

5 May 2026

The Hon. Dr Daniel Mulino MP  
Assistant Treasurer and Minister for Financial Services  
Langton Crescent  
PARKES ACT 2600

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Dear Assistant Treasurer,

### **Submission on amendments to the Family Trust Election and related provisions**

The Tax Institute (**TTI**) writes to you to express our serious concerns regarding the current operation of the family trust election (**FTE**) rules and related provisions contained in Schedule 2F to the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**), and their administration by the Australian Taxation Office (**ATO**).

In this submission, we offer several workable solutions that preserve integrity in the tax system and ensure a fair operating environment for taxpayers.

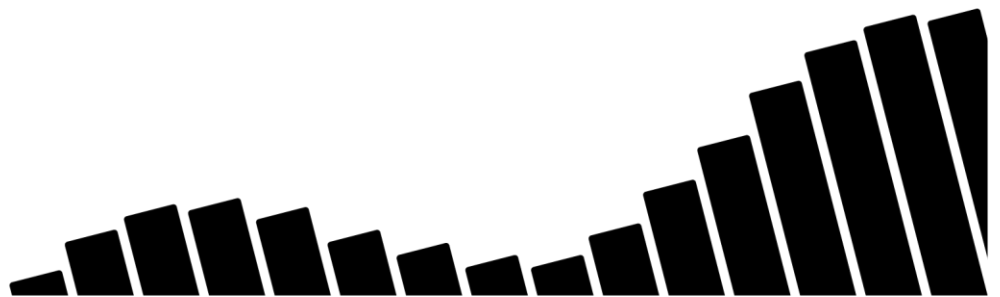
We note that we have had the benefit of reviewing the submissions on these issues made by CPA Australia on 16 July 2025 and Chartered Accountants Australia & New Zealand on 21 November 2025. The Tax Institute largely endorses the technical arguments outlined in those submissions and does not seek to re-prosecute the merits of those matters in this submission.

We note that we have engaged extensively with the ATO and the Tax Ombudsman over the past two years and have exhausted all avenues seeking administrative solutions before pursuing legislative reform. We continue to engage with the ATO and the Tax Ombudsman, however, our concerns outlined below can only be resolved through legislative reform.

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## Recent initiatives on tax reform and reducing red tape

On 27 June 2025, the Treasurer opened [public consultation](#) for the Economic Reform Roundtable and invited proposals and ideas for tax reform. Ministers and Members of Parliament hosted a series of roundtables and discussions with stakeholders, with a focus on increasing productivity and economic growth. In addition to the Treasurer's Economic Reform Roundtable held from 19 August to 21 August 2025, these include the Small Business Roundtable hosted by the Minister for Small Business, the Hon. Dr Ann Aly, on 24 July 2025, and a tax reform roundtable hosted by Ms Allegra Spender MP on 25 July 2025. Australia's tax system is ripe for reform, and it is positive to observe an increasing appetite for meaningful change.

There has also been a strong focus on reducing red tape, including within the tax system. The Treasurer tasked the Board of Taxation (**the Board**) with a [Red Tape Reduction Review](#) in September 2025, and we commend the Board on its consultation to date.

The Tax Institute is of the view that reforms to the FTE and family trust distribution tax (**FTDT**) rules fall squarely within the Government's objectives of increasing productivity, reducing red tape and creating a fairer system for all Australians.

## Executive Summary

The Tax Institute is deeply concerned that the FTDT regime is no longer operating in accordance with its original policy intent. Designed as a targeted anti-avoidance measure to prevent the transfer of trust losses to non-family members, the regime is now producing widespread and unintended consequences for a much wider group of taxpayers, most concerningly, even as a result of honest mistakes or inadvertent errors.

The Second Reading Speech accompanying the introduction of the enabling legislation stated:

The family trust distribution tax is an anti-avoidance measure designed to ensure that the tax benefit of a family trust's losses cannot be transferred to non-family members. **The government hopes the tax will never need to be paid.**

[emphasis added]

While the government at the time stated that FTDT 'need not ever be paid by any trust or interposed entity and in that sense is optional'<sup>1</sup>, we are seeing an increasing number of cases where taxpayers are finding themselves liable for FTDT for reasons inconsistent with its policy intent. The provisions apply unjustly and harshly to situations that do not involve, and have never involved, the recoupment of trust losses, passing on of franking credits, or any mischief or manipulative behaviour to avoid tax.

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<sup>1</sup> Explanatory Memorandum, [Taxation Laws Amendment \(Trust Loss and Other Deductions\) Act 1998](#) (Cth) [11.2]

The effect of the provisions is punitively and disproportionately harsh, resulting in:

- unexpected FTDT and general interest charge (**GIC**) liabilities in the millions, and in some cases, hundreds of millions of dollars that date back many decades but which are only now being identified;
- widespread financial distress, the loss of financial security for affected private groups including family operated small businesses, and the prospect of business closure and bankruptcy and loss of jobs;
- significant professional indemnity claims relating to historical client arrangements, resulting in large claims against tax practitioners;
- the potential for tax practitioners to decline to advise clients on FTE related matters for fear of professional indemnity exposure, thereby reducing the availability of professional advice for taxpayers in a highly complex area of law; and
- resulting in some cases of double, or even triple, taxation, and enlivening other taxing regimes including franking deficit tax.

These issues are systemic and cannot be resolved through administrative action alone. Legislative reform is urgently required to restore alignment with policy intent, improve fairness, and reduce unnecessary complexity and red tape.

The Tax Institute recommends a targeted package of reforms, including:

- introducing a limited amendment period for FTDT;
- providing a legislative moratorium on ATO compliance activity relating to FTDT as an interim measure while we work towards a long-term solution;
- aligning the penalty regime with shortfall interest charge (**SIC**) principles;
- granting the Commissioner a discretion to address honest mistakes;
- allowing greater flexibility to vary or revoke elections; and
- simplifying compliance processes.

More broadly, the regime should be reconsidered as part of a holistic redesign, given its expansion beyond its original purpose into multiple areas of the tax system.

Timely reform will protect the integrity of the tax system while ensuring that it operates fairly, proportionately and in a manner that supports, rather than undermines, the growth and prosperity of Australian families and businesses.

