

29 October 2026

Committee Secretariat
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee Secretariat,

Treasury Laws Amendment (Tax Reform No. 3) Bill 2026

The Tax Institute welcomes the opportunity to make a submission to the Senate Economics Legislation Committee (**Committee**) in respect of its inquiry and report on the Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 (**Bill**) and accompanying explanatory memorandum (**EM**).

This submission builds on our [submission](#) to Treasury dated 31 July 2026 on the [consultation paper](#) (**July 2026 submission**) and our [submission](#) to Treasury dated 18 September 2026 on the [exposure draft legislation](#) (**September 2026 submission**). It also builds on our [submission](#) to Treasury dated 21 August 2026 on the exposure draft legislation for [Tranche 2 of the CGT and negative gearing reforms](#) (**August 2026 submission**). It focuses mainly on Schedules 1 to 3 of the Bill, which introduce the minimum tax on discretionary trusts, the associated roll-over relief and the electable regime. It also raises issues with the CGT and negative gearing amendments in Schedules 4 and 5, and the transitional relief for excess concessional contributions in Schedule 6.

The Tax Institute supports the Government's objective of improving the fairness of the tax system. We acknowledge that the Bill reflects some of the feedback provided during consultation. In particular, we welcome:

- the new discretion for the Commissioner to disregard an automatic revocation of an excluded election trust (**EET**) election where revocation would be unreasonable (proposed section 102UYH of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**));
- the statement in the EM that an EET election and nomination do not, of themselves, require a resettlement of trust property (EM paragraph 3.23), although this does not bind state and territory revenue authorities for duty purposes;
- the retention of the exclusion for distributions to registered charities and deductible gift recipients (proposed paragraph 101AE(1)(d));

- the principles-based fixed trust definition (proposed section 272-65 of Schedule 2F to the ITAA 1936);
- the continuation of the active asset and 15-year periods for assets transferred under the roll-over (proposed section 126-980 of the ITTP Act; EM paragraphs 2.106 and 2.107);
- the new exclusions for employee share trusts, approved worker entitlement funds, and certain special purpose entities (proposed paragraphs 101AB(1)(e) to (g));
- the new exclusions from minimum tax income for certain non-assessable non-exempt income and related franking credits (proposed paragraphs 101AE(1)(g) to (i)); and
- the confirmation that transfers under the roll-over will not give rise to family trust distribution tax (**FTDT**) (proposed section 126-950 of the *Income Tax (Transitional Provisions) Act 1997* (Cth)) (**ITTP Act**).

However, many of the significant policy, technical and practical issues we raised in our earlier submissions to Treasury remain unresolved. Some changes made since the exposure draft also broaden the regime and have not been the subject of consultation.

Our overall position is that Schedules 1 to 3 should not be passed until all of the deferred rules, regulations and legislative instruments on which they depend have been released for consultation and, in any event, should be passed only with the amendments we recommend ([Recommendation 2](#)).

Consultation timing

The consultation period for the exposure draft legislation was 12 business days. The Bill was introduced on 14 October 2026, less than a month after that consultation closed on 18 September 2026. The Bill was referred to the Committee on 15 October 2026. Submissions close on 29 October 2026, 10 business days later, and the Committee is due to report on 13 November 2026. These measures are among the most significant changes to the taxation of trusts in decades. In our view, this timeframe does not allow adequate scrutiny of a Bill of this size and complexity.

The administrative, reporting, notification, collection rules and interaction issues are yet to be released (EM paragraphs 1.17 and 1.100). The Committee is therefore being asked to consider only part of the regime.

The Government's approach of progressing these reforms in multiple tranches has also made it harder to keep track of which measures have passed, which are before Parliament, and which are yet to be introduced. Paragraph 4.179 of the EM states that Schedule 4 is the second tranche of the CGT reforms, and that further tranches will deal with, among other things, CGT roll-overs, foreign and temporary residents, tax consolidated groups, employee share schemes and demergers. This approach is indicative of a regime that is being frantically developed at the same time as it is being rushed through Parliament, and is not being given the proper consideration it merits.

In our view, this approach does not serve taxpayers, their advisers or the system. Taxpayers are being asked to make long-term decisions, including whether to restructure, while key parts of the rules remain unknown. Trustees may need to decide whether to restructure or make an election before they know the compliance obligations that will apply if they are subject to the minimum tax.

