18 September 2026

The Treasury
Langton Crescent
PARKES ACT 2600

By email: mintaxtrusts@treasury.gov.au

Dear Treasurer,

Minimum tax on discretionary trusts – exposure draft legislation

The Tax Institute welcomes the opportunity to make a submission to the Treasury regarding its consultation on the exposure draft package of legislation on minimum tax on discretionary trusts.

The package of draft legislation released on 3 September 2026 comprises:

- Treasury Laws Amendment Bill 2026: Minimum tax on discretionary trusts (**the draft Bill**);
- Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026 (**the draft Imposition Bill**);
- accompanying draft explanatory materials – minimum tax, imposition Bill (**draft EM**);
- Treasury Laws Amendment Bill 2026: Minimum tax on discretionary trusts – roll-over relief (**the draft roll-over relief Bill**);
- accompanying draft explanatory materials – roll-over relief (**roll-over relief draft EM**);
- Treasury Laws Amendment Bill 2026: Minimum tax on discretionary trusts – electable regime (**the draft electable regime Bill**); and
- accompanying draft explanatory materials – electable regime (**electable regime draft EM**)

In the development of this submission, we have closely consulted with our members, who have specific knowledge, experience and expertise in trust taxation.

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The Tax Institute supports the Government's efforts to reform the taxation of trusts and improve the fairness of the tax system. Reform is long overdue in this area. However, we feel it would be better to re-write the tax laws relating to trusts as a whole. There are many legacy issues that impact the taxation of trusts in addition to the Government's concerns about inappropriate income splitting. Addressing this one issue in isolation risks further complicating an already excessively complex area. This should be an opportunity to re-write and improve the taxation of trusts overall.

Regarding these measures, we are pleased to see that some of the recommendations we made in our submission dated 31 July 2026 (**July 2026 submission**) on the consultation paper titled '*Minimum tax on discretionary trusts*' have been reflected in the exposure draft legislation and associated materials. In particular, we welcome the proposed:

- exclusion of distributions to registered charities, deductible gift recipients and certain income tax-exempt entities from the minimum tax base;
- refundability of excess franking credits remaining after the trustee has satisfied its minimum tax liability;
- introduction of a broader and more modernised fixed trust definition intended to ensure that fixed trusts and widely held trust structures are excluded from the regime;
- roll-over relief to facilitate restructuring from discretionary trust structures into alternative entities; and
- an alternative pathway for existing discretionary trusts to avoid the application of the minimum tax without undertaking a full restructure.

However, we continue to have concerns regarding several aspects of the proposed design. While the exposure draft legislation reflects a number of recommendations made in our earlier submission, several significant policy, technical and practical issues remain unresolved. In particular, we are concerned about:

- the continued denial of the minimum tax offset to corporate beneficiaries, which may result in effective double taxation and tax outcomes that exceed the stated 30 per cent policy objective;
- the absence of a comprehensive mechanism to preserve the benefit of trustee-level minimum tax through trust chains to the ultimate taxpayer;
- uncertainty regarding the interaction of the regime with foreign resident beneficiaries, Australia's tax treaties and distributions from foreign trusts;
- the operation of the testamentary trust exclusion, including restrictions on eligible beneficiaries that may adversely affect legitimate estate planning and asset protection arrangements;
- the lack of clarity regarding the scope of the primary production exclusion in relation to common rural ownership and operating structures;
- the interaction of the proposed regime with other tax measures, including Division 7A, capital gains tax provisions and broader trust taxation reforms;
- the significant compliance, restructuring and implementation costs likely to be incurred by affected taxpayers, including the roll-over's restriction to a single transferee entity;

- significant, unresolved design issues in the electable regime, including its interaction with the small business capital gains tax (**CGT**) concessions, state duties, and its structural similarity to the family trust election (**FTE**) and family trust distribution tax (**FTDT**) framework;
- extensive reliance on Ministerial legislative instruments for several threshold eligibility questions, including roll-over continuity for trusts that are not family trusts; and
- the deferral of important administrative, reporting, notification, and collection arrangements to future tranches of legislation, which limits stakeholders' ability to fully assess the regime's practical operation.

We discuss these issues further below and make recommendations to ensure the regime operates in a proportionate, targeted, and administratively workable manner, while remaining consistent with the Government's stated policy objectives.

Consultation timing

The consultation period for this exposure draft legislation package is only 16 calendar days. It is arguably one of the most significant changes to our tax system in decades. Given the significance of the proposed reforms, the extensive range of taxpayers and structures potentially affected, and the highly technical nature of the legislative package, we consider that a longer consultation period would have been appropriate. While we welcome the release of exposure draft legislation and the opportunity to provide further feedback, the limited timeframe constrains stakeholders' ability to undertake detailed analysis, consult affected taxpayers and identify potential unintended consequences. This is particularly relevant given that many concerns raised during the initial consultation process remain unresolved or have only been partially addressed.

We are also concerned that the Government intends to finalise implementation of the minimum tax regime through further tranches of legislation, including administrative and integrity arrangements. While we recognise that substantial reforms may need to be developed progressively, this approach makes it difficult for taxpayers, advisers and other stakeholders to fully understand and assess the operation of the proposed regime as a whole. Stakeholders are effectively being asked to comment on only part of the framework, even as important aspects of the regime remain under development. In our view, meaningful consultation is best achieved when stakeholders have visibility of the complete legislative framework, enabling a comprehensive assessment of the policy's practical operation, compliance burden and interaction with existing tax laws. We therefore encourage Treasury not to introduce the package into Parliament before providing further opportunities for consultation as the remaining elements of the regime are developed.

Our detailed observations and recommendations are contained in **Appendix A**, organised by reference to each of the three draft Bills in the package, followed by issues that cut across the package as a whole.

We would be pleased to work with the Government to discuss the points raised in our submission further. We can provide the Government with access to a range of tax technical and industry experts who have contributed to our submission.

We look forward to engaging with you further in the next stage of this consultation process.

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.

If you would like to discuss any of the above, please contact our Tax Counsel,
John Storey, at (02) 9602 2003.

Yours faithfully,

Scott Treatt	**Tim Sandow**
Chief Executive Officer	President

APPENDIX A

We have set out below our detailed comments and observations on the exposure draft package of legislation. These are organised by reference to the draft Bill, the draft roll-over relief Bill and the draft electable regime Bill, referring to the accompanying explanatory materials where relevant, followed by issues that cut across the package as a whole.

Part 1: the draft Bill, minimum tax on discretionary trusts

Continued denial of the minimum tax offset to corporate beneficiaries

We remain concerned that the exposure draft legislation continues to deny corporate beneficiaries access to the minimum tax offset while simultaneously assessing those beneficiaries on their share of trust income. New section 101AF restricts the offset to beneficiaries that are not bodies corporate.

While we acknowledge Treasury's objective of preventing trustee-level minimum tax from being converted into refundable franking credits, denying any recognition for trustee-level tax paid goes significantly beyond addressing that integrity concern. Under the proposed design, trust income distributed to a corporate beneficiary may be subject to a trustee-level minimum tax of 30 per cent and company tax of up to 30 per cent, potentially resulting in effective tax rates that substantially exceed the stated policy objective of a 30 per cent minimum tax.

We are concerned that this outcome is punitive to family businesses and closely held groups that use corporate beneficiaries for legitimate commercial purposes, including retaining working capital, funding future investments, managing risk, and meeting financing obligations. The current design does not adequately distinguish between structures that are designed primarily to reduce tax through the allocation of trust income and those established for ordinary commercial reasons.

Recommendations

- Reconsider the blanket denial of the minimum tax offset to corporate beneficiaries.
- Treasury should consider permitting corporate beneficiaries to access a non-refundable offset equal to the trustee-level minimum tax paid, applied first to reduce the company's own tax liability. The offset should generate a corresponding franking credit so the benefit can flow through when the company later distributes to shareholders. That credit can itself be non-refundable at the shareholder's end, so it can reduce their tax to zero but cannot produce a cash refund beyond that. We consider this could be achieved in one of two ways: either by maintaining a separate franking account to track those credits, or by using a formula that caps the benefit available to an individual shareholder where a company has paid dividends out of profits sourced from trust distributions.
- Publish further modelling demonstrating the combined trustee, company and shareholder tax outcomes under the proposed regime.

Worked example — updated modelling

The following updates the modelling in our July 2026 submission to confirm the outcome is unchanged under the draft Bill.

It assumes $100,000 of trust taxable income, an individual beneficiary on the top marginal rate of 47 per cent (including Medicare levy), and a 30 per cent company tax rate.