Our detailed response and recommendations are contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

Following your consideration of this letter, we would like to arrange a time to discuss our submission, including other professional associations that share our concerns, to discuss further the importance of the urgent changes that are needed and to provide further context to the points we raise. Please let us know what times would suit for a meeting.

Please contact The Tax Institute's Head of Tax & Legal, Julie Abdalla, on (02) 8223 0058 or the Chair of our National Small and Medium Enterprise (**SME**) Technical Committee and Co-Chair of the ATO's Private Groups Stewardship Group (**PGSG**), Jonathan Ortner, Partner, Arnold Bloch Leibler, on (02) 9226 7239 if you have any queries or require further information.

Yours faithfully,

**Julie Abdalla**

Head of Tax & Legal

**Tim Sandow**

President

## APPENDIX A

# Family trust distribution tax

## Original policy rationale

Prior to 16 April 1998, there were no statutory constraints imposed on trusts insofar as their ability to carry forward prior year tax losses. This resulted in trusts becoming a more favourable vehicle than companies and resulted in some instances of trust loss trafficking.

On 16 April 1998, the [Taxation Laws Amendment \(Trust Loss and Other Deductions\) Act 1998](#) (the **enabling legislation**) received Royal Assent as Act No. 17 of 1998, with retrospective application from 7:30pm Australian Eastern Standard Time on 9 May 1995. The enabling legislation amended the ITAA 1936 to insert [Schedule 2F](#) into the ITAA 1936 (**Schedule 2F**). Schedule 2F contains the trust loss and other deductions provisions, as well as the rules relating to FTEs, interposed entity elections (**IEEs**) and FTDT.

Despite the enabling legislation being [repealed](#)<sup>2</sup> on 10 March 2016, as part of a legislative clean-up, the provisions in Schedule 2F continue to operate.

The [Explanatory Memorandum \(EM\)](#) accompanying the enabling legislation explained that the purpose of the rules was to prevent a significant leakage of revenue that was resulting from the trafficking in trust losses by restricting the recoupment of losses and other deductions of trusts.

The EM relevantly states:

1.4 The purpose of the trust loss measures is to restrict the recoupment of prior year and current year losses and debt deductions of trusts in order to prevent the transfer of the tax benefit of those losses or deductions. **The tax benefit of losses is transferred when a person who did not bear the economic loss at the time it was incurred by the trust obtains a benefit from the trust being able to deduct the loss.** The measures are intended to prevent a significant leakage of revenue that has resulted from the transfer of the tax benefit of trust losses.

[emphasis added]

Family trusts (as defined) that distribute only to members of the family group (as defined) were not expected to be affected by the measures.

A special tax, FTDT, is payable where a family trust distributes income or capital to persons who are not members of the family group of the individual specified in the FTE made by the family trust.

The EM provides:

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<sup>2</sup> See item 723 of the table in s 3 of the [Amending Acts 1990 to 1999 Repeal Act 2016](#) (Cth).

1.22 [...] **family trusts are subject to concessional treatment and most of the trust loss provisions do not apply to them.**

1.23 A trust becomes a family trust for the purposes of the measures if it makes a family trust election. A consequence of making the election is that a special tax, called family trust distribution tax, is payable where a family trust gives income or capital to persons who are not members of the family group. This tax is levied at the top marginal rate applying to individuals, plus Medicare levy.

1.26 **The family trust distribution tax ensures that the tax benefit of losses of a family trust cannot be transferred to non-family members.**

[emphasis added]

The EM further states that:

1.41 [...] the tax will **only apply if trusts and relevant interposed entities fail to abide by the election they have made.** It is hoped that the tax will never need to be collected.

[emphasis added]

The EM to the enabling legislation describes the consequences where an election is made, and a distribution is made outside the family group of the test individual specified in the FTE. Relevantly, the EM states:

5.43 A special tax, called family trust distribution tax, is payable in certain circumstances by a family trust or trust, company or partnership that has made an interposed entity election. This will be the case if income or capital of the trust, company or partnership is distributed to persons other than those in the family group or if such persons become presently entitled to the income or capital. The term 'distribution' is defined in Subdivision 272-B (see paragraphs 13.51 to 13.61).

Where certain conditions are breached, FTDT is imposed by the [Family Trust Distribution Tax \(Primary Liability\) Act 1998 \(FTDT Act\)](#), which results in the tax becoming payable under Schedule 2F<sup>3</sup> on the amount or value of income or capital distributed outside the family group.

## Far-reaching impact of the provisions

The provisions in Schedule 2F were never intended to generate taxation revenue from bona fide, legitimate, family trust arrangements. Three decades after the commencement of the rules, we are observing an increasing number of FTDT issues identified by the ATO and tax practitioners.

The issues are arising primarily due to:

- the complexity of the law coupled with poorly drafted provisions;
- a historical lack of clear guidance on the interpretation of certain provisions;
- changing ATO views, for example, seeking to extend a distribution beyond a beneficiary, company or partner in TD 2017/20 in respect of section 272-60;
- the concept of a family group not keeping up with modern day standards and the effluxion of time and its impact on family groups (for example, because of death, divorce and family breakdowns);

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<sup>3</sup> *Income Tax Assessment Act 1936* (Cth) sch 2F ss 271-15, 271-20, 271-25, 271-30, 271-55.

- genuine misunderstandings by taxpayers, practitioners and the ATO;
- a lack of information on the status of historical elections contributed to by the ATO's poor record keeping system;
- taxpayers changing advisers and tax agents, where the new adviser or tax agent was not aware of the prior election status, and the lack of confidence relying on the ATO FTE/IEE records and the difficulty of obtaining this type of information when onboarding a new client; and
- the general requirement on taxpayers to keep records for 5 years, whereas FTDT matters can go back indefinitely, making it challenging to retain the appropriate paperwork.

Significant tax liabilities are arising from bona fide family arrangements that do not involve:

- any mischief or manipulative behaviour to avoid tax, or pay less tax than should be payable on distributions by the trust;
- recouping trust losses; or
- passing on franking credits to beneficiaries.

Indeed, numerous FTDT matters appear to have arisen due to passing of key family members and where succession to the family assets and structures such as trusts and private companies has passed on to the next generation. The next generation have had limited experience and guidance on how to manage structures without having any prior background to the family trust requirements in Schedule 2F.