We recommend that the Committee require the Government to publish a timetable for the remaining tranches, and a consolidated summary of the status of each measure in the reform package ([Recommendation 1](#)).

Commencement and legislative instruments

Schedules 1 to 3 commence only when the [Income Tax Rates Amendment \(Minimum Tax on Discretionary Trusts\) Act 2026](#) commences. However, the roll-over window opens on 1 July 2027. If the Bill is passed in the final sittings of 2026, trustees will have limited time to obtain advice, valuations and consents. The Bill, and the legislative instruments it relies on, need to be in place well before that date so that trustees can make informed decisions.

Several threshold questions are left to legislative instruments that have not yet been released. These include:

- the conditions for excluding distributions to registered charities and deductible gift recipients, and the cap for other exempt entities (proposed subsections 101AE(2) and (3) of the ITAA 1936);
- further kinds of trusts that are not minimum tax trusts (proposed subsection 101AB(2));
- matters for and against material discretionary elements under the new fixed trust definition (proposed subsection 272-65(5) of Schedule 2F to the ITAA 1936), the roll-over transferee test (proposed subsection 126-935(4) of the ITTP Act, and the eligible company test (proposed subsection 102UYD(4)); and
- the entire continuity test for roll-over relief for trusts that are not family trusts (proposed subsections 126-925(3) to (5) of the ITTP Act).

We recommend that the Committee request a timetable from the Government for these instruments. In our view, Schedules 1 to 3 should not be passed until all of the deferred rules, regulations and legislative instruments on which they depend, including drafts of these instruments and the deferred administrative, notification and collection rules, have been released for consultation. In any event, Schedules 1 to 3 should be passed only with the amendments we recommend in Appendix B ([Recommendation 2](#)).

If Schedules 1 to 3 are nonetheless passed before the instruments are made, the Bill should, at a minimum, provide that an instrument that operates adversely to taxpayers applies only to elections and choices made after the instrument is registered, and that the roll-over period and the EET election period are each extended if the relevant instruments are not registered well before those periods begin. This is crucial because the consequences of a later adverse instrument may be severe and irreversible. For example, an automatic revocation because a nominated company is no longer a company to which section 102UYD applies (proposed subparagraph 102UYG(2)(e)(iv)) is outside the Commissioner's discretion, which covers only paragraphs 102UYG(2)(b), (c) and (d) (proposed subsection 102UYH(1)). Similarly, an instrument made under proposed paragraph 126-935(4)(b) may cause a transferee to have material discretionary elements and so remove the roll-over under proposed subsection 126-905(5). This approach does not alter our position above ([Recommendation 2](#)).

We recommend that the ATO publish guidance and approved forms for the roll-over and the electable regime well before 1 July 2027 ([Recommendation 3](#)).

Compliance costs

The Impact Analysis at Attachment 1 to the EM estimates that the Government's preferred option will impose one-off implementation costs of \$939 million (within a range of \$780 million to \$1.1 billion) and ongoing costs of \$48 million a year. The alternative option considered, which would extend the minimum tax offset to all beneficiaries, is estimated to involve lower one-off costs of \$602 million but higher ongoing costs of \$97 million a year. The higher ongoing cost of the alternative option reflects, in part, the absence of roll-over relief and an electable regime under that option. The Impact Analysis notes that, without them, many discretionary trusts may not be able to reduce their ongoing compliance costs because their structures would remain complex. Under the preferred option, most of the cost falls in the first years, when trusts must decide whether to restructure.

These estimates exclude state and territory duties, which are not treated as regulatory costs under the Regulatory Burden Measurement framework. The Impact Analysis itself notes stakeholder estimates that duty on a \$1 million transfer could range from \$36,590 to \$55,000. The estimates also assume an average restructuring cost of around \$11,000 for businesses and \$2,000 for non-businesses. The business figure sits at the lower end of the ranges reported by other stakeholders (\$9,536 to \$23,436 and \$15,000 to \$50,000 per restructure). The non-business figure is well below them. Our [July 2026 submission](#) noted member estimates that legal restructuring costs alone could range from approximately \$4 billion to \$13.3 billion across the small business sector. In our view, the estimates are likely to materially understate the true cost of these measures to taxpayers.