Path	Trustee minimum tax	Company tax	Beneficiary/ shareholder top-up	Total tax	Effective rate
A – Distributed directly to an individual on the top marginal rate	$30,000	–	$17,000	$47,000	47%
B – Distributed to a corporate beneficiary and retained	$30,000	$30,000	–	$60,000	60%
C – Distributed to a corporate beneficiary and later fully franked to an individual on the top marginal rate	$30,000	$30,000	$17,000	$77,000	77%

The proposed section 101AF of the draft Bill confirms this outcome. The offset remains unavailable to bodies corporate, so Paths B and C continue to produce tax outcomes well above the stated 30 per cent policy objective.

Treasury may be concerned that providing recognition for trustee-level minimum tax through a corporate beneficiary could result in low-income shareholders obtaining refunds of tax that was intended to operate as a minimum level of tax. However, with a well thought through design, any credit-tracing mechanism could remain non-refundable throughout the ownership chain, maintaining Treasury’s policy intent. The following examples illustrate that such an approach would both preserve Treasury's integrity objective and prevent excessive cumulative taxation where the ultimate shareholder is subject to higher rates of tax.

Scenario	Current proposal	Proposed credit-tracing approach
Low-income shareholder (for example, 14%)	Trustee-level tax of 30% is retained and no refund is available.	Trustee-level tax is recognised but any excess credit remains non-refundable. Treasury's objective is preserved.
Top marginal rate shareholder (47%)	Combined trustee, company and shareholder taxation can substantially exceed 47%.	Trustee-level tax is recognised through the chain and the shareholder pays only the balance required to reach their marginal rate.

These examples demonstrate that recognising trustee-level minimum tax through a non-refundable credit mechanism need not undermine the integrity of the regime. The approach preserves a 30 per cent minimum tax outcome while preventing the same trust income from being subject to multiple layers of tax as it passes through corporate beneficiaries and ultimately to shareholders.

Preservation of trustee-level tax through interposed trusts

We remain concerned that the draft Bill does not provide a comprehensive mechanism to preserve the benefit of trustee-level minimum tax through trust chains. Trust-to-trust distributions are commonly used for legitimate asset protection, succession planning and commercial purposes.

While certain provisions recognise the minimum tax paid by an interposed trust in limited circumstances, the Draft Bill does not provide a comprehensive tracing mechanism to ensure that the economic benefit of trustee-level tax ultimately reaches the end beneficiary. As a result, the effective tax burden may differ depending on the structure through which income is distributed.

Feedback from our members has also highlighted the significant compliance burden that is likely to arise for large groups involving multiple trusts, particularly when trust-to-trust distributions span several tiers. This will increase complexity for taxpayers and advisers and may create additional compliance risks.

Section 101AF only addresses one scenario for preserving trustee-level tax through a chain. Where a beneficiary of a minimum tax trust is itself a minimum tax trust, that trustee beneficiary may apply the non-refundable offset against its own liability, and its own beneficiaries then become entitled to a corresponding offset (draft EM para 1.54). Two common structures fall outside this mechanism.

Worked example — where the chain mechanism breaks down

Trust M (a minimum tax trust) distributes $100,000 to an interposed entity, which distributes the income onward to individual beneficiary O.

- Where the interposed entity is itself a minimum tax trust (Trust N): Trust M's trustee pays $30,000 minimum tax; the interposed trust can apply that $30,000 as a non-refundable offset; O becomes entitled to a corresponding offset. The mechanism works as intended.
- Where the interposed entity is a company: Trust M's trustee still pays $30,000 minimum tax, but the company is a corporate beneficiary and cannot access any offset. The company pays up to $30,000 further tax, and any later franked distribution to O carries no credit for the trustee-level tax. The combined outcome mirrors Path C above.
- Where the interposed entity is a fixed trust or a trust that has made an electable regime election (and so is not itself a minimum tax trust): section 101AF does not appear to apply. The offset is expressed by reference to a beneficiary that is 'itself a minimum tax trust'. Trust M's $30,000 minimum tax appears to be absorbed, with no offset flowing through to O.

The current treatment also differs from the established policy reflected in Australia's imputation system. Under the franking rules, company tax paid can generally be traced through interposed trusts to the ultimate recipient. A comparable principle could be adopted for trustee-level minimum tax to ensure tax paid at one level is recognised further along the ownership chain.

This extension would not, on its own, resolve the position where a company sits anywhere in the chain, whether as the interposed entity or the ultimate beneficiary. For as long as section 101AF denies the offset to corporate beneficiaries outright, trustee-level tax would still be lost at that point in the chain, regardless of how the interposed-entity mechanism is extended. Full resolution of the trust-chain issue therefore depends on our recommendation above, that corporate beneficiaries be given access to the offset.

A further problem arises where the interposed trust has carried-forward tax losses. Where Trust N can apply the section 1010AF offset in principle, but its own tax liability for the year is reduced or eliminated by prior-year losses, the offset has nothing left to apply against. On the current drafting, an unused non-refundable offset of this kind is not refunded or carried forward. The trustee-level tax already paid by Trust M would simply be lost, contrary to the usual principle that a beneficiary should not be worse off for receiving income through a loss-making entity. This also creates an incentive to strip assets out of loss trusts specifically to avoid the problem, working against the very restructuring behaviour the measure is meant to discourage.

Recommendations

The Treasury should:

- at a minimum, extend the interposed-entity offset mechanism to beneficiaries that are fixed trusts, excluded election trusts (**EET**), or other non-minimum-tax-trust entities, so that trustee-level tax is preserved wherever the interposed entity is not itself a body corporate;
- develop a comprehensive mechanism to preserve trustee-level minimum tax through trust chains until the income reaches the ultimate taxpayer;
- provide detailed guidance regarding the operation of the minimum tax in multi-layered trust structures;
- consider whether trust-to-trust distributions should receive alternative treatment that reduces tracing obligations and compliance costs; and
- consider allowing an unused non-refundable offset arising under paragraph 1.54 to be refunded, or carried forward to a later income year, where the interposed trust cannot use it because of carried-forward losses.

Ambiguity in the material discretionary elements test for fixed trusts

We welcome the move away from the rigid vested and indefeasible test in Schedule 2F toward a principles-based test in section 272-65 asking whether material discretionary elements affect a trust's beneficiaries. The proposed section 272-65 and the draft EM supports this with a non-exhaustive list of indicators and useful illustrations, including the employee share scheme and alphabet share examples (paragraphs 1.75 to 1.80 of the draft EM). This is a genuine improvement.

The test remains, however, a question of fact and degree, without a bright-line rule or safe harbour for common structures. This creates real uncertainty about which trusts qualify as fixed trusts, and are therefore excluded from minimum tax trust status altogether, and which remain subject to the regime. We are concerned this ambiguity risks under-inclusion in practice. A trust that should sensibly be treated as a fixed trust may not have enough certainty to rely on that exclusion with confidence.

Given the consequences of getting this wrong, 30 per cent minimum tax rather than none, we expect a meaningful number of trustees to restructure defensively even where their arrangement has no genuine discretionary element. That outcome would be an unnecessary cost, driven by uncertainty in the definition rather than by any real income-splitting risk.

We recognise section 272-65 already gives the Minister a legislative instrument power to add further matters for or against a material discretionary element (draft EM para 1.79), which we discuss further in Part 4 below. That power does not resolve the immediate problem. A trustee deciding now whether to restructure needs certainty now, not a clarification that may or may not be made later, in response to disputes that have already arisen. A safe harbour in the primary law, and a private ruling pathway, would give trustees something to rely on when the decision has to be made.

Recommendations

The Treasury should consider:

- adopting a rebuttable presumption or safe harbour, as recommended in our July 2026 submission, based on entitlements being applied consistently with unit holdings or ownership interests over a specified period, such as three years;
- providing a binding, streamlined private ruling or certification pathway so trustees can obtain certainty on fixed trust status before restructuring, rather than only being able to test the question after the event; and
- express carve-outs for the structures identified in our July 2026 submission that commonly cause difficulty under a discretionary elements test, including wholesale property syndicates, employee share trusts and managed investment trusts.

Deed amendment as an alternative pathway: resettlement and duty risk

A trustee does not need to use the roll-over or the electable regime to avoid minimum tax trust status. It could instead amend its own trust deed directly, removing the material discretionary elements that would otherwise make it a minimum tax trust, so that the trust satisfies the new fixed trust definition on its own terms. Neither the draft EM nor the roll-over relief draft EM addresses this pathway or its risks.