While some much-needed changes were made to the provisions in 2007<sup>4</sup>, the rules have not been updated over the past 18 years and no longer reflect contemporary arrangements. Succession related transfers of the control of family wealth, the inability to specify a deceased person as a test individual, and the passage of decades since many FTEs and IEEs were first made, are revealing the far-reaching impact of FTDT.

This is, among other things, causing severe financial and emotional distress and in many cases, devastation, to clients, reputational and severe financial damage to tax practitioners who have tried to correctly advise their clients, and, in some cases, wiping out wealth created by working class families over many decades (for example, where the relevant FTDT and GIC amounts payable far exceed the net wealth of the family group grown over multiple generations). It is alarming that these outcomes are typically resulting from administrative oversights or honest mistakes by tax practitioners (rather than taxpayers who cannot be expected to understand the rules), and are grossly disproportionate to the mischief (or lack thereof).

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<sup>4</sup> [Tax Laws Amendment \(2007 Measures No. 4\) Act 2007](#) (Cth) sch 8.

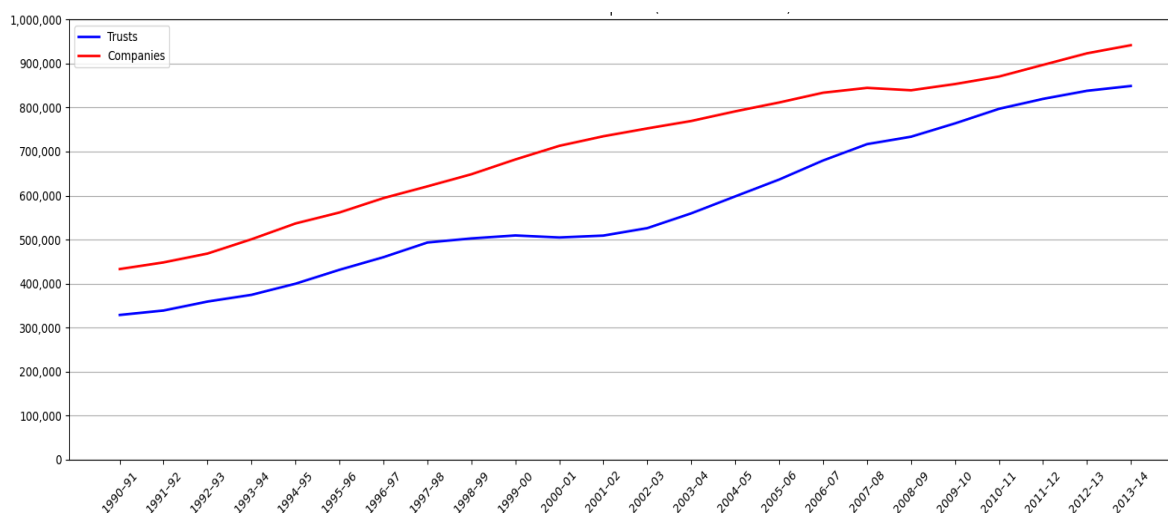
## Extent of issue

Trusts remain a legitimate and legal method for maintaining family assets, asset protection and succession for family assets and they are not used only for tax planning purposes. According to the ATO, there were approximately 823,448 trusts in Australia in 2015. The numbers of trusts increased by almost 700% from 1990 to 2014. Most trusts are discretionary trusts and fixed unit trusts. Figure 1 (below) shows the total number of trusts from 1990 to 2014 compared to companies, while Figure 2 (below) reports the total number of trusts by trust types. In total, trust income in 2013–14 exceeded \$340 billion, making this vehicle a defining feature of the Australian economy with trusts in the financial services sector alone accounting for over \$24 billion<sup>5</sup>.

Recent ATO data indicates that there are over 300,000 discretionary trusts which have trading income as their main source of income, and almost 480,000 discretionary trusts which have as their main source of income investment activities.<sup>6</sup> This highlights how prevalent across all aspects of Australia's economy the use of trusts has become. We note that this includes use by many small businesses and average families, not only high net wealth family groups.

Given their widespread use, changes to the way family trusts are being taxed or regulated have far-reaching consequences.

**Figure 1: Growth in trusts versus companies since 1990–91<sup>7</sup>**

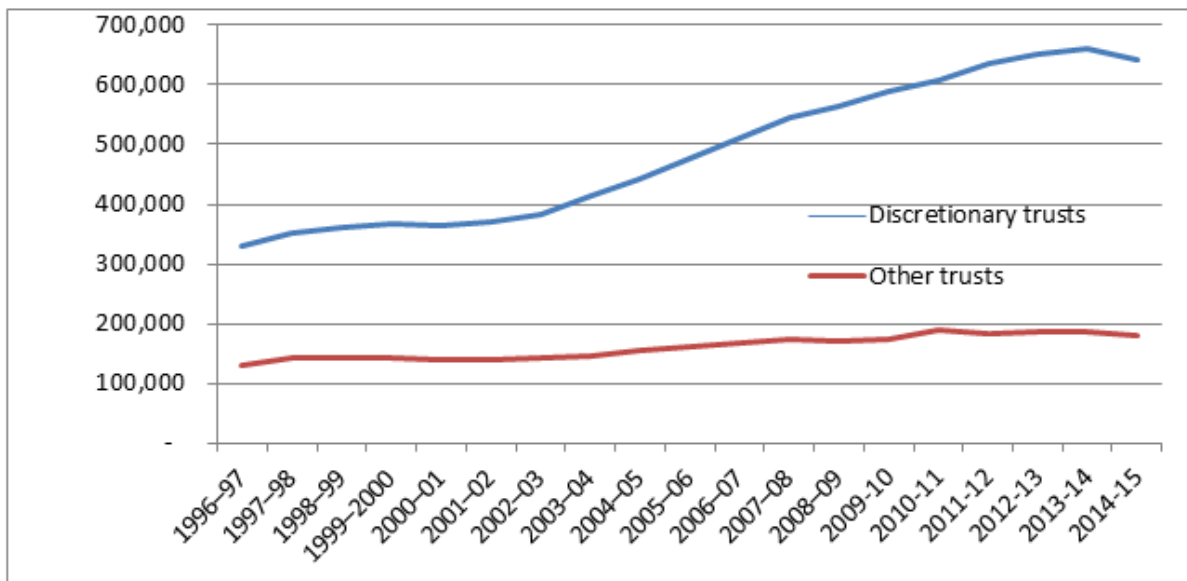


<sup>5</sup> Australian Taxation Office, [Current Issues with Trusts and the Tax System](#) (Web Page, 25 January 2019).

