TechKnow Podcast – September 2026 – What advisers need to know: trusts, regulation and reform

Recording date: 14.09.26

Due for release 16.09.26

Host: Bryan Ashenden

Synopsis

The financial advice industry continues to experience significant change, from Federal Budget measures to regulatory developments from Government and regulators. This podcast focuses on recently released draft legislation relating to the future taxation of discretionary trusts from 1 July 2027. In addition, we will examine the recent Government response to consultation on consumer protection measures in the wake of the Shield and First Guardian failures.

Transcript

The financial advice industry continues to experience significant change. More developments on Federal Budget measures. Government responses to industry failures with measures to improve consumer protection. And further updates on the Delivering Better Financial Outcome or DBFO reforms.

Hello, and welcome to TechKnow, a podcast series brought to you by BT Technical Services. My name is Bryan Ashenden, and I have the pleasure of leading the BT Technical Services team – a group of professionals dedicated to helping you as advisers work through strategy options for your clients. Now before we begin, I'd like to acknowledge the traditional owners of the land on which we are recording today, the Gadigal people of the Eora Nation here in Sydney, and pay my respects to elders past, present, and emerging.

In this podcast, we will look at some of the developments and announcements that have arisen over the last few weeks that could have an impact on what advice you provide to clients in the future, and how you provide that advice.

Let’s kick off with a look at the latest developments from this year’s Federal Budget. Recently, we had the release of draft legislation for consultation regarding the taxation of discretionary trusts from 1 July 2028. As a reminder, the broad intent of this measure is to require the trustee of a discretionary trust to withhold 30% tax from the distributions it makes to eligible beneficiaries. The beneficiaries would then, provide they are not a corporate beneficiary, be entitled to a non-refundable tax offset equal to the amount of the tax withheld.

This gives rise to three broad consequences. Firstly, if the beneficiary is an individual, the changes have no substantial impact if they are already on a 30% marginal tax rate - excluding the distribution. This would be the case where they have at least $45,000 of other taxable income in the year from other sources.

Second, if the beneficiary is an individual, there is a real impact if the beneficiary is an individual and they have a marginal tax rate below 30% - or in other words, they have less than $45,000 of taxable income from other sources excluding the trust distribution. In these situations, the changes will have an impact because of the non-refundable nature of the tax offset. Whilst some of a beneficiary’s tax liability may be reduced in these circumstances, because they will have some of the distribution taxed at a rate of less than 30%, the difference will not be refunded and is a tax cost to them under this new approach. At the extreme where the beneficiary has no other taxable income and is therefore on a nil tax rate, the distribution is essentially taxed at 30%, with no refund entitlement. Under existing rules, the distribution would not have been taxed at all.

The third, and arguably most significant consequence arises where there are distributions made to a corporate beneficiary. This is because corporate beneficiaries are not entitled to the non-refundable tax offset for the tax withheld at the trustee level, and the consequences when amounts are then paid out to shareholders can result in significant differences compared to if the payment had been made direct from the discretionary trust to the beneficiary.

To illustrate this with an example, assume a discretionary trust had $10,000 of net (or taxable) income to distribute to a beneficiary who is on the highest marginal rate. Under current laws, the beneficiary would be paying $4,700 tax (including Medicare levy) on that distribution, leaving them with $5,300 after tax.

Under the proposed laws, the trustee would initially withhold $3,000 from the distribution. Whilst the beneficiary then only received $7,000 as a cash distribution, they are still required to include their share of the net income distribution in their tax return – in other words $10,000. Tax on that would be $4,700 but they can offset or reduce this with the non-refundable tax credit of $3,000 (being the tax withheld by the trustee), reducing their personal tax liability to $1,700. Taking this off the $7,000 cash received, they are left with $5,300 after tax – the same position as under the current law.

However, if the $10,000 was first paid to a corporate beneficiary, whilst the company only receives $7,000 as a cash distribution, the $10,000 net income entitlement (before the trustee withholding is applied) is again taxable to the company. So the company pays another $3,000 tax at the standard 30% corporate rate, but is not entitled to any tax offset. So we now have a situation where the company only has $4,000 cash left. If this was then paid out as a fully franked dividend to the shareholder on the highest marginal tax rate, after allowing for imputation credits, the shareholder has to pay another $972 tax on the dividend, leaving them with only $3,082 after tax.

This is now effectively a 70% tax rate suffered on the initial $10,000 available for distribution from the discretionary trust – compared to what would have been a 47% tax rate under existing rules, or the same rate if distributed direct to the individual under the new rules. For a shareholder on a nil tax rate, the overall distribution would have been taxed at around 43%, compared to 30% if direct under the new rules and 0% under today's existing rules.