A deed amendment of this kind risks being treated as a resettlement. Depending on the extent of the change, the Commissioner may view it as terminating the existing trust and creating a new one, consistent with the views expressed in Taxation Determination TD 2012/21. We raised this same risk in our July 2026 submission, in a different but analogous context: a proposed irrevocable election to be treated as a fixed trust, an idea Treasury has not adopted in the draft Bill. There, we noted that a deed amendment may trigger CGT event E1 or E2 and potentially give rise to transfer duty if it is treated as creating a new trust. The underlying risk applies equally to a trustee who amends its deed to fit the new fixed trust definition outside any formal relief, and neither the draft EM nor the roll-over relief draft EM addresses it in that context.

This leaves a real gap. A trustee attracted to this option because it avoids the cost and complexity of a full roll-over restructure has no guidance on where the line sits, and no relief from resettlement consequences if it is crossed. The state duty consequences could match or exceed those of a formal roll-over, without any Commonwealth income tax relief.

Recommendations

The Treasury should consider:

- providing guidance on when a deed amendment made to satisfy the new fixed trust definition will, and will not, be treated as a resettlement for income tax purposes;
- coordinating with the states and territories, or through the Council on Federal Financial Relations, on the duty treatment of deed amendments made for this purpose; and
- whether limited relief is warranted for deed amendments that do no more than remove a discretionary element captured by the new fixed trust definition, consistent with the relief already available for a full roll-over restructure.

Foreign resident beneficiaries and foreign trusts

The draft Bill does not alter the scope of the exclusion for amounts subject to foreign resident withholding tax under the proposed paragraph 101AE(1)(f). Other categories of income commonly distributed to foreign resident beneficiaries, including capital gains on non-taxable Australian property and other Australian-sourced business income, remain outside this exclusion and appear liable to both the minimum tax at trustee level and the existing section 98 assessment regime for non-resident beneficiaries.

We remain concerned that this outcome may exceed Australia's taxing rights under its double tax agreements, many of which limit Australia's taxing right on these amounts to a rate below 30 per cent.

The interaction with a chain of resident discretionary trusts is also unresolved. Where a resident discretionary trust distributes income to a second resident discretionary trust, which in turn distributes to a foreign resident beneficiary, it is unclear whether the exclusion looks through the chain to the ultimate foreign recipient, or whether the first trust's minimum tax liability applies in addition to withholding tax payable by the ultimate recipient.

The draft Bill also does not address the position of foreign discretionary trusts assessed under section 99B. Differing treatment between domestic and foreign trust structures may create arbitrage opportunities or unintended competitive distortions that the exposure draft does not consider.

Recommendations

It would be helpful if the draft Bill could:

- confirm the exclusion for foreign resident beneficiaries applies by reference to the ultimate foreign resident recipient's entitlement, traced through any chain of resident discretionary trusts.
- clarify how the minimum tax is intended to interact with section 98 assessments and Australia's double tax agreements, to avoid double taxation or treaty override.
- clarify how distributions from foreign discretionary trusts, including those assessable under section 99B, interact with the minimum tax regime.

Worked example — foreign beneficiary through a chain of trusts

Resident discretionary Trust A earns $100,000 of interest income and distributes it to resident discretionary Trust B, which in turn distributes the amount to foreign resident individual C.

- If the exclusion looks through to the ultimate recipient, withholding tax of $10,000 (10 per cent, or the relevant treaty rate) applies, and neither trust pays minimum tax.
- If the exclusion does not look through: Trust A's trustee is liable for minimum tax of $30,000 (30 per cent), in addition to withholding tax payable by C, producing a combined outcome of up to $40,000, or 40 per cent on the same $100,000.

The draft Bill does not indicate which outcome is intended.

Testamentary trusts and deceased estates

We welcome the continued exclusion for discretionary testamentary trusts established for genuine testamentary purposes. However, the restriction that a qualifying testamentary trust benefit only individuals and income tax-exempt entities is unchanged from the consultation paper design, and the exposure draft does not address the concerns we raised about its practical operation.

The restriction turns on when the testamentary trust is established, not when the underlying will is made. A will drafted today, with a beneficiary class that reflects entirely legitimate estate planning and asset protection objectives, will still fail the restriction if the testator dies on or after 1 July 2028, a date no testator can control or plan around. Testators have no practical means of ensuring, at the time they make or update their will, that the eventual testamentary trust will satisfy the ‘individuals and income tax-exempt entities only’ condition, particularly where death occurs many years after the will was settled.

Many testamentary trusts are intentionally limited to a particular child and that child's bloodline, with company, trust or charitable beneficiaries included for asset-protection rather than tax purposes. Restricting qualifying testamentary trusts to individuals and exempt entities may remove these longstanding protections.

Treasury should clarify how the property-injection rules and beneficiary-restriction provisions interact for testamentary trusts established between 12 May 2026 and 1 July 2028.

Recommendations

The Treasury should consider:

- amending the exclusion to operate by reference to distributions actually made to individuals and income tax-exempt entities from deceased estate assets, with the minimum tax applying only where a distribution is made outside those categories, rather than disqualifying the trust based on its potential beneficiary class;
- allowing the trustee of a testamentary trust to make an election in the trust's first income tax return, to distribute only to the individuals and tax-exempt entities the trust deed already allows. This would let the exclusion operate by reference to what the trustee actually does, without requiring every will to be redrafted;
- aligning the property-injection date and the beneficiary-restriction date, to remove the gap between 12 May 2026 and 1 July 2028.
- providing guidance on the distinction between deceased estate assets and assets subsequently injected into a testamentary trust, including where estate assets are sold, replaced or reinvested during ordinary estate administration; and

- preserving legitimate asset-protection features of modern testamentary trust structures, including the ability to include company and trust beneficiaries for creditor protection and family law purposes.

Primary production income and common rural ownership structures

The draft Bill does not clarify how the primary production exclusion operates for common rural ownership structures. A discretionary trust owns farming land and leases that land to a related entity that carries on the primary production business. This structure is widely used for succession planning, asset protection, financing, and risk management. The rental income received by the land-owning trust does not appear to be income from carrying on a primary production business and is therefore not excluded from the minimum tax income.

This produces an outcome inconsistent with the Government's stated intention to exclude primary production income: the land-owning trust becomes liable for minimum tax on rental income, while the operating entity claims a corresponding rental deduction, potentially increasing the farming group's overall tax burden or creating a tax loss in the operating entity.

We note that the tax law already recognises the commercial reality of these structures in the context of the small business CGT concessions. In particular, assets that would otherwise be regarded as passive assets can qualify as active assets where they are used in the business of a connected entity or affiliate. A similar approach could be adopted for the primary production exclusion, so that income derived from land used in a primary production business carried on by a related entity is treated as eligible primary production income.

Recommendations

The Treasury should consider:

- adopting a look-through approach where land is genuinely used in a primary production business conducted by a related entity, consistent with the approach taken under the small business CGT active asset rules for connected entities and affiliates;
- treating rental income derived from such land as eligible primary production income where the land is used in a primary production business carried on by a related entity; and
- providing guidance on the application of the exclusion to common primary production arrangements, including share farming, agistment, water entitlement, carbon credit and mixed farming arrangements involving multiple related entities.

Worked example — related-entity farming structure

Land Trust owns farmland and leases it to Operating Co, a related entity that carries on the primary production business, for $200,000 in annual rent.

- Operating Co claims a $200,000 rental deduction against its farming income.
- Land Trust receives $200,000 of rental income. As this is not income from carrying on a primary production business, it is not excluded minimum tax income, and Land Trust's trustee is liable for minimum tax of $60,000 (30 per cent).

- The farming group's combined position is a $60,000 minimum tax liability on income derived from land used in a primary production business, despite the Government's intention to exclude primary production income. The income would still be taxable when distributed to beneficiaries, but the current drafting may result in a higher overall tax burden for the group.

Additional worked example in the draft EM

Worked examples in the Explanatory Materials are important because both the ATO and taxpayers often rely on them when interpreting and applying new tax rules. The current package includes only one detailed worked example (Example 1.1 in the draft EM, dealing with franking credits), even though it introduces several complex trust taxation measures. Additional examples would help explain how the rules operate in practice and provide greater certainty for taxpayers and advisers.

We recommend that Treasury include worked examples for the following situations:

- **Testamentary trusts and injected assets (after paragraph 1.39)**
An example showing how the exclusion applies where a trust holds both original estate assets (or replacement assets) and assets contributed to the trust after the relevant date.
- **Minimum tax rate calculation (after paragraph 1.49)**
An example showing how the minimum tax rate is calculated where different parts of a trust's income are taxed differently and a trustee's final minimum tax liability must be determined.
- **Beneficiary tax offset apportionment (after paragraph 1.53)**
Paragraph 1.52 refers to a beneficiary's 'assessable amount' but does not illustrate the calculation. An example could show how a beneficiary's tax offset is calculated when their entitlement includes both income subject to the minimum tax rules and income excluded from those rules.
- **Interaction with other rebates and the 'common income' calculation (after paragraph 1.62)**
An example showing how the 'common income' rules operate where a beneficiary may be entitled to both an existing rebate and a minimum tax offset, including how those concessions interact.