We recommend that the Committee seek further information from the Government on how these estimates were calculated, and whether a simpler design with lower overall costs could achieve the same policy objective ([Recommendation 4](#)).

Post-implementation review

We recommend that the Government commit to a post-implementation review of the measures within 12 months of commencement to ensure that the changes operate as intended, and to address any later identified unintended consequences ([Recommendation 5](#)).

Our summary of key issues and recommendations is contained in **Appendix A**, and our detailed comments and recommendations are contained in **Appendix B**. This submission is divided according to the Bill's Schedules.

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 Head of Tax & Legal, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,

Julie Abdalla

Head of Tax & Legal

Tim Sandow

President

APPENDIX A

Summary of key issues and recommendations

Our key issues and recommendations are summarised in the table below.

Recommendations 1 to 5 are discussed in our covering letter, and Recommendations 6 to 46 are discussed in Appendix B.

No.	Key issue	Recommendation
General		
1	Reforms progressed in multiple tranches	Publish a timetable for the remaining tranches of the reforms, and a consolidated summary of the status of each measure in the reform package.
2	Legislative instruments not yet released	Do not pass Schedules 1 to 3 until all deferred rules, regulations and legislative instruments have been released in draft for consultation. In any event, pass Schedules 1 to 3 only with the amendments recommended in this submission. Seek a timetable from the Government for the legislative instruments. If passed beforehand, adverse instruments should apply only to choices made after registration, and the roll-over and election periods should be extended if instruments are late.
3	Guidance and system readiness	The ATO should publish guidance and approved forms for the roll-over and the electable regime well before 1 July 2027.
4	Compliance costs	Seek further information on how the compliance cost estimates in the Impact Analysis were calculated, and whether a simpler design could achieve the policy objective at lower cost.
5	Post-implementation review	The Government should commit to a post-implementation review of the measures within 12 months of commencement.
Schedule 1: Minimum tax on discretionary trusts		
6	Minimum tax trust status tested at any time during the year	Explain the policy rationale for the 'at any time during' test. Exclude trusts that are fixed trusts at year-end and made no distributions while they were a minimum tax trust, or alternatively, apportion minimum tax income.
7	Corporate beneficiaries continue to be denied the minimum tax offset	Give corporate beneficiaries a non-refundable offset for trustee-level minimum tax, with a corresponding non-refundable franking credit, and publish modelling of combined outcomes.
8	The minimum tax offset is lost through interposed trusts that are not minimum tax trusts	Allow the minimum tax offset to flow through interposed trusts that are not minimum tax trusts to the ultimate beneficiary.

No.	Key issue	Recommendation
9	Franking credit offset for the trustee	Ensure the trustee of a minimum tax trust can use franking credits against its minimum tax liability, as Example 1.6 of the EM intends.
10	Apparent drafting error in proposed subsection 207-45(2)	Correct the apparent drafting error in subparagraph 207-45(2)(b)(iii).
11	Interaction with the minimum tax on capital gains in Division 119	Allow the section 101AG offset to reduce extra income tax under Division 119, or amend Division 119 to take account of minimum tax paid by the trustee.
12	Widely held trusts, managed investment trusts and the fixed trust definition	Expressly exclude widely held trusts, MITs and AMITs, provide a safe harbour for fixed trust status, give guidance on deed amendments, and publish an assessment of the wider effects of the new fixed trust definition.
13	Testamentary trusts	Base the testamentary trust exclusion on distributions actually made, state in the law when a testamentary trust is established, and align the property-injection and beneficiary-restriction dates. Clarify paragraph 101AD(1)(c), and protect trusts under wills or codicils executed before 1 July 2028.
14	Vulnerable adults are not covered	Extend the vulnerable beneficiary exclusions in paragraphs 101AE(1)(b) and (c) to adults who meet the same criteria.
15	A simpler alternative design	Explain why a simpler model such as taxing the trustee in a manner similar to a company or under the public trading trust rules in Division 6C, was not adopted, with a comparison of compliance costs.
16	Cap on distributions to exempt entities	Set clear principles or a maximum for the exempt entity cap in the Bill, or remove the power. Ensure the charity and exempt entity exclusions apply by default until conditions are determined.
Schedule 2: Roll-over relief		
17	Loss of the CGT discount on transfers to a company	Clarify how a trust's deferred gain is treated on a roll-over, and preserve the CGT discount on that deferred gain where the transferee is a company.
18	Share capital for transferred assets	Confirm that the transferee company can recognise share capital for the value of the assets transferred, without the share capital account being tainted under Division 197, subject to appropriate integrity rules.

