

LET'S CHAT TODAY

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With:

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Information provided is general in nature; precise application depends on specific circumstances.

TODAY'S TOPIC

Restructuring out of a discretionary trust

Why, stamp duty, capital gains tax, practical steps — and the proposed 30% trust tax

THE COMMERCIAL CASE

Why restructure?

The reasons were already there

The 30% tax is the nudge, not the reason

There are strong reasons to use a company that have nothing to do with the proposed 30% trust tax.



The reasons were already there

Business owners who should always have been structured through a company have had the same reasons all along.



The proposed 30% trust tax is the push

The introduction of the tax should help move those owners — it is the trigger, not the justification.

Operational advantages of a company



Reinvest at 25%

Retain profits at a flat 25% — lower than a bucket company or an owner's effective rate — so the business can reinvest.



Add or sell down partners

Greater ability to introduce additional partners, or sell down to other parties.



Franking credits

Available where the shareholders are individuals.



No trust distributions

No need for annual trust distributions — a simpler year-end.



No Division 7A loans

No Division 7A loans to manage — provided owners understand the rule on the right.



The rule: pay or declare

To access company money, pay higher wages or declare dividends — don't just take it out.

The trade-off: streaming vs simplicity



THE TRUST

Capital gains streaming and indexing

The discretionary trust's advantage: the ability to stream capital gains to chosen beneficiaries as well as cost base indexing* — the main thing owners give up.

**Historically, the flat 50% CGT discount.*

*** Also ease of paying distributions over wages.*



THE COMPANY

Day-to-day management ease

A flat 25% rate on retained profits to reinvest, no distributions to resolve, and no bucket companies to manage.

Does the annual compliance management ease trump the discretionary trust advantages.

The stamp duty hurdle: QLD and WA stand out



MOST STATES

Business-asset duty abolished

Stamp duty has been abolished over business assets in most states, so business restructures are more manageable there.



QLD AND WA

The exceptions

Queensland and Western Australia are the exceptions — duty on business assets remains.

BUT IN QLD

Queensland has had a stamp duty exemption for small business restructures for the last few years — let's look at how it works.

QUEENSLAND

The stamp duty exemption

Duties Act 2001 (Qld), chapter 10, part 1A — small business restructures

One exemption for each starting point

Duty applies to transfers of dutiable property in Queensland — land, Queensland business assets and chattels (Duties Act 2001 (Qld), ss 9–10).



s 413F — individual to company

An individual transfers to a company in which they are a shareholder. Duty is not imposed to the extent of the lesser of their ownership interest and share interest.



s 413G — partnership to company

All partners must be shareholders. Exempt to the lesser of each partner's partnership interest and share interest.



s 413H — trust, beneficiaries as shareholders

All default beneficiaries must be shareholders. Exempt to the lesser of each beneficiary's trust interest and share interest.



s 413I — trust, trustee as sole shareholder

The trustee is the sole shareholder and the beneficiaries' rights are unchanged — transfer duty is not imposed.

Section 413I: the extract

413I Exemption—transfer of small business property from trustee to transferee corporation with sole shareholder

(1) This section applies in relation to a dutiable transaction that is a transfer, or an agreement for the transfer, of small business property if—

(a) the trustee of a small business entity that is a discretionary trust transfers, or agrees to transfer, the property of the entity to a transferee corporation; and

(b) the trustee is the sole shareholder in the transferee corporation; and

(c) the unencumbered value of the property the subject of the transfer or agreement is not more than \$10m; and

(d) the rights and interests of the small business beneficiaries of the trust immediately before the transfer or the agreement was entered into are the same immediately after the transfer or the agreement was entered into.

(2) Transfer duty is not imposed on the dutiable transaction.

Duties Act 2001 (Qld), s 413I(1)–(2). Subsection (3) also removes vehicle registration duty on an application to transfer a vehicle.