<sup>6</sup> Australian Taxation Office, [Trust Statistics for Taxation Statistics 2022–23](#) (Commonwealth of Australia), [Table 4](#).

<sup>7</sup> Australian Taxation Office, [Taxation Statistics 2014–15](#) (Commonwealth of Australia).

**Figure 2: Growth in trusts, number of trusts since 1996–97<sup>8</sup>**



## Pervasive expansion of provisions beyond original purpose

The ‘family trust’ concept has moved well beyond its original function as a targeted anti-traffic rule within the trust loss regime, and now operates as a general gateway concept across several unrelated parts of the income tax law. Schedule 2F was introduced to stop the transfer of the tax benefit of trust losses and debt deductions to persons who did not bear the underlying economic loss. A trust is a ‘family trust’ when an FTE under section 272-80 is in force, and that status is built around a specified individual and that person’s family group. Once a valid election is in place, the ordinary trust loss rules largely fall away except for the modified income injection test.

Treasury has previously recognised that the family trust rules had already spread beyond the original trust loss setting. In its 2011 consultation paper on [Modernising the taxation of trust income](#) (2011 Treasury Consultation Paper) (which was issued under a former Labor Government), Treasury said the family trust rules provide concessional treatment not only for the trust loss rules, but also for the franking credit trading rules and trustee beneficiary reporting rules, and it expressly noted the complexity of the rules around making elections, identifying the family group, using interposed entity elections, and varying the test individual. That observation remains accurate, but the concept has spread further since then.

<sup>8</sup> Australian Taxation Office, [Taxation Statistics 2014–15](#) (Commonwealth of Australia).

The clearest early expansion was into the dividend imputation system. The 1999 explanatory memorandum expressly extended the transitional family trust and interposed entity election rules so that taxpayers could use those elections for the franking credit trading measures.<sup>9</sup> It stated that, unless a trust elected to be a family trust, the 45-day rule would generally deny beneficiaries of non-fixed trusts franking rebates and other franking benefits for post-31 December 1997 acquisitions. That logic still echoes in current law: section 207-145 of the ITAA 1997 denies the gross-up and tax offset where the recipient is not a 'qualified person', and that test still depends on Division 1A of former Part IIIAA of the ITAA 1936.

The same 1999 legislation also exported the family trust concept into the company loss (and other related) rules. Its policy objective was to extend to companies concessional tracing rules already available under the trust loss measures, and it explained that where relevant interests in a company are held by a family trust, the trustee is treated as owning those interests as an individual. The ATO continues to describe this as a 'company loss tracing concession' for non-fixed trusts that are family trusts. This is important because it shows the family trust concept ceased to be merely a trust-loss carve-out and became a tracing device for the corporate loss rules as well.

A much later and conceptually different migration occurred in the small business restructure roll-over. Subdivision 328-G is designed to facilitate tax-neutral restructuring, but ordinarily it requires there to be no material change in the ultimate economic ownership of transferred assets. The 2016 explanatory memorandum said that discretionary trusts may be unable to satisfy that test because proportionate ultimate economic ownership cannot readily be identified, and so an alternative rule was created for family trusts. Section 328-440 now treats the ownership requirement as satisfied where the relevant owners before and after the transfer are members of the same Schedule 2F family group. In other words, a concept designed for loss trafficking is now used as a proxy for ultimate economic ownership in small business restructures.<sup>10</sup>

The concept has also been pulled into the trustee beneficiary reporting and circular trust distribution rules. Current sections 102UK and 102UT exclude family trusts, IEE trusts, and certain related trusts from the ordinary trustee beneficiary statement regime.

The result is that an FTE is no longer a narrow election about whether a trust should access a simplified treatment under the trust loss rules. In substance, it is now a multi-regime tax status. It determines access to franking credits, affects ownership tracing for company losses, relaxes ultimate economic ownership tests for restructuring, alters trustee beneficiary reporting obligations, and interacts with anti-avoidance rules for circular trust distributions. This is a materially different policy role from the one described when Schedule 2F was introduced to combat the transfer of trust losses and deductions.

This expansion has introduced real complexity.

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<sup>9</sup> [Explanatory Memorandum](#), *Taxation Laws Amendment Bill (no.8) 1999* (Cth).

<sup>10</sup> [Explanatory Memorandum](#) to *Tax Laws Amendment (Small Business Restructure Roll-Over) Bill 2016* (Cth)

- First, taxpayers and advisers must now understand not only Schedule 2F itself, but also a network of dependent provisions scattered throughout the ITAA 1936, *Income Tax Assessment Act 1997 (ITAA 1997)* and the *Tax Administration Act 1953 (TAA)* and their respective related regulations.
- Secondly, one of the most important present-day consequences of a family trust election, franking credit access, still requires users to navigate ‘qualified person’ concepts housed in former Part IIIAA of the ITAA 1936. A rule can hardly be said to be coherent or modern when its practical operation in 2026 still depends on repealed legislative architecture.
- Thirdly, the mechanics of the regime are themselves layered and difficult, with diverging views between tax practitioners and the ATO on various key technical points. Treasury previously noted the complexity of identifying which entities can be within a family group, including companies, trusts and partnerships brought in through IEEs.

There is a broader structural unintended consequence as well. Because the concept of an FTE now is relied on in several regimes, the system creates pressure for ‘defensive’ elections. The practical incentive is therefore to elect early to preserve flexibility for franking, tracing and restructuring, even where trust loss trafficking is not remotely in issue. However, once that election is in force, the trust enters a much narrower statutory distribution world, backed by FTDT. In policy terms, this is a poor outcome: a concession aimed at integrity ends up driving taxpayers into a long-term status election for unrelated commercial reasons, where the elections are irrevocable apart from limited exceptions.