Part 2: The draft roll-over relief Bill

Roll-over relief — restriction to a single transferee

The roll-over is structured around a single transferor and a single transferee (subsection 126-430(1) of the *Income Tax (Transitional Provisions) Act 1997)* (Cth) (**ITTP**). Paragraph 1.20 of the roll-over relief draft EM confirms that no more than one entity can receive the relevant assets as the transferee.

This is narrower than the approach proposed in our July 2026 submission, which suggested the relief should be available for all trust and company transactions reasonably necessary to complete a genuine group restructure.

The core policy objective should be that after the relevant restructure, the ownership interests in the transferee entity are fixed and not discretionary. As long as that outcome is achieved, it should not matter how many transferee entities are involved. Because of the flexibility offered by discretionary trusts, they can accommodate a wide range of genuine family and succession arrangements. It may not be appropriate or possible in all circumstances for the fixed entitlements in each asset or asset class owned by the trust to be the same. Changing from a discretionary trust to a structure with fixed entitlements is a major change. The more options available to facilitate that, the more likely the rollover relief will be able to accommodate a wide range of family and succession arrangements. As long as the end result is that the assets of the trust are held in a structure where the ownership interests are fixed, the policy objectives of this measure will be achieved.

Recommendations

- Treasury could consider extending the roll-over relief to restructures involving more than one transferee entity where the transfers form part of a single, coordinated restructure.

Worked example — separating two business lines

Family Trust K carries on a business and holds a portfolio of investment properties. Beneficiary A is active in the business, and beneficiary B is active in respect to managing the property portfolio. Over time the family and succession arrangements have evolved such that generally beneficiary A benefits from the income from the business, and beneficiary B benefits from the property portfolio. Given the flexible income distribution powers of the trust, Family Trust K was able to accommodate this arrangement. However, if all assets of the trust must be transferred to a single transferee entity with fixed ownership interests, this arrangement will no longer be possible. Beneficiary A and B would have fixed entitlements to all the assets of the trust. If instead the business could be transferred to an entity in which beneficiary A has fixed entitlements, and the properties transferred to an entity in which beneficiary B has fixed entitlements, the result will be that all assets of the trust are held in entities in which the ownership interests are fixed, but the family succession arrangement will be able to continue without disruption.

Roll-over relief: confirming excluded assets remain eligible for transfer

The proposed subsection 126-430(4) of the ITTP lists five categories of asset that are not required to be transferred under the roll-over (roll-over relief EM para 1.30). It is not clear from the drafting whether these assets are simply optional to transfer, or whether transferring them would put them outside the roll-over altogether.

The distinction matters. If an excluded asset cannot be transferred using the roll-over, this would create real problems. A CGT asset used to generate primary production income could not be rolled over even where it is also used for another purpose, such as farmland that is both farmed and separately rented. An asset with a cost of $1,000 or less could exclude low-cost goodwill or other intangible assets, and shares in a business held at a nominal historical cost, from the relief altogether, even though these are often central to the restructure a trustee is trying to achieve.

Recommendations

- Treasury should consider confirming expressly that assets falling within the excluded categories remain eligible to be transferred using the roll-over, and that the exclusion only affects whether the asset must be transferred to satisfy the all-assets requirement.

Roll-over relief: consider an asset-by-asset alternative

The roll-over currently requires the trustee to transfer all required assets, other than excluded assets, within the transitional relief period (proposed subsection 126-430(3) of the ITTP, roll-over relief draft EM para 1.27). The excluded asset categories involve genuinely subjective judgement, for example confirming which assets are reasonably required to discharge liabilities or pay winding-up costs. Because the transfer can occur over more than one income year, a trustee that begins but does not complete the required transfers risks having earlier years amended to reverse relief already claimed (subsection 126-430(9) of the ITTP, roll-over relief EM para 1.28).

This adds real complexity and uncertainty to a measure meant to make restructuring easier. A trustee cannot be confident in year one that the roll-over will still apply in year three.

An asset-by-asset roll-over would remove this risk. Each transfer would stand or fall on its own terms, without depending on the outcome of transfers made in other years or the characterisation of other assets as excluded. The excluded asset definition, and the complexity and subjectivity that comes with it, would no longer be needed.

Recommendations

- Treasury should consider allowing the roll-over to apply on an asset-by-asset basis, rather than requiring all required assets to be transferred as a single package within the relief period.
- If the all-assets requirement is retained, Treasury should consider removing the risk of retrospective amendment where a trustee has made genuine, good-faith progress toward completing the required transfers within the period.

Continuity requirements: the meaning of indirect interests and the family group definition

The continuity requirements for a family trust look to whether individuals with a direct or indirect interest in the transferee were beneficiaries and family group members immediately before the transfer (proposed subsection 126-440(1) of the ITTP, roll-over relief draft EM para 1.39). The reference to an indirect interest is meant to look through one or more interposed entities to the underlying individuals (roll-over relief draft EM para 1.41), but its meaning is not clear where the ownership chain crosses into a second family trust with a different test individual. Take a company owned by a trust that has nominated the spouse or sibling of the first trust's test individual under its own family trust election. It is not clear whether that company is treated as indirectly held by the first trust's family group.

This reflects a longstanding gap in the family group definition itself, not just in this measure. A family group may not currently include an entity clearly controlled by the family but held through a second family trust that nominates a different, related test individual. This measure is a good opportunity to close that gap, so entities clearly controlled by the family are included in the family group for both family trust distribution tax purposes and the continuity test in this roll-over.

While the FTDT provisions are being revisited, we think Treasury should also consider aligning the amendment period for FTDT with the normal four-year period and giving the Commissioner discretion to disregard genuine, inadvertent mistakes. This connects to the concerns we raise elsewhere in this submission about the electable regime repeating the FTDT experience.

Recommendations

- Treasury should consider clarifying how it traces indirect interests where the ownership chain crosses into a second family trust with a different test individual.
- Treasury could use this measure to fix the underlying family group definition, so entities clearly controlled by the family are captured for both family trust distribution tax purposes and this roll-over's continuity test.
- Treasury should consider aligning the family trust distribution tax amendment period with the normal four-year period and giving the Commissioner discretion for genuine, inadvertent mistakes.

GST implications of a roll-over restructure

The proposed subsection 126-450(2) of the ITTP confirms the roll-over does not itself affect liabilities under other laws. GST, fringe benefits tax, state and territory duties and other taxes continue to apply according to their ordinary operation (roll-over relief draft EM para 1.64). A transfer of assets from a trustee to a company or other transferee is a supply between different entities and will often be a taxable supply for GST purposes unless a specific concession applies.

The GST-free treatment for a supply of a going concern under section 38-325 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) has its own strict conditions. These include that the supply includes all things necessary for the continued operation of the enterprise, that both parties are registered or required to be registered, and that the parties agree in writing that the supply is of a going concern. Many restructures required under this measure will not cleanly satisfy those conditions, particularly where a trust holds passive investment assets rather than an operating business, or where only part of the trust's assets are transferred in a given income year.

This adds a further, unaddressed cash-flow cost to a restructure that is already subject to CGT rollover relief at the Commonwealth level and, in many cases, full transfer duty at the state level. A restructure driven by a change in Commonwealth tax law, rather than a genuine commercial transaction, should not also carry an unrelieved GST cost as a matter of course.

Recommendations

The Treasury should consider:

- clarifying whether GST relief is available for a transfer that qualifies for the income tax roll-over, and if not, why not;
- whether a purpose-built GST relief, or confirmation that the going concern concession will apply in the ordinary case, should accompany the income tax roll-over; and
- providing worked guidance on how the going concern conditions apply to a trust holding passive investment assets, given these trusts are expressly within the scope of the roll-over.

Certainty on deductions for restructuring costs

Our July 2026 submission raised uncertainty about how restructuring costs would be treated for tax purposes. Neither the roll-over relief draft EM nor the draft EM addresses this. Absent a specific provision, these costs would ordinarily fall to be considered under section 40-880 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**), which allows certain business-related capital expenditure to be deducted over five years.

Section 40-880 has a threshold condition that does not fit this measure well. The deduction is only available where the taxpayer carries on a business, has carried on a business, or is winding up a business that was carried on. Subsection 126-430(1) of the ITTP is not limited to businesses, and paragraph 1.21 of the roll-over relief draft EM confirms the relief is intended to apply to discretionary trusts that restructure in response to the introduction of the minimum tax, including trusts that hold business and investment assets, and those that hold passive investments and do not carry on a business.