THE GATES

(a) entity and transfer · (b) trustee sole shareholder · (c) value ≤ \$10m · (d) beneficiaries' rights unchanged

Gates 1 and 2: the entity and the property



THE ENTITY

A small business entity

A discretionary trust carrying on a relevant Queensland business, with annual turnover of not more than \$5m.

A relevant Queensland business is conducted on or from a place in Queensland, or consists wholly or partly of supplying land, money, credit, goods or services to Queensland customers.



THE PROPERTY

Small business property

Dutiable property directly held and used by a person for the purpose of carrying on the business.

Not included: property used as a residence by the person, or investment property the person holds and uses to generate income to fund the business.

***Exemption not available for investment property owners**

Typical fit for a service business: goodwill, client lists and depreciating assets — with no real property in the transfer.

Gate 3: the company must be dormant (s 413C)

A transferee corporation is an unlisted corporation that, since its registration and before the transfer or agreement, has not:



Held any assets or liabilities



Been a party to an agreement



Been a beneficiary or trustee of a trust



Issued or sold any shares or rights relating to shares

PRACTICE POINT

Use a freshly registered company and keep it clean until the transfer — a company that has already done any of the above things fails the definition.

Gates 4 and 5: the cap and unchanged rights

VALUE CAP

\$10M

Maximum unencumbered value of the property transferred.

UNCHANGED

Small business beneficiaries' rights and interests

These must be the same immediately after the transfer as immediately before. A small business beneficiary is a default beneficiary, or a person entitled to income or property from the trust on appointment by the trustee.

In practice: the taker in default and the discretionary beneficiaries must stay the same — and the transaction can't be conditional on any change to the beneficiaries.

The outcome: no transfer duty — but stamp it

THE OUTCOME

No transfer duty

Transfer duty is not imposed on the dutiable transaction (s 413I(2)). Vehicle registration duty is also not imposed on an application to transfer a vehicle (s 413I(3)).

STILL TO DO

Stamp the documents

Steps must be taken to arrange for the transaction documents to be stamped.

The five gates, in one line:

Entity ≤ \$5m turnover

Small business property

Dormant company

Value ≤ \$10m

Beneficiaries unchanged

INCOME TAX

Small business restructure rollover

Subdivision 328-G ITAA 1997

Without the rollover, a transfer triggers CGT



WITHOUT

CGT on the transfer

Moving an asset from one legal owner to a related party ordinarily triggers CGT on any gain — even if no money changes hands, because of the market value substitution rule (s 116-30 ITAA 1997).



WITH SUBDIVISION 328-G

Gains and losses disregarded

Intended to ‘facilitate flexibility for owners of small business entities to restructure their businesses, and the way their business assets are held, while disregarding tax gains and losses that would otherwise arise’ (s 328-425).

Introduced by the Tax Laws Amendment (Small Business Restructure Roll-Over) Act 2016. ATO guidance: LCR 2016/2 (effect of the rollover) and LCR 2016/3 (genuine restructure).

What carries across: cost bases and history

The rollover covers CGT assets, trading stock and revenue assets as part of the restructure, and passes these roll-over costs from the trust to the company (s 328-455):



CGT assets

Other than trading stock, revenue or depreciating assets: the transferor's cost base for post-CGT assets just before the transfer.



Trading stock

The cost of the item to the transferor, or its value.



Revenue assets

The amount at which the transferor makes neither a profit nor a loss.



Depreciating assets

The usual depreciating asset rules — s 40-340(1) gives automatic rollover where 328-G would apply but for the asset being depreciating.

Six conditions to access the rollover



1 Genuine restructure

The transaction is, or is part of, a genuine restructure of an ongoing business.



2 Small business entity

Each party is a small business entity, or is affiliated or connected with one, or is a partner in one.



3 Ultimate economic ownership

No material change in who ultimately owns the asset, or in their shares.



4 Active asset

The asset is a CGT asset (not a depreciating asset) and an active asset when the transfer takes effect.

***Does not include shares in trading company**



5 Residency

The transferor and each transferee meet the residency requirement (s 328-445).