In The Tax Institute’s view, the solution is not another narrow band aid fix. The Government should instead decouple the family trust concept from the multiple policy applications it has come to service. The imputation system should have a purpose-built rule for discretionary trusts rather than relying on Schedule 2F status. Subdivision 328-G should test continuity of economic ownership directly, rather than borrowing the family group construct from the trust loss rules. Company tracing and trustee beneficiary reporting should likewise be framed by their own policy criteria, not by whether a trust has opted into Schedule 2F. At the same time, Schedule 2F itself should be rewritten so that the family trust regime is easier to enter, easier to understand, and easier to exit prospectively where no integrity concern exists. 2011 Treasury Consultation Paper identified simplification of the family trust rules as a live issue; the case for doing so is even stronger now than it was then.

This is no longer a niche trust-loss issue. The FTE regime has become a legislative hinge across multiple integrity and concession regimes across Australia’s tax system. This spread has made the law harder to understand, harder to administer, and more likely to produce outcomes that turn on technical election status rather than substantive policy. The Government should treat reform of the family trust rules as a matter of system-design, not merely a Schedule 2F tidy-up.

## Societal impact

Australia’s tax laws were never meant to operate in such a way that can singlehandedly destroy family wealth or small business viability. Yet, feedback from our members indicates that increasing numbers of taxpayers now face insolvency or bankruptcy over long-tail liabilities they, and until recently the ATO, never knew existed. Entire family groups that have operated honestly and contributed to Australia’s economy for decades risk losing everything.

We also understand from our members that there are many small businesses and farmers of modest means operating via trusts, especially those with regional and country practitioners who have generally not had as much access to education in the past, may have issues that could result in considerable tax liabilities and adviser liabilities.

For passive private groups (whether small, medium or large), the regime creates a risk that family wealth can be destroyed by historical technical failures rather than deliberate misconduct. Elections made decades ago, lost records, changes in family structure, or minor defects in documentation can trigger liabilities long after the relevant transactions occurred. Families are forced to reconstruct old trust arrangements and prove the validity of elections that may have been made with the assistance of prior advisers many years earlier.

For operating private groups, the effects are even more serious. A large retrospective FTDT assessment can destabilise or destroy an otherwise viable business. Where the business sits within a trust structure, the liability may not remain confined to a passive holding entity; it can threaten the operating enterprise itself. This creates flow-on consequences for employees, suppliers, creditors, and local and wider communities. FTDT is not merely a technical tax problem. It has become a business continuity, ongoing supplier/client issues, and an employment issue.

Employees of family-owned and privately held businesses are especially exposed. Unexpected historical tax bills can lead to cancelled investment, reduced hiring, lower wages growth and, as our members are starting to witness, insolvency and bankruptcy. The cost of the regime is therefore borne not only by owners or controllers, but also by workers and communities who had no role in the underlying technical issue involved.

The regime is also distorting the tax advisory market. Advisers and taxpayers must now approach ordinary trust compliance as if it were a forensic reconstruction, and spend considerable time seeking to gather evidence out of fear. Historical deed tracing, election validation and family-group analysis have become standard risk-management exercises. Seeking to reconstruct past financial and trust records to determine what distributions have been made, when they were made, and to whom takes considerable time and difficulty as electronic systems and record storage have changed so much over the past three decades. Accessing historical records can be extremely difficult and in many cases, the records can only be accessed for a limited time, typically no more than 10 years at best. This drives up costs considerably, and causes smaller firms to withdraw from trust advisory work altogether. The likely result is a two-tier system in which only larger clients can afford the high quality specialist advice needed to manage risk. This creates an unfair prejudice against smaller taxpayers who are less able to afford the support of specialist practitioners and larger firms that are willing to take on these matters. Issues are likely to fester where taxpayers are unable to access professional advice, and this has broader ramifications for voluntary compliance.

Insurers are likely also affected, because a regime that is indefinitely retrospective, rigid, and capable of generating very large liabilities, naturally increases professional indemnity exposure for accountants and lawyers. That pressure is likely reflected in higher premiums, narrower coverage and more defensive professional practices.

The ATO is burdened as well. The current system appears administratively heavy, resource-intensive and poorly supported by historical record systems. Considerable compliance effort is being devoted to technical issues that often do not involve real avoidance or current-year risk. This is a poor allocation of administrative resources.

The cumulative outcome of these consequences is that the regime is undermining confidence and trust in the tax system. A law that imposes ruinous liabilities on honest families and businesses because of technical complexity with defects, old and missing elections, or historical uncertainty, erodes confidence in both the law and its administration.

The Government should now treat FTDT reform as necessary and urgent changes in addition to providing more appropriate tax integrity, and productivity enhancement. The present regime is imposing costs across private groups, employees, advisers, insurers, and the ATO, that are extremely out of proportion to its original purpose.

## Key issues and recommendations

### Unlimited amendment period

FTDT is due and payable at the end of 21 days after a 'distribution' is made outside the family group and does not rely on the issuance of an assessment by the Commissioner. The imposition of FTDT is self-operative when the relevant conditions<sup>3</sup> in Schedule 2F are satisfied. Accordingly, the concept of a limited period of review, within which the Commissioner can ordinarily issue a notice of assessment, is not currently relevant to FTDT. This starkly contrasts with the limited period of review that applies to assessments issued to taxpayers that are generally limited to four years (or two years for some taxpayers), and determinations made under the general anti-avoidance provisions in Part IVA of the ITAA 1936 of four years, and other anti-avoidance measures contained in Australia's tax laws.

In the absence of any limitation on the period of review for FTDT, the ATO is currently unable to limit its administration of the law relating to FTDT other than the imposition of GIC. Therefore, if FTDT is payable, further work is required by the ATO to exclude any distribution that has been previously subject to tax by a beneficiary.

A limited amendment period is essential to the proper operation of a self-assessment system because it gives taxpayers confidence that, after a defined point, their income tax position for a year will generally be treated as final. Without such a limit, taxpayers remain exposed to the possibility that assessments may be reopened long after returns have been lodged, records have been archived, transactions have been completed and commercial decisions have been made. That lingering exposure undermines one of the central conditions on which voluntary compliance depends: the ability of taxpayers to arrange their affairs with a reasonable degree of certainty.

From a policy perspective, an unlimited amendment period for FTDT is inconsistent with the certainty rationale that underpinned the reforms coming out of the [Report on Aspects of Income Tax Self-Assessment \(RoSA\)](#), and the broader design of Australia's self-assessment system.