No.	Key issue	Recommendation
19	Restrictions on who can hold interests in the transferee	Allow a minimum tax trust to hold interests in the transferee, and give the Commissioner a discretion to disregard a material discretionary element in the transferee that has only minor or consequential impacts, such as a power to pay different dividends on different classes of shares. Align the transferee and eligible company tests.
20	Restriction to a single transferee	Allow more than one transferee where the transfers form part of a single coordinated restructure.
21	An all-or-nothing roll-over with an extended period of uncertainty	Allow the roll-over to apply asset by asset, shorten the 4-year period to 2 income years, consistent with the shorter period of review that applies to most individuals and small businesses, limit the consequence of a later breach, clarify how Division 7A obligations can be settled, and define 'relevant trust assets'. Align the section 126-940 amendment period with the clawback period.
22	Cost base of membership interests	Give members a cost base where interests in the transferee are issued to them as part of the restructure, and extend the roll-over to the trust's transfer of those interests to its members. Confirm a nil floor where liabilities exceed the roll-over cost.
23	Continuity requirements and deed amendments	Clarify the effect of deed amendments on the continuity test, and include a default continuity test for trusts that are not family trusts.
24	Timing and meaning of transfer	Clarify that an asset is transferred at the time of the relevant CGT event.
25	Trustee powers	Provide guidance on trustee powers and duties for these restructures.
26	Notification requirements and the offence for failing to notify	Remove or soften the progress notification requirement, and limit the obligation to notify a failure to cases where the party is aware, or ought reasonably to be aware, of it.
27	Interaction with the electable regime	Allow a trustee that revokes an EET election to use the roll-over within the relief period, and confirm that a failed roll-over does not prevent an EET election.
28	State and territory duties	Lead a coordinated national approach to duty on roll-over restructures and EET elections.
29	Family trust distribution tax	Apply the approach in section 102UYH to the FTDT regime, and align the FTDT amendment period with the standard period.

No.	Key issue	Recommendation
Schedule 3: Electable regime		
30	When a voluntary revocation takes effect	Amend section 102UYG so that a voluntary revocation takes effect from the start of the income year after the year in which the trustee decides to revoke, consistent with paragraph 102UYJ(1)(b) and EM paragraphs 3.76 and 3.77, and align section 102UYI.
31	Application of section 99A on revocation	Allow a voluntary revocation without section 99A applying, so that the election remains in force for the year of the decision and the trust becomes a minimum tax trust from the following year. Extend section 102UYH to revocation events affecting a nominated company.
32	Limits on election timing and the Commissioner's discretion	Amend subsection 102UYC(6) to allow the Commissioner to extend the time for notice of an EET election. Amend section 102UYH to allow late applications within 60 days of the trustee becoming aware of the event. Publish guidance on the discretion.
33	New features of the electable regime	Explain the new features of the electable regime in the EM, with worked examples.
34	Legal effect of the nomination	Confirm in the Bill the legal effect of an EET election and nomination, including that there is no resettlement, and through a coordinated national approach seek confirmation from the states and territories that an EET election and nomination do not, of themselves, result in a resettlement for duty purposes (see also Recommendation 39). Redraft subsection 102UYE(3), and publish guidance on what a trustee resolution must achieve to give effect to an EET nomination, so that well-intentioned drafting does not inadvertently change beneficiaries' interests.
35	Notification of automatic revocation	Limit the obligation to notify an automatic revocation to cases where the trustee is aware, or ought reasonably to be aware, of the event.
36	No variation for new family members	Allow nominations to be varied for new family members, and the eligible beneficiary pool to be updated after 1 July 2028.
37	Interaction with family trust elections and family trust distribution tax	Address the interaction of the electable regime with FTDT and section 152-70.
38	Eligible companies	Provide guidance on eligible companies, and confirm that alphabet shares are not of themselves a material discretionary element.