So, with these significant tax changes coming from 1 July 2028, what can be done about it? Whilst it is still too early to take any real or meaningful action, particularly as we only have draft legislation that could be subject to change, the draft legislation does provide a few options to consider, one of which had not been canvassed prior to this new consultation draft.

The first option is to make no change, and to keep the discretionary trust in place as it is. This decision may be relevant depending upon the purpose for establishing the discretionary trust in the first place. If it was established for estate planning or asset protection purposes, have those reasons changed? Do they still remain relevant and important, even if there is more tax to be paid under the new rules? If that is the case, then perhaps there is no need to make any changes to existing strategies.

If those reasons continue to exist, and if the level of tax is a concern, then whilst a simple answer, perhaps consideration could be given to who distributions will be paid in the future. Distributions can still be targeted towards those not on the highest marginal tax rate, but done knowing that there will essentially be a 30% tax that applies.

A second option that could be considered is a new one that has arisen under the draft legislation recently released – and that is the option to become an excluded election trust –

or EET. This is a new option that will effectively preserve the existing tax treatment for the trust and its distributions, but subject to certain and very important requirements.

To be an EET, the discretionary trust needs to be in existence as at 1 July 2028, and the trustee will need to make an election and nominate who the beneficiaries are going to be, and the percentage of future net income of the trust that is to be allocated to each beneficiary. The percentage allocations need to total 100%, and the beneficiary needed to be able to benefit under the trust as at 1 July 2028. Broadly, however, anyone who would normally be able to benefit as a beneficiary can be nominated.

Also, it is important to note that if the trustee had already decided to start using the roll-over relief provisions that will be available from 1 July 2027 (the third option to avoid the 30% withholding), then the EET election option is not available.

The consequence of making a valid election is that the withholding requirements will not apply to the trustee and the existing tax treatment continues. However, we have essentially turned the trust into a fixed trust for tax purposes as all future distributions are fixed. If a future distribution does not follow the election, either in terms of who paid to or in line with the percentage allocations, then the election becomes void. In the year it is voided or revoked, the net income of the trust will be taxed in the hands of the trustee at the highest marginal tax rate, and in future years the 30% withholding requirements will apply. An EET election cannot be reinstated thereafter by paying future distributions in the nominated way. Once breached, it cannot be rectified.

The benefit of the EET election is to preserve the existing tax treatment of distributions, even to eligible corporate beneficiaries, and avoid the high tax imposts discussed earlier. It also means that with no restructuring of the trust required, there are no stamp duty consequences as the discretionary trust remains in place.

The third option, as mentioned earlier, is to elect to take roll-over relief, where all the assets of the discretionary trust will be transferred to a single new entity, whether that be a company, a fixed trust or even an individual. It is important to note that all assets needed to go to the same, single recipient. They cannot go to multiple recipients.

If chosen, the tax characteristics of the assets will transfer across to the recipient and there is no tax realised at the time of transfer. The roll-over relief will be available from 1 July 2027 for a period of three years and not all assets are required to be transferred at the same time. Rather, the transfer of assets can occur gradually over the three year period If desired.

Importantly though, as mentioned earlier, if the roll-over relief is going to be used, then the ability to make the EET election disappears, so it is only one or the other. And whilst this roll-over relief can be achieved without any immediate income tax or capital gains tax consequences, it may give rise to stamp duty considerations.

Overall, we need to await the finalisation of this draft legislation to understand exactly how it will work, as there could be changes to the existing drafts. However, it does provide the ability to start some conversations with impacted clients on what their future options are.

Ok, well it’s now time to take a short break, but don’t go anywhere. I’ll be back in less than a minute to look at the recent announcements from the Government about consumer protection measures to be introduced as a response to recent failures in the financial services environment, as well as provide an update on the latest news on the Delivering Better Financial Outcomes reforms.

<BREAK>

<END BREAK>

Welcome back. A couple of weeks back now, the Government made announcements about strengthening consumer protection within superannuation and the financial system, off the back of consultation undertaken subsequent to the collapse of Shield and First Guardian.

Whilst there were a number of announcements made, today I will only touch on a few of them.

One announcement made was that the Government intends to introduce, via legislation, an obligation on superannuation trustees to have, and comply with, advice fee deduction caps for their members. The legislation is intended to be principles based, which likely means the government will not set the actual cap itself, but will provide guiding principles in terms of how that cap should be determined, and perhaps also what trustees should be doing in terms of ongoing monitoring etc, to ensure that fees being charged do relate to the superannuation balances in question, and represent fair value.

It is important to note that the question of advice fee caps is not a new issue. We have had instances back in 2019 and 2021 of APRA and ASIC jointly writing to superannuation trustees about their obligations to act in their member's best financial interests, and having in place appropriate measures and controls to test the validity of advice fees sought to be charged to a member's account.