The lack of any statutory finality rule for FTDT is difficult to reconcile with the policy logic described above. If the purpose of a limited amendment period is to ensure that taxpayers can, after a reasonable period, arrange their affairs on the basis that a prior year is closed, then a regime that leaves trustees and related entities exposed to FTDT indefinitely undermines that objective. A family trust may have made an election many years earlier, may have undertaken transactions on the footing that historical years are no longer open in the ordinary income tax sense, and may nonetheless remain vulnerable to a later FTDT liability if the Commissioner (or even the taxpayer) subsequently identifies a distribution or conferral outside the family group.

The abovementioned tension is especially acute because FTDT is not a marginal or procedural impost. The ATO's current guidance emphasises that FTDT can have significant financial consequences, that the Commissioner has no discretion to ignore its application, and that the Commissioner cannot limit the period for which FTDT applies<sup>11</sup>. In policy terms, that means taxpayers may face a harsh substantive liability long after the relevant year, without the protection of the finality principle that ordinarily moderates post-lodgement risk in the self-assessment system.

An unlimited period also undermines several of the administrative benefits that justify limited amendment periods more generally. Over time, records are harder to locate (particularly when they are no longer required to be retained under record keeping laws and where record keeping systems have changed dramatically over time) or attest to, personnel change, advisers disengage (whether due to retirement, death, incapacity, or otherwise), and the commercial context of historical trust distributions becomes more difficult to explain. RoSA's logic was that compliance activity should occur within a period that is reasonably necessary for the ATO to detect and address errors in ordinary cases, not at an indefinite future point. An FTDT regime with no effective outer limit reverses that logic: it shifts the cost of long-tail uncertainty and evidentiary decay onto taxpayers even where there is no fraud, evasion, or deliberate concealment. The result is not simply reduced certainty; it is reduced administrative fairness.

The ordinary amendment rules already show how that balance is conventionally struck: the Commissioner is given a substantial review period in standard cases, with unlimited powers reserved for exceptional circumstances such as fraud or evasion. In circumstances where there has been fraud or evasion, one would expect the taxpayer to have deliberately concealed true tax position, making it difficult for the Commissioner to address compliance concerns within the ordinary amendment period. However, that concern is not present here, and, in particular, the work that the ATO has been doing in modernising trust administration systems, by streamlining trust reporting, means that the ATO has more accurate and high-quality data to be able to address any FTDT concerns within the standard amendment period.

If the Government's policy objective remains to balance revenue protection with certainty, FTDT is anomalous because it effectively treats all cases as though they warrant perpetual exposure, rather than confining indefinite exposure to egregious misconduct-based exceptions.

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<sup>11</sup> Australian Taxation Office, [Family trust distributions tax – What you need to know](#) (Web Page, 21 May 2025).

The Tax Institute considers the absence of a limited period of review for FTDT is unreasonable, particularly in cases that involve honest mistakes and clerical errors. This is exemplified by the fact that these rules were designed to deal with the inappropriate carry forward of trust losses or utilisation of franking credits. In all other circumstances, these rules are subject to the usual four-year limitation period. For example, the tax assessment for a shareholder that does not satisfy the 45-day holding rule and claims franking credits attached to a franked distribution when it was not otherwise entitled to the franking credits will be limited to a 4-year amendment period.

## **Recommendation 1**

For the above reasons, the current FTDT position is at odds with the policy reflected in the RoSA commentary. A regime that permits FTDT liabilities to be raised without any equivalent limited amendment period departs from the principle that taxpayers should, after a reasonable period, be entitled to finality in relation to past years. We consider this inconsistency warrants reform. We recommend that FTDT is aligned more closely with the ordinary architecture of section 170 by introducing a defined limitation period for FTDT liabilities, subject to targeted exceptions for fraud, evasion, deliberate non-disclosure, or other clearly identified integrity risks. This would better reconcile the protection of the revenue with the certainty, finality and administrative fairness that RoSA recognised as essential features of a well-functioning self-assessment system.

## **GIC accruing**

FTDT is currently automatically imposed 21 days after a distribution is made outside of the family group. If the amount of FTDT remains unpaid after 60 days, GIC applies automatically.

The self-executing, inflexible nature of FTDT, together with the Commissioner's lack of ability to amend or remit FTDT liabilities, raises serious concerns in respect of the GIC that accrues on the FTDT.

FTDT attracts GIC once the liability is due and remains unpaid, because GIC applies where an amount of tax or other liability under a taxation law remains unpaid after the date it should have been paid. By contrast, the SIC was introduced as part of the 2005 self-assessment reforms specifically for additional income tax liabilities revealed by an amended assessment.

The object of Division 280 is that SIC applies to shortfalls of income tax revealed when the Commissioner amends an assessment, and the statutory liability is framed by reference to an additional amount of income tax becoming payable because an assessment is amended.

That distinction produces an anomalous outcome for FTDT. FTDT is imposed under the FTDT Act by reference to amounts made taxable under Schedule 2F to the ITAA 1936. In practice, once the FTDT amount is due, it is treated as an existing tax debt, so any delay attracts GIC in the ordinary way. SIC is unavailable because FTDT is not an 'additional amount of income tax' arising on amendment of an assessment within Division 280. The result is that a trustee facing FTDT is subjected to the harsher late-payment interest regime of GIC, even where the economic reality is closer to a later-detected tax exposure than to a straightforward failure to pay an assessed primary income tax debt on time.


This is unfair for at least three reasons.

- First, the rate differential is material. For the quarter April to June 2026, the ATO’s published annual GIC rate is 10.96%, while the SIC rate for the same quarter is 6.96%. That is a spread of 4 percentage points, before taking account of daily compounding. In other words, taxpayers exposed to FTDT are charged at a rate markedly above the rate Parliament has considered appropriate for liabilities that emerge only after later review or correction.
- Second, the policy rationale for SIC applies with real force here. SIC exists because, where a liability is only later crystallised through amendment, the taxpayer commonly did not know at the original due date that the higher amount was owing. That same fairness concern can arise with FTDT: the liability often turns on complex Schedule 2F tracing, family group boundaries, FTEs/IEEs, and characterisation questions that may only be appreciated after the event, or after ATO review. Yet the law treats FTDT as if it were simply an overdue known debt, exposing the trustee to the more punitive GIC regime rather than the more appropriate SIC regime designed for later-emerging liabilities.
- Third, the disparity has become more severe since 1 July 2025, because ATO interest charges incurred on or after that date are no longer deductible. The practical consequence of this legislative change is especially acute where GIC applies, because the higher nominal rate now becomes a fully non-deductible after-tax cost. A trustee subject to FTDT therefore bears not only a higher headline charge than a taxpayer subject to SIC, but a higher non-deductible charge. This compounds the inequity.