No.	Key issue	Recommendation
39	State and territory duties	Seek confirmation from the states and territories that an EET election and nomination are not of themselves dutiable.
Schedule 4: CGT adjustments		
40	Loss of the main residence exemption for individuals overseas on 30 June 2027	Add Subdivision 118-B to the deferral exemptions, or otherwise ensure the main residence exemption is tested at the actual sale, and confirm related matters in the EM.
41	Loss ordering amendments limited to superannuation entities	Extend the loss ordering amendments to the complying superannuation class of a life insurance company, and explain why the choice in section 102-35 is limited to superannuation entities.
42	1 July 2027 valuations where the apportioning method is not available	The ATO should publish guidance on 1 July 2027 valuations where the apportioning method is not available.
43	<i>De minimis</i> threshold and CGT event K7 gains	Adopt a <i>de minimis</i> threshold for the minimum tax on capital gains, and clarify the treatment of CGT event K7 gains.
Schedule 5: Negative gearing		
44	Transition from the Ministerial determination power	Confirm the status of the Tranche 2 draft determination, and the definition that applies if the Bill does not receive Royal Assent before 1 July 2027.
45	Buildings not fit for habitation and balancing adjustments	Provide guidance on when a building is not fit for habitation, and clarify the treatment of losses from balancing adjustment events.
Schedule 6: Transitional relief for excess concessional contributions		
46	Transitional relief for individuals who receive additional contributions	Extend the relief to contributions made in the 2025-26 income year, to salary sacrifice contributions, and to all mandatory employer contributions for the June 2026 quarter made in 2026-27. In addition, the EM or the ATO should confirm that the Commissioner will treat the transition to Payday Super as a special circumstance under section 291-465 of the ITAA 1997, so that individuals who fall outside the relief can apply to have the contributions disregarded or allocated to another year.

APPENDIX B

We have set out below our detailed comments and recommendations for your consideration.

Schedule 1—Minimum tax on discretionary trusts

Minimum tax trust status tested at any time during the year

In the [exposure draft](#), the trustee was liable if the trust was a minimum tax trust at the end of the year of income. The Bill now applies where the trust is a minimum tax trust 'at any time during the year of income' (proposed paragraph 101AA(b)). Status is tested 'at a particular time during a year of income' (proposed subsection 101AB(1)), and minimum tax income is so much of the trust's net income for the whole year as is not excluded (proposed section 101AC).

We understand the change may be intended to stop a trust changing its status at year-end. However, it appears to mean that a trust that becomes a fixed trust part-way through a year, for example following a deed amendment, is a minimum tax trust for that whole year. Its minimum tax income is worked out on its net income for the whole year, including the period after it became a fixed trust. This concept was not in the exposure draft and has not been the subject of consultation.

Where a trust has not made any distribution of income or capital while it was a minimum tax trust, and is a fixed trust at the end of the year, the trustee has not exercised any discretion in a way that could give rise to income splitting. In our view, there is no mischief in that case for the minimum tax to address.

Recommendation 6

- The Committee should seek an explanation from the Government of the policy reason for the 'at any time during' test.
- Amend the Bill so that a trust that becomes a fixed trust during a year is not subject to the minimum tax for that year if:
 - it is a fixed trust at the end of the year; and
 - it did not make any distribution of income or capital while it was a minimum tax trust.
- Alternatively, amend the Bill so that minimum tax income is apportioned by reference to the part of the year in which the trust is a minimum tax trust. This should apply at least to trusts that become fixed trusts between 1 July 2027 and 30 June 2030.
- Include a worked example in the EM.

Corporate beneficiaries continue to be denied the minimum tax offset

The Bill continues to deny corporate beneficiaries access to the minimum tax offset (proposed subparagraph 101AG(1)(d)(i) of the ITAA 1936), while still assessing those beneficiaries on their share of trust income. We raised this issue in both of our submissions to Treasury.

Trust income distributed to a corporate beneficiary may be subject to minimum tax of 30 per cent at the trustee level and company tax of up to 30 per cent. No franking credit arises for the trustee-level tax. When the company later pays a dividend, the trustee-level tax is not recognised. The example below assumes \$100,000 of trust taxable income, an individual on the top marginal rate of 47 per cent (including Medicare levy) and a company tax rate of 30 per cent.