And in June this year, ASIC released Report 833, which looked to the questions of how well platform trustees are monitoring risks to retirement savings. That Report highlighted a number of concerns, particularly around advice fee caps either being non-existent, not enforced, or where there were caps, being in ASIC's opinion, too high. If you haven't had a chance to read it, I would recommend that you find some time to have a read as it gives some good background to the current discussion facing the industry. You can download a copy of Report 833 from ASIC's website.

Since the release of Report 833, there has been movement amongst many trustees to review existing processes and caps to address concerns raised by ASIC though its report findings. And with the Government's latest announcements to introduce legislation, the focus has increased. We are seeing trustees starting to change existing positions or increase controls. Generally this has not been about whether the fees being charged relate to the superannuation balances in questions, as this is an area the advice industry has long been focussed on, but comes back to the question of the quantum of the fees charged.

Trustees will need to determine a level for fees, and it may be that in the short terms there are notable differences from one trustee to another. But it is also possible that over time, and once the Government has released its principles based legislative approach to this matter, that there may be a greater level of commonality amongst providers. Not necessarily the same fee, but the principles will be more consistent on how those fee levels are arrived at.

For you as advisers, whilst it may be difficult to implement at first if there is a limit that impacts your existing fee arrangements into the future, you may need to consider if there are other ways that your fees can be charged, such as against non-super investments the client holds. What is important to remember is that recommending to a client to change from one superannuation fund to another as it allows you to charge a higher fee is unlikely to meet your best interests requirements.

Some of the other measures announced include:

- Giving the ATO the power to prevent amounts being rolled into new self managed super funds where the ATO has concerns around fraud, financial abuse, misconduct or potential harm.
- Requiring SMSF trustees to undertake mandatory trustee education prior to an SMSF being registered and for investment strategies to be formally documented in writing.
- Addressing harmful lead generation activities, by banning unlicensed real-time communication.
- Limiting future compensation scheme of last resort payments to actual losses suffered and excluding “but for” claims.

Importantly, the Government also gave a long-awaited update on the Delivering Better Financial Outcomes reforms. Previous reforms, which had been released in draft legislative format, will proceed, which included changes to the way intra-fund advice fees could be charged, allowing and encouraging targeted superannuation prompts to be provided by trustees in a manner that would not constitute personal advice, and reforms to streamline existing statements of advice.

It has been some time since draft legislation for these measures was first released, so it will be important to see how these measures progress and whether concerns previously raised will be addressed as legislation is finalised.

An update was also provided around changes to the best interests duty. Originally the Government has announced an intent to modernise the best interests duty that would allow it to be scalable with the level of advice being provided, and also in terms of who was providing that advice. However, the Government has now changed its approach, perhaps conscious of the need to maintain relevant safeguards post the Shield and First Guardian collapses, and instead focus on removing the seventh safe harbour defence step, which has been viewed by many as a barrier to the effective provision of scaled advice.

The New Class of Adviser was also mentioned. At this stage, this new advice provider concept will only be allowed to operate within APRA regulated superannuation funds and life insurance entities, with this to be revied after three years. For many in financial advice, it will be disappointing that this model cannot be implemented within advice practices to potentially create efficiencies, but it is equally important to remember that if this initial rollout results in more people seeking advice - those who otherwise wouldn't have – then this does create the potential for more Australians to see the value of advice and potentially seek comprehensive advice from you in the future.

And finally, the Government has announced that the Code of Ethics will be reviewed to ensure it is fit for purpose and supports the safe provision of scaled advice.

So, as you can see, there is certainly a lot of change facing the advice profession at this point in time, with many of the proposals being significant not only for your clients and strategies you seek to implement, but also for how advice businesses may operate into the future.

Well, that's about all we have time for in this podcast.

Just a reminder, if you have any questions about the content of today's podcast, or other advice strategy questions in general, and you are a registered adviser with BT Panorama, you can contact our BT Technical Services team via the BT Panorama mobile app. To call, simply open the app, head to the contact us section, and navigate to the option to initiate a call with BT technical services. Or you can simply email the team at technical@btfinancialgroup.com.

And don't forget to join us for our fortnightly BT Academy Webinar series where we talk all things regulatory and technical. Our next webinar will be held at midday AET on Wednesday, 23 September 2026 when I will be presenting on "The good, the not too bad, and the too soon to tell". That session will expand more on a range of the issues discussed in this podcast, with a focus on the regulatory and legislative changes that the financial advice profession is currently facing into.

To register for that session, simply head to www.bt.com.au/professional and navigate to the Events and Webinars section within BT Academy. You can also explore some of our previous webinars that are available on demand and quality for CPD points if originally held within the last 12 months.

Once again, thanks for joining us today. Until next time, bye for now.