6 Choice

The transferor and each transferee choose to apply the rollover to the assets transferred.

Gate 1: what is a 'genuine restructure'?

"...a 'genuine restructure of an ongoing business' is one that could be reasonably expected to deliver benefits to small business owners in respect of their efficient conduct of the business. However, it is a composite phrase emphasising that the SBRR is not available to small business owners who are restructuring in the course of winding down or realising their ownership interests."

LCR 2016/3 at [6]



A bona fide commercial arrangement

Genuinely undertaken to facilitate growth, innovation and diversification, adapt to changed conditions, or reduce administrative burdens, compliance costs and cash flow impediments.



Economic ownership is maintained

The owners keep operating the business through a different structure — same assets, key personnel, suppliers, sales and services.



A structure advice would have chosen

One likely to have been adopted had the owners obtained appropriate professional advice when setting up the business.

Features drawn from LCR 2016/3 at [7].

What isn't genuine — and the safe harbour



Preparing for a sale

LCR 2016/3, Example 5: a restructure undertaken in preparation for selling the business is not a genuine restructure of an ongoing business.



Succession planning

LCR 2016/3, Example 6: a restructure undertaken as part of a succession planning exercise is not genuine for these purposes.



Extracting wealth

LCR 2016/3, Example 7: a restructure used to extract wealth from the business assets is not genuine.



Safe harbour (s 328-435)

No change in ultimate economic ownership of any significant asset (other than trading stock) for at least 3 years — certainty, though it can't be confirmed until the 3 years pass.

Gate 2: are both parties small business entities?

AGGREGATED TURNOVER

< \$10M

Previous year, or likely for the current year (s 328-110). The entity must also carry on a business in the year.

Aggregated turnover = the entity's annual turnover plus that of its connected entities and affiliates (s 328-115).

Dealings between the entity and its connected entities or affiliates are excluded (s 328-115(3)).

Annual turnover = ordinary income derived in the ordinary course of carrying on a business, excluding GST (s 328-120).

A company wholly owned by the trust is connected with a small business entity — or becomes one itself in a later income year.

Gate 3: same owners, via a family trust election



THE SPECIAL RULE

Family trust + family group

Where a non-fixed trust is involved, ultimate economic ownership is unchanged only if the trust is a family trust, and every individual with ultimate economic ownership before and after is a member of its family group (s 328-440; Sch 2F ITAA 1936).



THE FIXES

Two documents

1. A family trust election nominating a specified individual (s 272-80, Sch 2F ITAA 1936).
2. A deed of variation, entered into before the transaction, limiting the beneficiaries to members of the family group.

Note: the trust will hold 100% of the company's shares, so the election also matters for later franked dividends.

Gate 4: active assets (s 152-40)



ACTIVE

Used in the business

An asset used in the course of carrying on a business.

Or an intangible asset that is owned and inherently connected with the business — goodwill is the example given.



NOT ACTIVE

s 152-40(4) exclusions

Financial instruments (loans, debentures, bonds, futures, forward and swap contracts, rights or options over shares, securities, loans or contracts).

Assets whose main use is deriving interest, an annuity, rent, royalties or foreign exchange gains — subject to limited exceptions.

Depreciating assets sit outside Subdivision 328-G, but s 40-340(1) gives rollover relief where the rollover would otherwise apply.

Gates 5 and 6, and the Part IVA question



Residency (s 328-445)

A company is resident if it is incorporated in Australia. A trust is a resident trust for CGT purposes if its trustee is an Australian resident.



Choice

Transferor and transferee must both choose the rollover — typically confirmed in the business sale agreement signed by both parties.



Anti-avoidance (Part IVA)

Part IVA is not covered in this presentation. One step using a rollover Parliament introduced for genuine restructures should sit comfortably — but consider it in the wider context.