This leaves a category of trust expressly within the scope of the measure, passive investment trusts with no underlying business, facing legal, accounting, valuation and duty costs with no clear path to any deduction at all. These costs arise solely from a government-imposed structural change, not the ordinary conduct of a business, and a trust with no business cannot rely on section 40-880 to recover any part of them.

Recommendations

The Treasury should consider:

- confirming the tax treatment of restructuring costs incurred by trusts that do not carry on a business, given section 40-880 will not assist them; and
- a specific deduction or cost-recovery provision for restructuring costs incurred solely because of this measure, that does not depend on the section 40-880 business threshold, consistent with the options raised in our July 2026 submission.

Additional worked example in the roll-over relief draft EM

The draft EM for the roll-over relief does not contain any worked examples, despite covering some of the most important aspects of the regime, including the all-assets requirement, the continuity test, the cost base treatment of consideration issued on a transfer, and the material discretionary elements clawback. We recommend that Treasury include additional examples to explain how these rules are intended to operate in practice, particularly in the following areas.

- **Required and excluded assets (after paragraph 1.37)**
  An example showing how the all-assets transfer requirement applies where a trust holds both assets that must be transferred and assets that are specifically excluded from the transfer requirement.
- **Continuity requirements through interposed entities (after paragraph 1.42)**
  An example demonstrating how the continuity of ownership requirements apply where interests are held indirectly through one or more entities.
- **Cost base of membership interests (after paragraph 1.75)**
  An example illustrating how the cost base rules operate where membership interests are issued as consideration and liabilities are assumed as part of the transfer.
- **Clawback of roll-over relief (after paragraph 1.82)**
  An example showing the consequences where discretionary features are introduced during the clawback period, resulting in a loss of roll-over relief.

Part 3: The draft electable regime Bill

Practical operation and long-term implications of the electable regime

We welcome the introduction of the electable regime as an alternative to restructuring. However, significant concerns remain regarding its practical operation and long-term implications.

While the election operates for tax purposes only, it may substantially influence how trustees exercise their powers in practice by requiring future distributions to be made consistently with nominated percentages. This raises questions about the extent to which the elected trust continues to operate in a manner traditionally associated with a discretionary trust.

Neither the draft Bill and the draft EM nor the draft electable regime Bill and the electable regime draft EM say what a trust becomes once it makes the election, for purposes beyond the minimum tax itself. It is unclear whether an EET trust should be treated as a fixed trust, remain a discretionary trust with a tax-law overlay, or occupy a third category comparable to the hybrid trusts that were common before the current fixed trust rules were tightened. This matters wherever the tax law, or another law, turns on that classification, and leaving it unaddressed invites inconsistent answers across different provisions.

The election requires trustees to make long-term decisions regarding beneficiary nominations within a relatively short timeframe. Family businesses and multi-generational trusts may find it difficult to determine a distribution framework that remains appropriate over many decades. Family circumstances, business ownership structures and succession objectives commonly evolve over time and cannot always be anticipated when the election is made

We have also identified concerns regarding:

- the limited circumstances in which nominated beneficiaries may be changed;
- the treatment of newly formed entities and future family members;
- the impact of insolvency, family law disputes and other life events;
- the effect of the election on asset protection outcomes;
- the consequences of inadvertent breaches resulting in automatic revocation; and

- the significant compliance burden associated with deciding whether to elect, determining nomination percentages and maintaining ongoing compliance.

Concerns also remain about how the electable regime interacts with existing trust taxation provisions, including the capital gains streaming provisions in Subdivision 115-C and the franking credit streaming provisions in Division 207. Members have questioned whether the nominated entitlement framework is compatible with these existing rules.

Much of this design is not unprecedented. The electable regime shares its underlying structure with the FTE and FTDT framework in Schedule 2F to the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**), an election that is difficult to unwind once made, a compliance test with no materiality threshold, and a mechanical consequence for departure. We raised longstanding, unresolved concerns about the FTDT regime in our July 2026 submission, including that it can operate disproportionately to its underlying policy objective and produce unintended outcomes for taxpayers acting in good faith. Those concerns remain unresolved in the near two decades the FTDT regime has been in force. We consider that Treasury should treat that experience as a direct precedent in finalising the design issues identified above, rather than legislating them afresh. The profession already knows how challenging this regime is, and this is an opportunity to avoid repeating that experience before a large number of family and business structures are built on it.

Recommendations

- Provide a mechanism to periodically re-confirm or adjust an EET nomination (for example, every five to ten years) without requiring full revocation and permanent loss of access to the election.
- Extend the limited circumstances in which nominated beneficiaries may be varied to include the birth or adoption of a beneficiary's child, marriage, or comparable life events, where the trust deed already permits the relevant person to benefit.
- Introduce a proportionate consequence for minor or inadvertent breaches of an EET nomination (for example, immaterial rounding or timing differences), rather than automatic revocation and assessment of all trust income at the top marginal rate under section 99A.
- Clarify the interaction between the EET nomination framework and the capital gains streaming provisions in Subdivision 115-C and the franking credit streaming provisions in Division 207.
- Treat the FTE/FTDT experience as a direct precedent in settling the design choices above, rather than legislating them afresh.

Worked example — inadvertent breach of an EET nomination

Family Trust L makes an EET election for the 2028-29 income year (subsection 102UYB(4) of the ITAA 1936, electable regime draft EM para 1.11). It nominates two adult children as beneficiaries, each entitled to 50 per cent of the trust's income and capital (subsection 102UYB(2) of the ITAA 1936, EM para 1.19). In the 2030-31 income year, a rounding error in the trustee's distribution resolution results in one child receiving 49 per cent and the other 51 per cent.

- The EET election is automatically revoked for the 2030-31 income year (subsection 102UYF(2) of the ITAA 1936, EM paras 1.7, 1.43, 1.63).

- Both children are treated, for income tax purposes, as never having been presently entitled to that year's trust income (section 102UYG of the ITAA 1936, EM paras 1.7, 1.66).
- The trustee is assessed on the entire net income of the trust for 2030-31 at the top marginal rate plus Medicare levy under section 99A, not merely the mismatched portion (section 102UYG of the ITAA 1936, EM para 1.66).
- The trust is a minimum tax trust in all future income years, and no further EET election can be made (subsections 102UYB(6) and 102UYF(1) of the ITAA 1936, EM paras 1.16, 1.60, 1.66).

A single clerical error produces a materially disproportionate one-year outcome and permanently bars access to the regime.

EET nomination: the same-percentage requirement for income and capital

The EET nomination must allocate the same percentage of capital to a beneficiary as the percentage of income allocated to them (subsection 102UYB(2) of the ITAA 1936, electable regime draft EM para 1.19). Many trust deeds do not support this. Income and capital entitlements are often structured differently, for example where capital defaults to a different class of beneficiary than income, or where a deed reserves capital appointments for a later decision.

We continue to work through a workable solution; however, given the limited time available, we have not been able to identify a satisfactory solution. We will continue to work with Treasury to find a suitable outcome that addresses the policy objective while accommodating the practical limitations and differing entitlement structures of existing trust deeds.

Recommendations

Treasury reconsider the requirement that an EET nomination allocate the same percentage of capital and income to a beneficiary and undertake further consultation with stakeholders to identify a workable alternative that achieves the policy intent.

EET election timing and its exclusivity with the roll-over

The EET election must be made in the 2028-29 income year (proposed subsection 102UYB(4) of the ITAA 1936, electable regime draft EM para 1.11), by the earlier of the due date for that year's return and the date it is actually lodged (subsection 102UYB(5) of the ITAA 1936, electable regime draft EM para 1.13). For many trusts, that due date could be as early as 31 October 2029. There is no second chance. A trustee who misses this window, including one who is simply behind on lodgements for unrelated reasons, cannot make the election in a later year and cannot make it at all once the window has closed.

More fundamentally, we do not see why the election needs to be restricted to a single window at all. An ongoing right to elect, available in any income year a trust is a minimum tax trust, would remove the timing pressure entirely without weakening the policy objective, since the election would still only apply from the year it is made.

The election is also unavailable if the trustee has chosen to apply the roll-over, whether or not the roll-over is completed or any assets remain untransferred (proposed subsection 102UYB(6) of the ITAA 1936, electable regime draft EM para 1.16). We do not see a clear policy reason why a trustee should be forced to choose between the two mechanisms permanently, particularly if the roll-over is changed to operate on an asset-by-asset basis as we recommend above. A trustee might reasonably want to roll over some assets and make an EET election for a trust that continues to hold others.