The current position therefore creates a mismatch between legal form and policy substance. In legal form, FTDT is treated as an immediately payable debt and so falls into GIC. In policy substance, many FTDT liabilities resemble the kind of later-identified tax exposure for which SIC was created. There is little fairness in subjecting trustees to the ATO’s highest routine interest regime merely because the liability is structured outside the amended-assessment machinery, especially where the underlying issues are technical, evaluative and frequently only identified retrospectively.

In one case study presented by the ATO at the NSW Tax Forum hosted by The Tax Institute in May 2025, the ATO calculated over \$26 million of FTDT and related GIC of around \$41 million in respect of a family business (involving a family that provided bus services) where the FTDT liability related to around 20 years of activity. In this case study, the total liability of \$67 million (FTDT + GIC) was well over two times the \$30 million of net assets that the family had, which would have destroyed all of the family’s wealth grown via the family business. The following is an extract from the ATO PowerPoint presentation at that event:

**FTDT Events**

	<b>YTD FTDT</b>	<b>\$0</b>	<b>YTD GIC</b>	<b>\$5,800,554</b>
	<b>Total FTDT</b>	<b>\$26,135,775</b>	<b>Total GIC</b>	<b>\$40,997,839</b>

We note that in this case, if the taxpayer had made the right elections up front, the \$67m liability would not have arisen. This demonstrates that the issue arose as a result of a paperwork error, and not any kind of tax mischief and is clearly a disproportionate outcome.

The ATO’s presentation slides are included with this letter as **Annexure A**. We would be pleased to make available the presentation recording if required.

## Recommendation 2

We recommend that further consideration is given to the appropriateness of GIC as the applicable penalty regime in these matters.

We note that references to the GIC in Schedule 2F could easily be replaced to SIC with a view to equating FTDT notices with income tax notices of assessments such that GIC is only triggered after the issuance of an FTDT notice.

## Absence of the Commissioner's discretion

Subparagraph 271-75(1)(b) of Schedule 2F provides that, where FTDT is imposed on a trust, it is due and payable 21 days after the relevant distribution or conferral. Where a conferral or distribution was made before the making of an election, FTDT is due and payable at the end of 21 days after the day on which the election was made.<sup>12</sup> This liability is not contingent on the Commissioner issuing a notice or document of any kind. Rather, it is self-operating, and can accrue without the taxpayer's knowledge.

## Absence of discretion for honest mistake or inadvertent omission

Section 109RB in Division 7A of Part III of the ITAA 1936 contains a discretion that allows the Commissioner to disregard a deemed dividend (or allow it to be franked) where it has been triggered by an honest mistake or inadvertent omission by the taxpayer or any other entity whose conduct contributed to the mistake or omission.

Paragraph 1.8 of the [explanatory memorandum](#) to the [Tax Laws Amendment \(2007 Measures No. 3\) Act 2007](#) (Cth), which introduced the discretion in section 109RB, explains that the discretion will allow the Commissioner to appropriately handle the situation where taxpayers have inadvertently triggered a deemed dividend because of a past mistake or omission.

The Minister's [Second Reading Speech](#) explains that the amendments were designed to reduce both the extent to which taxpayers can inadvertently trigger a deemed dividend under Division 7A, and the punitive nature of the provisions. In particular, the discretion in section 109RB was designed to:

- give the Commissioner greater flexibility to administer the provisions; and
- reduce ongoing compliance costs and tax penalties for private companies, especially for the many small businesses that use a company structure.

Since its introduction with effect from the 2001–02 income year, the discretion in section 109RB is conditional but has been applied to relieve taxpayers who faced adverse tax outcomes due to administrative oversights, such as a simple miscalculation of the minimum yearly repayment in one year. The discretion is not unfettered, as the Commissioner can exercise the discretion only if the deemed dividend arose because of an honest mistake or inadvertent omission.

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<sup>12</sup> Subparagraph 271-75(1)(a) of Schedule 2F.

ATO Law Administration Practice Statement [PS LA 2011/29](#) provides guidance on the process to be followed when considering the exercise of the Commissioner's discretion under section 109RB. If Division 7A applies regardless of the mistake or omission, then the discretion cannot be exercised.<sup>13</sup>

Paragraph 9C of PSLA 2011/29 provides:

Actions or omissions made to circumvent Division 7A cannot satisfy the requirements of honest mistake or inadvertent omission. Evidence that there has been a deliberate indifference or wilful blindness would not satisfy the requirement of honesty and would not constitute an honest mistake.

Further, section 109RB was inserted into the ITAA 1936 on 21 June 2007 but had retrospective application from the 2001–02 income year. This was a clear reflection of the government's intent to provide relief for eligible taxpayers up to five years before the enabling legislation received Royal Assent.

The discretion contained in section 109RB is clear precedent for legislative reform of Schedule 2F to provide relief to taxpayers who are liable for FTDT liabilities and related GIC arising from honest administrative errors and oversights. We see no justification for Schedule 2F not containing a similar discretion. It is difficult to identify a reasonable policy basis for treating taxpayers inconsistently across tax regimes, where the tax outcomes of genuine administrative oversights can be disregarded under one regime but cause inflexible and unforgiving tax outcomes under another regime.

### Recommendation 3

The Tax Institute recommends that Schedule 2F is amended to allow the Commissioner the discretion to make certain decisions concerning FTDT liabilities.

We consider that the Commissioner's discretion should be available, provided there is no indication of a scheme involving the transfer of losses, fraud or evasion, to:

- allow rectification of clerical errors where there has been an honest mistake or inadvertent omission;
- treat a prior invalid election with respect to an entity as being valid provided that distributions have been made in accordance with that election; and
- determine that an FTDT liability be confined to an amount that, in the view of the Commissioner, represents the value of a benefit that has been provided to someone who is not part of the family group.

