a viable, long standing and well established business.

Such factors are crucial for securing finance and insurance, in particular warranty insurance previously mentioned.

In most cases, even in a restructure, a new entity, notwithstanding that they may have been restructured from a long standing entity, will be treated as new for those purposes jeopardizing the ability of the business to continue trading and operating as they have done so in the past.

For example in Queensland, in order to carry out residential building work a new entity will be required to meet minimum Financial Requirements to prove the company's financial standing. Other jurisdictions require a similar assessment to secure home warranty insurance or home indemnity insurance.

Given any restructure would mean the establishment of a new entity with a new license attached it is unclear how the financial history of the entity would be considered by the insurers.

However, it is conceivable that such information may not be given much weight, for example, in NSW it appears that when seeking new eligibility following dissolution of a trusts the underwriter must ask for a Deed of Indemnity in Respect of Former Business in situations where:

- icare HBCF has issued certificate of insurance to a Builder that has requested that their Eligibility be surrendered or has previously allowed it to expire (former Builder). See Division 8.3 Cancelled Eligibility, or
- a previous or current principal or shareholder of the Former Builder either seeks or maintains Eligibility with another Builder.[2]

It also appears that changing structure and securing a new license attached to a new entity will trigger an eligibility review as a 'new assessment'. This will impose time, cost and administrative burden on the new entity. These assessments can significantly jeopardise the pre-existing trading arrangements including the number and value of residential building work that can be undertaken. It is not until the new entity has a proven record of financial stability that limits can be review and changed. This will likely have a significant impact on the amount of work that can be undertaken, particularly much needed new residential work.

Further, workers compensation premiums may also be adversely affected. For example, NSW offers a *Safe Employer Reward* which considers applying a premium reduction in certain circumstances including where the employer has 'at least three years of policy history'[3].

Similarly in Victoria employers with a claims history are given a rating that will affect their premium if their wages total more than $200,000 per annum. If a business has a good rating (or low claims), their premium will be reduced.

In both cases it is unclear whether the prior businesses history will transfer to take advantage (or to continue to take advantage) of these discounts.

This could also impact the ability of the new entity to secure other types of insurance at the same level and cost when compared to that obtained through the prior entity Including workers compensation, contract works, and public liability insurance.

Finally, changing licensing arrangements and transferring contracts on foot raises adverse perceptions regarding the business practice and long term viability giving rise to perceptions of phoenixing activity.