Separately, revocation of an EET election requires the trustee to notify the Commissioner by the earlier of the return's due date and the date it is lodged (paragraph 102UYF(1)(b) of the ITAA 1936, electable regime draft EM para 1.62). Our understanding, from member feedback on the underlying provision, is that the trustee must also have decided to revoke before the end of the income year, as a separate element from the notification itself. We recommend this be confirmed against the Bill text directly, given the EM's own narrative does not spell out that distinction. If it is correct, we do not see what the separate decision-timing requirement adds. The practical trigger is the notification itself, and requiring proof of exactly when an internal decision was made creates an evidentiary burden with no corresponding benefit.

Recommendations

- Treasury should consider making the EET election an ongoing choice available in any income year a trust is a minimum tax trust, rather than restricting it to the 2028-29 income year alone.
- If a single window is retained, Treasury should consider allowing the EET election to be made in a later income year where a trust missed the 2028-29 window, at least where the Commissioner is satisfied the trustee has a reasonable excuse.
- Treasury should consider removing the rule that prevents a trustee from making an EET election after choosing to apply the roll-over, particularly if the roll-over is changed to operate on an asset-by-asset basis.
- Treasury should consider removing the separate requirement that the trustee decide to revoke an EET election before the end of the income year, leaving notification by the return's due date as the operative test.

Interaction with the small business CGT concessions (Division 152)

Access to the small business CGT concessions for a discretionary trust depends on identifying a ‘significant individual’ with a small business participation percentage of at least 20 per cent. This matters most for the 15-year exemption and retirement exemption under Subdivisions 152-B and 152-D of the ITAA 1997. For a genuine discretionary trust, this is ordinarily only achievable through section 152-70 of the ITAA 1997. That section treats the individual specified in a family trust election as satisfying that percentage, provided every distribution of income and capital for the relevant income year is made to that individual or their family group, or no distribution is made at all.

Neither the draft EM nor the electable regime draft EM addresses how the EET nomination framework interacts with section 152-70. This matters for two reasons.

First, paragraph 1.28 of the electable regime EM notes only that a trustee ‘should have regard to’ any family trust election in force, and consider whether nominated beneficiaries are family group members. This is EM commentary only.

It does not correspond to any legislative requirement in the Bill, and stops well short of confirming that an EET nomination aligned with a family trust election actually preserves access to section 152-70. The EET nomination imposes its own strict conditions: 100 per cent of income and capital allocated to named beneficiaries, with automatic revocation for any departure. Taxpayers need confirmation that satisfying the EET nomination does not itself create a distribution pattern inconsistent with section 152-70's own conditions. They also need confirmation that making an EET election has no effect on the trust's status as a non-fixed trust for Division 152 purposes.

Second, for trusts whose eligible beneficiaries under the trust deed span more than one family group, the minimum tax now forces a choice between the roll-over, an EET election, or accepting the minimum tax. Neither EM confirms whether any pre-existing Division 152 position, however limited, is preserved through either pathway.

We note the contrast with the roll-over relief EM. Section 126-475 of the ITTP expressly addresses continuity of small business CGT treatment where a transferred asset was a replacement asset under an earlier small business roll-over (roll-over relief draft EM paras 1.77-1.78). No equivalent provision appears in the draft electable regime Bill, despite the roll-over and the EET election being presented as alternative pathways for materially the same population of small businesses.

Recommendations

The Treasury should consider:

- confirming that a trust which is both a family trust and an EET trust, and which confines its EET nomination to family group members, retains an established pathway to satisfy the significant individual test under section 152-70;
- confirming that making or complying with an EET election has no adverse effect on a trust's characterisation as a non-fixed trust, or on any other threshold condition, for the purposes of Division 152; and
- extending the same level of consideration given to Division 152 continuity in the roll-over relief draft EM to the electable regime draft EM.

Worked example — EET nomination and the significant individual test

A family trust operates an active small business and holds a family trust election specifying an individual, X, as the test individual. In the 2028-29 income year, the trustee makes an EET election, nominating X and X's spouse as beneficiaries, each entitled to 50 per cent of the trust's income and capital.

On a sale of the business in 2033, the trustee wishes to access the 15-year exemption, relying on X as a significant individual under section 152-70. The exposure draft does not confirm whether the trustee's compliance with the EET nomination in each intervening year satisfies section 152-70's own distribution condition, leaving the trust's access to the exemption uncertain, even though it has done everything the electable regime requires.

Legal effect of the EET nomination: duties and drafting certainty

Public professional commentary is already divided on this question. Making an EET election, and complying with an EET nomination, could trigger a dutiable change in beneficial ownership in jurisdictions such as New South Wales, Victoria and Queensland. It might otherwise elevate a beneficiary's mere expectancy toward something resembling a fixed interest.

Having regard to the drafting of subsections 102UYB(2) and 102UYD(2), we consider the better view is that neither making an election nor complying with a nomination, of itself, changes any beneficiary's equitable interest or creates a fixed entitlement. The nomination is framed in permissive terms, as a trustee 'may' confer present entitlements. The trustee's discretion is not bound. The note to subsection 102UYD(2), together with the automatic revocation mechanism in subsection 102UYF(2)(a), confirms that a departure from the nomination carries a tax consequence rather than a breach of any legal obligation.

We do not consider this position to be free from doubt, however. The divergence of professional views already emerging is itself evidence that the exposure draft should put the question beyond argument. This matters particularly because state revenue authorities administer duties independently of the Commonwealth, and are not bound by anything said in the electable regime draft EM.

We are also concerned that subsection 102UYD(2), as drafted, invites this uncertainty unnecessarily. The subsection is framed as though it imposes an obligation on the trustee to confer present entitlements in accordance with the nomination. The actual consequence of non-compliance is addressed only in a note and in a separate provision. A more direct formulation, stating the consequence of a departure from the nomination without the intervening language of obligation, would remove the ambiguity at its source.

Recommendations

- Treasury should consider confirming expressly, in the primary law or the EM, that neither the making of an EET election nor a trustee's compliance with an EET nomination changes the equitable interests of beneficiaries or the interests of takers-in-default, and that it does not constitute an exercise of any variation, resettlement or dispositive power under the trust deed.
- Treasury should consider redrafting subsection 102UYD(2) to state the consequence of a distribution inconsistent with the nomination directly, rather than in terms capable of being read as imposing a positive obligation on the trustee.
- Treasury should consider confirming that an EET election and nomination do not constitute a trust resettlement or otherwise give rise to CGT event E1 or E2, consistent with the equivalent confirmation given for deed amendments considered under the roll-over relief (paragraph 1.90 of the roll-over EM).
- Treasury should consider providing model or precedent wording, or at minimum clear guidance, for the trustee resolutions or other documents used to give effect to an EET nomination. This would reduce the risk that well-intentioned drafting inadvertently effects a variation or resettlement of the trust.

- As duties are a state and territory matter, Treasury should consider seeking confirmation from the states, or coordinating through the Council on Federal Financial Relations, that making an EET election and complying with a nomination will not, by themselves, be treated as a dutiable transaction.

The relationship breakdown variation

For a trust that has made a valid EET election, the relationship breakdown variation exception (subsections 102UYE(3)-(4)) allows a trustee to vary the shares of income and capital as between two nominated beneficiaries who separate. It also allows the trustee to reallocate a departing beneficiary's share to the beneficiary who remains, where the change is given effect by a family law order, agreement or award. It does not permit the trustee to substitute a different person as a nominated beneficiary in place of either party.

The mechanism has a narrower threshold problem as well. It only applies where both members of the couple were originally nominated beneficiaries under that election. The EET nomination mechanism allows a trustee to name both spouses as nominated beneficiaries. However, in practice, families may appropriately structure the EET nomination around a single primary individual where the spouse of that individual is not nominated. Where only one spouse holds a fixed percentage as a nominated beneficiary, and a relationship breakdown involving that spouse and their non-nominated partner occurs, it appears that no variation relief will be available at all, since the rule is framed around two nominated beneficiaries separating from each other.

This creates a serious practical problem in the context of a relationship breakdown property settlement, as in effect it would not be possible to make any changes to the trust that has made the EET nomination. For example, it would not be possible for the non-nominated spouse to take control of that trust or to benefit from it in the future as part of a property settlement.

We are concerned this inflexibility creates a lever that could be used against a vulnerable spouse. A spouse could structure the EET nomination to produce this dilemma, in effect preventing the other spouse from being able to benefit or take control of the trust under a property settlement. The rigidity of the regime may also delay family law proceedings, where resolving a property settlement now carries a tax consequence extending well beyond the immediate transaction.