NON-TAX STEPS

Practical considerations

Moving the business, not just the tax

Two consents to check before signing



EXTERNAL FINANCING

Confirm there is none

Confirm whether the business has any external financing. If it does, the advice needs to be revisited.



LEASED PREMISES

Landlord consent first

Landlord consent should be obtained in writing, and formally entered into, before the business sale agreement is signed — this ensures there is no breach of lease.

THE RISK

If the business is transferred without consent, loans may be defaulted on, the landlord may have grounds to terminate the lease — and other contracts may need third-party consent too.

Lease consent: sequence matters (also applies for others)

FIRST

Obtain the landlord's consent in writing.

THEN

Formally enter into the consent.

THEN

Sign the business sale agreement.

FALLBACK

No consent yet? Make the sale conditional on it. If the buyer is confident, the sale can still proceed by the completion date — or completion can be deferred.

Consent before signing keeps the business out of breach of the lease.

Tell everyone who the new owner is



Bank accounts

Update bank accounts and give the new details to relevant people.



Invoices

Include the new bank account details on invoices.



Subscriptions and software

Existing subscription and software agreements, such as point-of-sale software.



Business name

Update the ownership of the business name.



Suppliers

Telephone, internet and IT companies, among others.



Everyone else

The list isn't exhaustive — check who the business deals with.

TIP

Work through the business bank statements to find who pays or is paid regularly — that's who needs to be told.

Move the numbers by journal — prove it with paper



BY JOURNAL ENTRY

Record the transfer

Balance sheet items and the purchase price owing can be moved in the accounting records by journal entry, rather than by moving cash.



BACKED BY DOCUMENTS

Prove the transfer

Support each entry with formal legal documentation: the business sale agreement (including the rollover choice), the landlord's consent, and the documents to be stamped.

A journal entry records the transfer — it doesn't replace the legal documents. Some legal requirements need formal notifications or agreements to be evidenced

PROPOSED LAW

The 30% minimum tax on discretionary trusts

Exposure draft released 3 September 2026 — not yet law

30% Minimum Tax

MINIMUM TAX

30%

On the net income of discretionary trusts, for income years starting on or after 1 July 2028.

Payable by the trustee, as a top-up to a rate of at least 30%.

Non-corporate beneficiaries claim a non-refundable tax offset for the tax paid on their share.

Announced in the 2026–27 Budget — the exposure drafts are the first tranche of the proposed legislation.

The exposure draft package:

1 • The minimum tax

2 • The EET election

3 • Roll-over relief

Who is — and isn't — a minimum tax trust

A minimum tax trust is any trust that is not one of the excluded types — in practice, discretionary trusts.



Fixed trusts

Including trusts with no material discretionary elements, under the new definition.



Special disability trusts

Subject to their own regulatory regime.



Deceased estates

The trust estate of a deceased person while under administration.



Complying super entities

Including SMSFs, complying approved deposit funds and pooled superannuation trusts.



Widely held trusts

Including MITs, AMITs and CCIVs — commercial, not closely held.



Charities, bare and employee trusts

Exempt entities, bare trusts (e.g. solicitor trust accounts) and employee share trusts — by operation of law.

Income carved out of the minimum tax



Primary production

Taxable primary production income keeps its existing concessional treatment.



Certain minors' income

Minors with a disability, carer or double-orphan payments, or income from compensation, workers compensation, life insurance or family breakdown property.



Charities and exempt entities

The share of net income to which a registered charity, DGR or income tax exempt entity is presently entitled.



Non-resident withholding

Amounts to which non-resident withholding tax applies, such as dividends, interest and royalties.



Testamentary trusts

Income of a discretionary testamentary trust established for genuine testamentary purposes — with conditions (next slide).



Attributable capital gains

Net income referable to beneficiaries' attributable capital gains is also excluded where an exclusion applies.

Testamentary trusts: carved out — with strings



EXCLUDED

Genuine testamentary income

Net income of a discretionary testamentary trust established for genuine testamentary purposes — from a will, codicil, intestacy or court order — including estate assets sold and replaced in arm's-length transactions.