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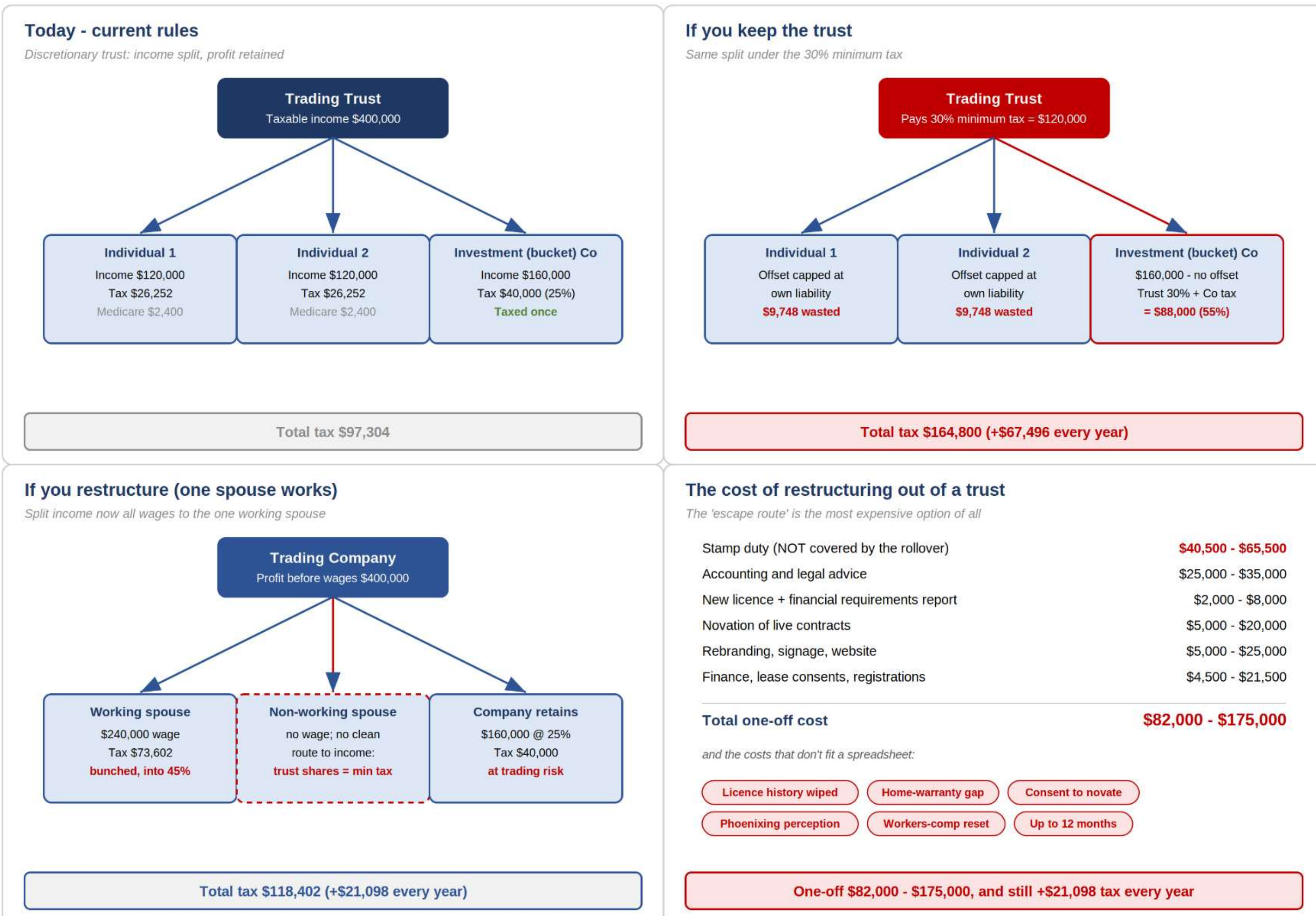
[2] https://edge.sitecorecloud.io/insuranceanf0c2-xmcprodf24d-xmprod74a5-5eb4/media/icare/unique-media/builders-and-homeowners/builders-eligibility/eligibility-guidelines/media-files/files/download-module/hbcf-eligibility-manual.pdf 6.25

[3] https://www.icare.nsw.gov.au/workers-compensation/employers/new-policy/how-to-lower-your-premium