Recommendations

The Treasury should consider:

- permitting substitution of a new nominated beneficiary on relationship breakdown, not only reallocation between existing nominees;
- extending the variation mechanism to relationship breakdowns involving only one originally nominated beneficiary, not only breakdowns between two beneficiaries who were both nominated;
- excluding automatic revocation, or providing an alternative consequence, where a trustee's departure from the nomination is compelled by, or made to avoid family trust distribution tax arising from, a family law order, agreement or award; and
- whether the current design creates a risk of financial or procedural leverage against a vulnerable or non-financial spouse, and whether additional safeguards are warranted.

Worked example: the family trust election and EET issue

A family trust has made a family trust election specifying an individual, X, as the test individual. It has also made an EET election nominating X, X's spouse Y, and Y's two siblings as beneficiaries, each entitled to 25 per cent of the trust's income and capital. X and Y separate, and Y ceases to be a beneficiary of the trust under the terms of a Family Court order. Y's siblings, however, remain nominated beneficiaries under the EET nomination. They are no longer members of X's family group following the relationship breakdown.

- If the trustee continues to distribute 25 per cent of income and capital to each of Y's siblings, consistent with the EET nomination, those distributions are made outside the family group and expose the trustee to FTDT.
- If the trustee instead withholds those distributions to avoid FTDT, the departure from the EET nomination automatically revokes the EET election. The trustee is then assessed on the trust's entire net income for that year at the top marginal rate plus the Medicare levy under section 99A.
- The current variation exception does not resolve this. It only permits reallocation between X and Y where they cease to be beneficiaries of each other's shares. It does not extend to Y's siblings, who were never party to the relationship breakdown.

EET variation on the death of a nominated beneficiary

Where a nominated beneficiary dies, the trustee must vary the EET nomination and notify the Commissioner within the return period for the income year of death (paragraph 102UYE(2)(e) of the ITAA 1936, electable regime draft EM para 1.51). The new nominated beneficiaries must be beneficiaries of the deceased person's own estate (paragraphs 102UYE(2)(a) to (d) of the ITAA 1936, electable regime draft EM para 1.47). This can be very difficult to comply with in practice. A beneficiary who dies late in the income year, for example on 29 June, leaves the trustee very little time to obtain the will, identify the deceased's beneficiaries, and vary the nomination before the return for that year is due, all while the family is often still dealing with the immediate aftermath of the death.

Recommendations

The Treasury should consider:

- allowing a longer period, such as two or three years, for a trustee to vary an EET nomination following a nominated beneficiary's death, consistent with the timeframes given for other deceased estate concessions; and
- allowing the deceased beneficiary's share of trust income to be allocated to their estate during that period without breaching the EET nomination.

Automatic revocation on ordinary family succession share transfers

Where a nominated beneficiary is a company, the EET election is automatically revoked if a shareholder ceases to hold their shares for any reason other than death or relationship breakdown (subsections 102UYF(2) and (3) of the ITAA 1936, electable regime draft EM paras 1.63 and 1.65). This captures an ordinary, fully taxed transfer of shares between family members as part of normal succession planning, for example a parent transferring shares in a family company to an adult child at market value, or under the market value substitution rule, with capital gains tax paid on the transfer in the usual way.

This significantly restricts how family businesses can manage generational succession while an EET election is in force. A trustee would need to choose between undertaking normal succession planning and keeping the election in place, even where the share transfer has no connection at all to the income-splitting concern the measure is meant to address.

Recommendation

Treasury should consider extending the allowable reasons for a change in a nominated company beneficiary's shareholders, to include a transfer for market value consideration, or one to which the market value substitution rule applies, between members of the same family group.

Beneficiary eligibility is frozen to the trust deed as it stood on 1 July 2028

A beneficiary must be capable of benefiting under the trust deed in force on 1 July 2028 to be specified in an EET nomination (paragraph 102UYB(3)(a) of the ITAA 1936, electable regime draft EM para 1.22). An entity that can only benefit because of an amendment made to the deed after that date cannot be nominated, even if the trustee would otherwise have every reason to include them.

This is a different problem from the narrow variation grounds we raise elsewhere in this submission. Even if those grounds are broadened, the starting pool of who can ever be nominated is still capped to the deed as it existed on a single date. A family whose deed does not yet include a category of beneficiary they would want to nominate, perhaps because a grandchild has not yet been born, or because the deed has simply not been updated recently, has no way to bring that person within reach of the election, now or in the future.

The 1 July 2028 date serves a specific purpose: confining the election to trusts that already existed at that time, so the concession cannot be accessed by establishing a new trust after the measure was announced. That purpose is satisfied once the trust itself is shown to have existed on that date. It does not require the class of persons capable of benefiting under the trust to be frozen as well. Allowing the eligible beneficiary pool to be updated to reflect the ordinary growth of the family the trust already serves, principally the birth of a child or grandchild, does not expand the population of trusts able to access the EET. It only lets an existing trust continue to operate as family trusts of this kind ordinarily do. That flexibility is consistent with, not contrary to, the purpose the freeze date is intended to serve.

Recommendations

- Treasury should consider allowing the eligible beneficiary pool for an EET nomination to be updated by deed amendment after 1 July 2028, at least for categories of beneficiary that reflect the ordinary growth of a family, such as the birth of a child or grandchild. This would not conflict with confining the election to trusts already in existence on that date, since it leaves the population of eligible trusts unchanged and affects only how an existing trust's beneficiary class evolves over time.
- If the 1 July 2028 freeze is retained, Treasury should consider extending the election window itself, so trusts have a genuine opportunity to update their deeds in anticipation of the election before the eligible class is locked in.

Beneficiary insolvency is not a permitted variation ground

The EET nomination can only be varied where a specified beneficiary dies or is involved in a relationship breakdown (subsection 102UYE(1) of the ITAA 1936, electable regime draft EM para 1.44). Insolvency of a nominated beneficiary is not a permitted ground for variation.

This creates a genuine dilemma for a trustee. Ordinarily, a trustee would simply exercise its discretion not to distribute to a beneficiary who becomes bankrupt, preventing 'new' entitlements being captured by the bankruptcy trustee, a basic asset-protection function of the structure. An EET nomination removes that flexibility. The trustee must make each nominated beneficiary presently entitled in accordance with the fixed nomination every year, or the election is automatically revoked. If a nominated beneficiary becomes bankrupt, the trustee has no ordinary means of protecting the income from the trust's assets: The trustee is left with no real choice: distribute into the bankrupt estate, or trigger a severe, whole-of-trust tax consequence. Recommendation

Treasury should consider adding insolvency or bankruptcy of a nominated beneficiary as a further permitted ground for varying an EET nomination, consistent with the treatment already given to death and relationship breakdown.

No variation path where a nominated company is wound up or deregistered

Where a nominated company beneficiary is wound up or deregistered, the EET election is automatically revoked (subsection 102UYF(2) of the ITAA 1936, electable regime draft EM para 1.63). The variation mechanism, which allows an individual beneficiary to be replaced or reallocated on death or relationship breakdown, has no equivalent for a company beneficiary that ceases to exist (subsection 102UYE(1) of the ITAA 1936, electable regime draft EM para 1.44).

A company can cease to exist for entirely ordinary reasons unconnected to any income-splitting concern, including a group restructure, a corporate simplification, or the natural winding up of a special purpose vehicle once its purpose is served. As currently drafted, any of these ordinary corporate events permanently ends the EET election, with the same severe consequence that applies to any other automatic revocation.

Recommendation

Treasury should consider allowing a trustee to nominate a replacement company where a nominated corporate beneficiary is wound up or deregistered, on the same basis as the substitution we recommend elsewhere for individual beneficiaries, rather than treating this as an automatic, unrecoverable revocation event.

Alphabet shares and the eligible company test

A company nominated as a beneficiary must be an eligible company, meaning there are no material discretionary elements affecting the rights or interests of its members (subsection 102UYC(1) of the ITAA 1936, electable regime draft EM paras 1.31 to 1.32). The roll-over relief draft EM's own discussion of the equivalent test in the ITTP gives alphabet shares as a standard example of a material discretionary element, where directors can choose which class of share receives a dividend, and in what amount (roll-over relief draft EM para 1.87).

The eligible company test is framed around material discretionary elements, not any discretionary element, suggesting a feature should be disqualifying only where it affects members' entitlements, not merely because a power of that kind exists in the company's constitution. Treating alphabet shares as inherently material, without regard to whether the discretion is actually exercised or is constrained in practice (for example, by a shareholders' agreement or an established pattern of pro rata dividends across classes), goes further than the materiality standard the test itself sets.