THE STRINGS

Three integrity rules

1. Property injected after 7.30pm (ACT time) on 12 May 2026, unrelated to the deceased estate, is taxed.
2. Trusts established from 1 July 2028: excluded only if the beneficiaries are individuals or exempt entities — not companies or other trusts.
3. Not excluded if derived under a scheme entered into to avoid the minimum tax.

Separate again: a deceased estate under administration is not a minimum tax trust at all.

How the rate works: a top-up

TAX ALREADY 30% OR MORE

NIL

The rate of minimum tax on that income is nil.

TAX BELOW 30%

TOP-UP

The rate of minimum tax equals the shortfall up to 30%.

NO TAX PAYABLE

30%

The rate of minimum tax is the full 30%.

Existing rates apply as they do now — section 12AB of the Income Tax Rates Act 1986 tops the minimum tax income up so the total rate is at least 30%.

No beneficiary presently entitled? The trustee already pays the top marginal rate under s 99A, so no minimum tax is needed.

Offsets for individuals — not for companies



NON-CORPORATE BENEFICIARIES

A non-refundable offset

Equal to 30% of the beneficiary's share of minimum tax income — matching the minimum tax the trustee pays on that share, so there is no double taxation.



COMPANIES AND EXEMPT ENTITIES

No offset

Corporate beneficiaries are assessed on the trust income they are entitled to. This ensures the minimum tax can't be negated by distributing through a company or an exempt entity.

A beneficiary that is itself a minimum tax trust can apply the offset against its own liability, passing a corresponding offset down to its beneficiaries.

Franking credits stay with the trustee

Example 1.1 in the explanatory materials — a minimum tax trust receives a fully franked dividend:

\$70

Fully franked dividend
received

+ \$30

Franking credit attached

\$100

Included in the trustee's
assessable income —
minimum tax of \$30

NIL

Liability after the \$30 franking
credit offset

The credit is used by the trustee and isn't available to beneficiaries — a non-corporate beneficiary instead claims a \$30 non-refundable offset. Excess credits are refunded to the trustee.

A new, wider definition of 'fixed trust'

A trust is a fixed trust if the beneficiaries have fixed entitlements to all the income and capital — or there are no material discretionary elements affecting the entitlements or rights of the beneficiaries.



LIKELY FIXED

Clearly defined, enforceable entitlements to all income and capital.

Powers that can't significantly vary existing rights — such as administrative powers or issuing new units.

A variation power needing every beneficiary's consent, or unable to adversely affect rights.



NOT FIXED

A trustee or another person can exercise a discretionary power to change who is entitled to the income or capital, or to vary the extent of those entitlements.

Who's actually impacted



1

Income that can't be paid out

Trusts where net income cannot be paid out as wages or other characteristics.



2

Using the tax-free threshold

Trusts where beneficiaries can leverage the tax-free threshold.

\$9,748

max tax benefit lost per beneficiary: $30\% \times \$45,000 = \$13,500$, less \$3,752 individual tax on \$45,000



3

Refundable franking credits

Trusts where franked dividends are received and individual beneficiaries can leverage refundable franking credits.

General feeling: the changes impact trusts holding passive investments where the underlying owners do not have any other sources of taxable income.

Some options to manage

ACCEPT

Pay the minimum tax

Stay discretionary and accept the 30% minimum tax from 1 July 2028.

ELECT (EET)

Nominate and lock in

Stay discretionary in form, but nominate beneficiaries and proportions (discussed further)

RESTRUCTURE

Move the assets

Transfer all required assets to a new structure under rollover relief (separate to previously discussed SBCGT rollover)—transfers made between 1 July 2027 and 30 June 2030.

EITHER / OR

A trustee can make an EET election or use the rollover — but not both. Consider whether anything actually needs to be done – does the 30% make a material difference.

The EET election: nominate and lock in



When

Only in the first income year starting on or after 1 July 2028 (2028–29 for most trusts). The trust must exist on 1 July 2028, and only one election can be made.