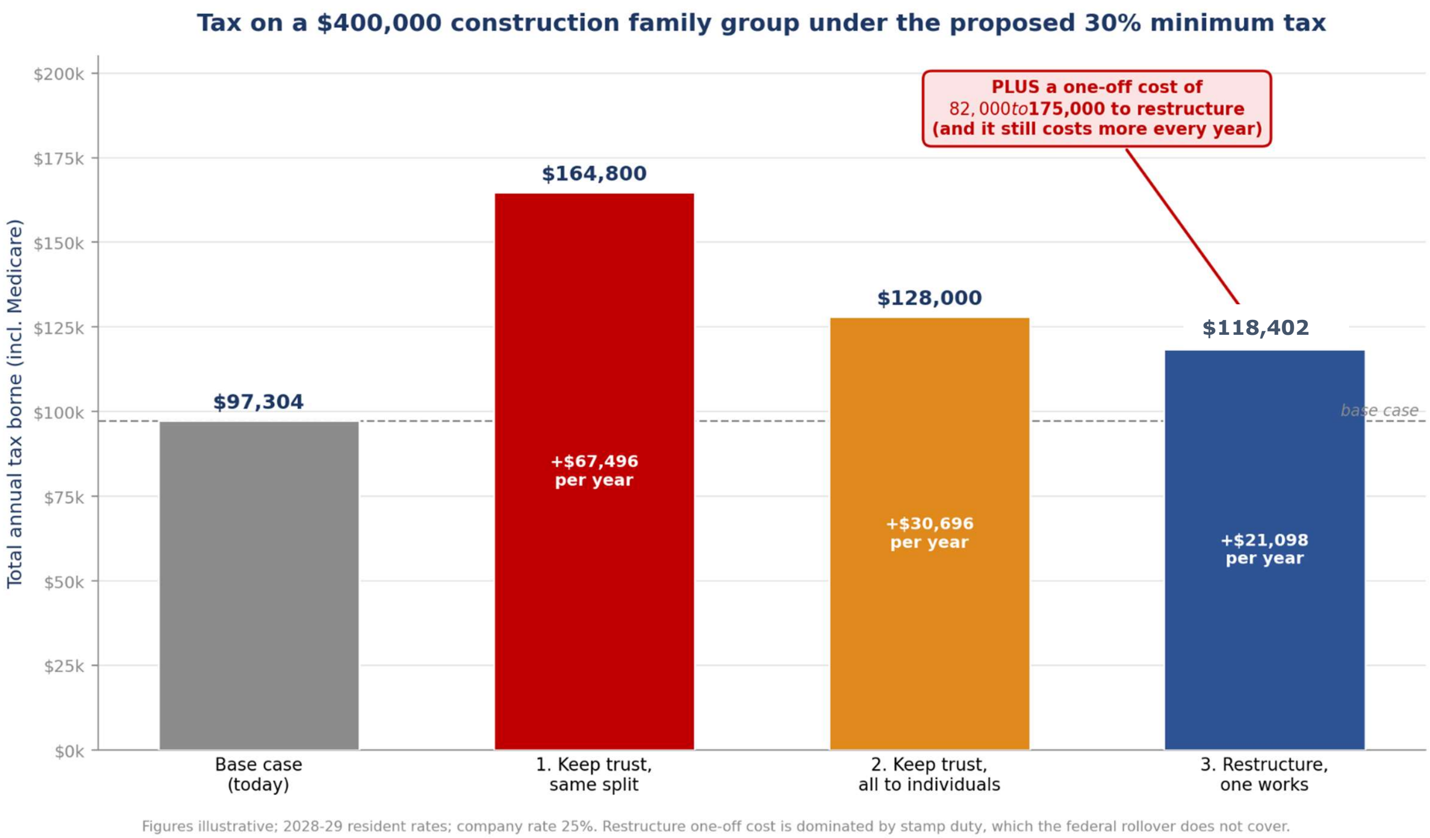
Attachment A

Where the tax falls: one construction family group under the proposed 30% minimum tax

Base group: a trading entity earning $400,000, historically split $120,000 / $120,000 to two spouses and $160,000 retained in an investment company



Figures illustrative. 2028-29 resident rates; company rate 25%. Not shown: dropping the bucket company and paying all income to individuals still totals $128,000 (+$30,696).


Tax on a $400,000 construction family group under the proposed 30% minimum tax
Total annual tax borne (incl. Medicare)
$200k
$175k
$150k
$125k
$100k
$75k
$50k
$25k
$0k
PLUS a one-off cost of
82,000to175,000 to restructure
(and it still costs more every year)
$97,304
$164,800
$128,000
$118,402
base case
+$67,496
per year
+$30,696
per year
+$21,098
per year
Base case
(today)
1. Keep trust,
same split
2. Keep trust,
all to individuals
3. Restructure,
one works
Figures illustrative; 2028-29 resident rates; company rate 25%. Restructure one-off cost is dominated by stamp duty, which the federal rollover does not cover.