Alphabet share structures are common in ordinary family company arrangements, for reasons unrelated to income streaming, including managing voting control and succession between family members. If the roll-over relief draft EM's per se treatment carries across to the electable regime, a family company could be excluded from nomination solely because its constitution contains an alphabet share structure, regardless of whether that structure has any material bearing on how income is actually distributed. Recommendation

Treasury should consider confirming that alphabet shares do not, of themselves, constitute a material discretionary element for the purposes of the eligible company test, and that materiality is instead assessed by reference to how the discretion is actually exercised or constrained, consistent with the approach adopted for the fixed trust definition.

Additional worked examples in the electable regime draft EM

The electable regime draft EM currently contains no worked examples. While the regime's broad design echoes the family trust election and FTDT framework, as noted above, its specific mechanics, the nomination process, the automatic revocation trigger, and the section 99A consequence are new and have no worked precedent. We recommend Treasury include additional examples at the following points to complement the worked example above.

- **Basic operation of an EET election over multiple years**
  The electable regime draft EM does not currently include an example showing the EET mechanism operating as intended over successive income years. An example could demonstrate how the election works where the trustee continues to comply with its requirements.
- **Automatic revocation of an EET election (after paragraph 1.67)**
  An example illustrating the consequences where the trustee fails to comply with the election requirements, including the tax consequences for the year of revocation and the trust's position in future years.

Recommendations

- Treasury should consider including worked examples for each of the situations outlined in Parts 1 to 3 above, or for other scenarios that it considers better illustrate how the rules operate.
- More broadly, Treasury could include worked examples whenever a provision involves complex calculations, apportionments, tracing rules, or tax rate calculations, given the practical role such examples play in ATO administration and taxpayer self-assessment.

Part 4: Issues across the package

Deferred administrative, notification and collection framework

Paragraph 1.85 of the draft EM states that later legislation will address the rules on administration and reporting, as well as residency, capital gains tax (**CGT**), and international tax issues. As a result, the concerns we raised in our July 2026 submission, including beneficiary notification requirements, PAYG instalments, and possible director liability under a Director Penalty Notice (**DPN**)-style regime, have not yet been considered in any draft law.

This creates a timing problem. Trustees will need to decide whether to restructure using the roll-over relief available from 1 July 2027, or make an EET election available only in the 2028-29 income year, before they know the administrative and tax-collection rules that would apply if they choose to stay as a minimum tax trust. In other words, taxpayers are being asked to make a permanent structural decision without knowing what compliance obligations they may face if they choose the alternative option.

Recommendations

- Treasury could consider releasing the administrative and collection tranche of legislation, or at least detailed policy parameters, before the roll-over relief and EET election decision points. This would allow trustees and taxpayers to make restructuring decisions with a clearer understanding of the compliance and collection framework that would apply if they remained a minimum tax trust.
- Treasury could also consider confirming whether any director liability regime associated with the minimum tax will incorporate safeguards similar to those available under the DPN regime. This could include a defined notice and remission period, defences for non-involvement, and relief where the trustee enters external administration, consistent with the recommendations outlined in our July 2026 submission.

Legislative Instrument making powers

The exposure draft package gives the Minister seven powers to make legislative instruments.

Most of these powers are reasonably limited, set out the governing test or worked indicators, and the instrument is reserved for supplementary detail consistent with that test. This is the case for:

- other kinds of trusts excluded from being a minimum tax trust, where subsection 101AB(2) is constrained by three stated conditions the Minister must be satisfied of (paragraph 1.23 of the primary EM);
- conditions for the registered charity and deductible gift recipient exemption under subsections 101AE(2)-(3), which the EM describes as forms and process matters (primary EM para 1.32);
- additional matters for or against ‘no material discretionary elements’ in the fixed trust definition in section 272-65 of Schedule 2F to the ITAA 1936, where the primary EM already sets out a non-exhaustive list of indicators and worked illustrations, such as the alphabet-share example at paragraph 1.87 (primary EM paras 1.75-1.80);

- additional matters for or against material discretionary elements in a roll-over transferee, on the same pattern (subsection 126-430(8) and paragraphs 1.83-1.87 of the roll-over EM); and
- additional matters for or against material discretionary elements in an 'eligible company' beneficiary under the electable regime, on the same pattern (subsections 102UYC(3)-(4) and paragraph 1.32 of the electable regime EM).

We do not oppose using delegated legislation in these five cases. Our general preference is for legislation to set out the governing test or principle in the primary law, with delegated instruments reserved for supplementary detail consistent with that test. Each of the five powers above meets that standard: the draft Bill already contains the main policy, and the instruments simply provide supporting detail. This is consistent with the ordinary hierarchy of laws and with the policy rationale described in paragraph 1.80 of the draft EM.

Two of the seven powers are much broader because the law provides no guiding principle for exercising them.

The exempt entity exemption's possible cap (subsections 101AE(2)-(3)) is not constrained by any stated test or ceiling. The EM says only that the Minister 'may also include a cap, or a method for working out a cap, on the amount that may be excluded' (paragraph 1.34 of the primary EM). Unlike the powers above, the draft EM does not indicate what would justify a cap, how it would be calculated, or what it is meant to prevent. It sits directly against the exclusion's evident purpose of removing exempt-entity distributions from the minimum tax base altogether.

More significantly, the roll-over's continuity requirement for minimum tax trusts that are not family trusts is left entirely to legislative instrument. There is no default in the primary law, and no fallback if no instrument is made (subsections 126-440(3)-(4) of the ITTP, paragraph 1.44 of the roll-over draft EM). This is not a supplementary power filling in detail around an existing test. It is the entire test. On the current drafting, a non-family-trust minimum tax trust, such as a commercial or investment trust with no family trust election in force, has no pathway to satisfy the continuity requirement. It would have no access to roll-over relief at all, unless and until the Minister acts.

This distinction is important for determining the appropriate response. For the five powers listed first, we are not seeking removal of the delegation. Rather, we consider that draft legislative instruments should be published alongside the exposure draft legislation so stakeholders can assess the complete policy framework during consultation.

For the two powers identified above, we consider that the draft Bill should contain the governing test, principle or a workable default position. Unlike the other delegated powers, no equivalent statutory framework currently exists against which the exercise of those powers can be assessed.

Recommendations

The Treasury should:

- publish draft versions of the legislative instruments during this consultation process, or provide a timetable for their release, so stakeholders can review them alongside the exposure draft;

- include a default continuity test in the primary legislation for non-family-trust minimum tax trusts, so access to roll-over relief does not depend entirely on a future Ministerial determination; and
- either limit the Minister's power to impose a cap on exempt-entity distributions by setting clear principles or maximum limits in the legislation, or remove the power altogether, consistent with the policy objective of fully excluding those distributions from the minimum tax base.

Division 7A and the High Court's decision in Bendel

Neither the draft EM, the roll-over relief draft EM, nor the electable regime draft EM refers to Division 7A or to the High Court's decision in *Commissioner of Taxation v Bendel* [2026] HCA 18, despite these interactions being raised prominently in our July 2026 submission and directly relevant to the Government's own announced but unenacted 2018–19 Budget measure concerning unpaid present entitlements.

Without clear ordering rules, an unpaid present entitlement (**UPE**) owed by a minimum tax trust to a corporate beneficiary risks being taxed cumulatively: once at the trustee level under the minimum tax, again at the company level with no offset, and potentially a third time if the UPE is later treated as a deemed dividend under a revised Division 7A regime. We are also concerned that taxpayers who revisited their UPE and sub-trust arrangements in reliance on the current legal position following *Bendel* could be adversely affected if a revised Division 7A measure applies retrospectively to arrangements entered into before the final design of either measure was known.

Recommendations

The Treasury should consider:

- coordinating the design of the minimum tax with any revised Division 7A measure, including clear ordering rules for UPEs subject to both regimes;
- providing transitional protection for UPEs arising, and for complying sub-trust or loan arrangements entered into, between the Bendel decision and the commencement of any revised Division 7A measure; and
- committing to publishing the ordering rules before either measure commences.

Worked example — cumulative tax on an unpaid present entitlement

Illustrative only, based on the current absence of ordering or offset rules. A minimum tax trust owes $100,000 in UPE to a corporate beneficiary.

- Trustee-level minimum tax: $30,000.
- Company tax on the $100,000 entitlement, with no offset for the minimum tax already paid: $30,000.
- If the UPE is not repaid or placed on a complying loan and is treated as a deemed unfranked dividend to an individual shareholder at the top marginal rate: a further $47,000 (47 per cent of the $100,000 deemed dividend).
- Combined potential tax: $107,000, exceeding the $100,000 of underlying trust income.

This outcome is avoidable only if Treasury introduces coordinated ordering or offset rules, which the draft Bill does not yet provide.