### Limit on varying or revoking elections

Subsections 272-80(5A) and 272-80(6A) respectively allow the trustee of a trust to vary or revoke an FTE only in respect of the income year specified in the election or in one of the next four income years.<sup>14</sup> A similar variation and revocation mechanism for IEEs is provided for in subsection 272-85(5C). The individual specified in an FTE can be varied only once.<sup>15</sup>

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<sup>13</sup> Paragraph 6 of PS LA 2011/29.

<sup>14</sup> Subsection 272-80(6B) of the ITAA 1936.

<sup>15</sup> Subsection 272-80(5B) of the ITAA 1936.

The ATO's [view](#) is that:

- to be effective, the variation or revocation of an existing FTE or IEE is made in a schedule to the entity's tax return;
- the variation or revocation cannot be backdated to an earlier income year;
- a tax return that has already been lodged cannot be amended to include a variation or revocation schedule; and
- the ATO cannot defer time for lodging a variation or revocation schedule not lodged with the tax return.

The ATO considers this to be the case even if the variation or revocation otherwise meets the relevant conditions in section 272-80 or section 272-85.

Taxpayers should be allowed an unlimited period to vary or revoke an FTE or IEE where the change is made to correct an administrative error, including errors arising from the selection of a different test individual than was intended, or for a third party sale where there is clearly a need for the election to be revoked so that the arm's length buyer is not burdened by a historical choice of the vendor.

The current rules can produce outcomes that are disproportionate to the nature of the error. In practice, many FTE and IEE issues do not arise from deliberate tax planning or an attempt to obtain an unintended benefit. Rather, they often arise because, when an election was made, the wrong test individual was specified through misunderstanding, incomplete records, changes in advisers, or simple clerical error. Often the trust was, at all relevant times, administered as a family trust for a single family group, and the election was intended only to preserve access to concessions or to circumvent the FTDT regime applying unexpectedly. In those cases, the nomination of a different test individual is an administrative mistake in the implementation of the election, not a change in the substantive economic or familial arrangements of the trust.

Where that kind of mistake cannot be corrected after a limited period, the consequences can be severe and long-lasting. A mistaken choice of test individual may retrospectively cause distributions to fall outside the relevant family group, expose trustees or entities to FTDT, complicate the utilisation of losses and franking credits, and create significant compliance costs for taxpayers seeking to reconstruct historic family relationships and trust records. These outcomes can arise even where there is no mischief, no revenue risk in substance, and no dispute that the trust has always operated within one family group. The law should not permanently entrench an obvious administrative mistake merely because it is discovered outside an arbitrary amendment window.

An unlimited correction period is justified because these errors are frequently identified only years later. In many cases, the issue comes to light during a transaction, succession planning exercise, ATO review, or change in professional advisers. By that stage, the original election may have been made many years earlier, and the individuals involved may no longer recall why one person was selected over another. A fixed time limit would therefore fail to address a large proportion of genuine historical mistakes. The taxpayers most in need of relief are often those whose errors have remained latent for extended periods.

Allowing an unlimited period to vary or revoke an election in these circumstances would improve the integrity and practical operation of the regime. It would enable the tax outcomes to align with the trust's true family relationships and intended operation, rather than turning on an accidental nomination error. It would also reduce unnecessary disputes, compliance costs and pressure for taxpayers to seek ad hoc administrative solutions where the merits are clear, but the law is inflexible.

Importantly, permitting correction of the nominated test individual does not undermine the integrity of the FTE regime. Any integrity concerns can be addressed through appropriate safeguards in the drafting of the provision.

#### **Recommendation 4**

The Tax Institute considers that taxpayers should not be subjected to a time limit within which they are able to vary or revoke elections where they satisfy the relevant conditions in the provisions.

If Treasury is not comfortable with this approach, we suggest a reasonable alternative approach would be as follows:

- implement a 12-month statutory window for taxpayers to go back and rectify mistakes;
- a limited exception for third party arm's length transactions; and
- expand the family control test to allow companies to pass the family control test where control of the company sits with family members of the test individual.

### **Unnecessary red tape in tax compliance**

Feedback from our members indicates that the ATO's Online Services for Agents (**OSfA**) does not fully reflect all elections that have been made. The FTE and IEE reports that are available in OSfA may show inconsistent or incomplete information on historical elections. This is in part because there is no requirement to lodge the election form, and for many years, tax return information provided to the ATO may not have fully or correctly reflected the elections that were made. The availability of data in the reports obtained from OSfA is limited by the extent to which full and correct information regarding the elections has been provided to and retained by the ATO.

Many historical elections cannot now be located, often due to the passage of time, changing of tax agents, the passing of family members, changes in electronic storage and retrieval systems, and lost records after multiple relocations of businesses or homes, including as a result of natural disasters such as fires and floods.

In some cases, OSfA is being updated at a later date — sometimes decades later than the FTE or IEE was made — leading to unexpected information being delivered to taxpayers about multiple elections being made. We understand from members that taxpayers have reported instances where they were advised by the ATO that there was no election on record, only to be advised shortly after making a new election that the original election had been located. There is no single source of truth which makes it even more difficult for taxpayers to comply even with the best of intentions.

While the ATO has announced that it has sharpened its [focus](#) on FTEs and provided warnings of [FTDT issues](#), an administrative intervention is required at least until legislative amendments are made. Additional web guidance and public advice for practitioners on FTDT are needed, but these alone will not resolve preexisting issues.

### **Recommendation 5**

We recommend that the concept of an approved form required for the purposes of making an election is removed. Instead, there could be a statutory requirement that the election is made in the relevant income tax return, with clear legislative parameters about what is and is not a valid election.

## **Moratorium on ATO compliance activity**

The Tax Institute considers that a moratorium on ATO compliance activity relating to FTDT should be imposed until a legislative solution is found to address the matters set out in this letter.

### **Recommendation 6**

We note that a moratorium on tax audits is not without precedent. For example, in context of payroll tax, the NSW Government announced a 12-month pause on payroll tax audits in relation to a specific matter affecting general practitioner medical practices. In that case, the *Revenue, Fines and Other Legislation Amendment Act 2023* (NSW) amended the *Taxation Administration Act 1996* (NSW) to provide a 12-month pause on audits of medical practices that engage general practitioners. As part of the effect of the legislative amendment, during the specified period, payroll tax that was payable but not paid, was not subject to interest or penalty tax.