Nominate

Name each beneficiary and their share. Each income share equals the capital share, the shares total 100%, and the trustee can't retain any.



Who can be named

Individuals, eligible companies and trusts that existed on 1 July 2028 and are objects under the deed. Not complying super funds, partnerships or non-eligible companies.



Deliver every year

Make each nominated beneficiary presently entitled to their share based on nomination to be exempt from 30% minimum tax, every year, and notify the Commissioner by the earlier of lodgment or the due date.

While the election is in force, the trust is not a minimum tax trust — and the 30% minimum tax doesn't apply.

Locked in — and costly to break



TWO PERMITTED CHANGES

Variations only if...

A nominated beneficiary dies — their share can be reallocated to individuals who are beneficiaries of their estate.

Two nominated beneficiaries separate and an order, agreement or award applies — their shares can be varied.



AUTOMATIC REVOCATION

The election ends if...

The trustee doesn't make the nominated beneficiaries presently entitled as nominated; a nominated trust vests or is wound up; or a nominated company is wound up, deregistered, stops being an object or an eligible company, or loses a shareholder (other than through death or relationship breakdown).

THE COST

In the year of revocation the nominated entitlements are disregarded and the trustee pays the top marginal rate plus Medicare (s 99A) on all net income. Later years bear the minimum tax, and the election can't be remade.

Rollover relief: restructure out of the trust

TRANSITIONAL WINDOW

3 YEARS

Transfers made from 1 July 2027 to 30 June 2030 — completing in 2027–28 avoids any minimum tax liability.

Assets move from the trustee of a minimum tax trust to one transferee — a company, individual, partnership, or trustee of another trust that isn't a minimum tax trust.

No 'genuine restructure' test (unlike Subdivision 328-G) — the relief is for restructures prompted by the minimum tax.

A deferral, not an exemption: the transferee inherits the cost base and tax history, and both sides must choose the rollover.

The rollover doesn't compel a trust to restructure, vest or wind up — and only applies to the extent the trustee can lawfully act.

All required assets must move

ALL OR NOTHING

Every asset in the trust's pool — not just business assets — must be transferred by 30 June 2030, or there is no relief for any asset already moved.

Not required to be transferred (Roll-over EM [1.30]):



Can't be transferred

Including non-proprietary attributes, such as carried-forward tax losses.



Primary production assets

CGT assets used to generate income from a primary production business.



Needed for liabilities

Assets reasonably required to meet trust liabilities, including tax and indemnity amounts.



Needed to wind up

Assets reasonably required to meet winding-up costs and expenses.



Cost of \$1,000 or less

For example the settled sum — so the trust needn't vest for lack of property.

Continuity in, discretion out



CONTINUITY

Same people, same family

For a family trust, everyone with a direct or indirect interest in the transferee afterwards must have been, before the transfer, a beneficiary and a member of the trust's family group. For other trusts, the rules are to be set by Ministerial determination.



NO MATERIAL DISCRETION

Four-year clawback

Relief is lost if material discretionary elements affect members' rights from the last transfer until the end of the fourth income year afterwards — for example, directors choosing which class of alphabet shares receives dividends.

Generally fine: powers over how assets are invested. Generally material: discretion over who receives income or capital, or in what proportions.

What the rollover does — and doesn't do



DOES

Defers the income tax

Disregards the direct income tax consequences of the transfer; the transferee takes the roll-over cost (cost base, cost, breakeven or adjustable value); and family trust distribution tax doesn't arise.



DOESN'T

Remove other taxes

GST, FBT and state and territory duties continue to apply. Later dealings — such as forgiving an unpaid price — have their ordinary consequences. And it's a deferral, not a permanent exemption.

THE QLD LINK

State duty still applies — which is why the Queensland small business restructure exemption (s 413I) matters alongside the rollover.

Let's chat



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Information provided is general in nature; precise application depends on specific circumstances.