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 paid out as a franked dividend to an individual on the top marginal rate (where minimum tax is paid from \$100,000 to be distributed)	\$30,000	\$30,000	\$9,714*	\$69,714	69.7%
D – Distributed to a corporate beneficiary and later paid out as a franked dividend to an individual on the top marginal rate (where minimum tax is paid from funds other than the \$100,000 to be distributed)	\$30,000	\$30,000	\$17,000	\$77,000	77%

Note: The table is based on the corporate beneficiary example in the [consultation paper](#), and on Example 1.5 of the EM, which applies the same treatment. Path D assumes that the trustee pays its minimum tax from funds other than the \$100,000 distributed, so that the corporate beneficiary receives the full amount. Neither the Bill nor the EM addresses this. If the trustee's minimum tax instead reduces the amount distributed (Path C), Company A would have \$40,000 to distribute after paying its own tax. This would result in \$12,857 of franking credits remaining in the company, generated by its own tax payment, generally unable to be used.

This outcome is a significant departure from the principles of the imputation system. It penalises family businesses and closely held groups that use corporate beneficiaries for ordinary commercial reasons, such as retaining working capital and funding investment.

We also note that the offset for individual beneficiaries is non-refundable (proposed subsection 101AG(2)). Individual beneficiaries on marginal rates below 30 per cent, such as retirees and lower-income family members, will bear tax at 30 per cent on trust income with no refund. We recommend that the Committee consider whether this outcome is consistent with the policy objective.

The future administration and collection rules (EM paragraph 1.64) should clarify how the trustee's minimum tax liability interacts with beneficiaries' entitlements to trust income.

Recommendation 7

- The Bill should be amended so that corporate beneficiaries receive a non-refundable offset for trustee-level minimum tax, which generates a corresponding franking credit when the company pays a dividend. That credit can itself be non-refundable at the shareholder level, consistent with the design set out in our [September 2026 submission](#).
- The Committee should seek modelling from the Government on combined trustee, company and shareholder tax outcomes under the Bill.

The minimum tax offset is lost through interposed trusts that are not minimum tax trusts

Treasury's [consultation paper](#) stated that where the beneficiary of a minimum tax trust is a trust that is not itself a minimum tax trust, the minimum tax offset could be passed on by the interposed trust to its beneficiaries. The exposure draft was unclear on this point. Paragraph 1.67 of the EM now states that such an interposed trust is entitled to apply the offset but, as it is not a minimum tax trust, 'any subsequent beneficiaries would not be entitled to the minimum tax offset'.

In practice, the trustee of an interposed trust is usually not assessed, because its beneficiaries are presently entitled to its income. The offset is therefore effectively lost. This will affect many common structures, including where the interposed trust is a fixed trust, an attribution managed investment trust (**AMIT**) or managed investment trust (**MIT**), or an EET. In each case, the offset is trapped at the interposed trust level, even though the ultimate beneficiary is taxed on the same income.

Example

Trust M, a minimum tax trust, distributes \$100,000 to Unit Trust F, a fixed trust. Unit Trust F distributes the \$100,000 to individual O, who is on the top marginal rate.

- Trust M's trustee pays minimum tax of \$30,000.
- Unit Trust F's trustee is not assessed, because O is presently entitled to the income. The offset available to Unit Trust F has nothing to apply against.
- O is assessed on \$100,000 with no offset and pays tax of \$47,000.
- Total tax is \$77,000 on \$100,000 of income, compared with \$47,000 if the income had been distributed directly to O.

This differs from the imputation system, where franking credits generally flow through interposed trusts to the ultimate recipient.

Recommendation 8

The Government should amend the Bill so that the minimum tax offset flows through interposed trusts that are not minimum tax trusts to the ultimate beneficiary, consistent with the position in Treasury's consultation paper.

Franking credit offset for the trustee

Paragraph 1.78 of the EM states that the franking credit on a franked distribution forming part of the trust's minimum tax income will be included in the trustee's assessable income, and that the trustee will be entitled to a franking credit tax offset when calculating its minimum tax. Example 1.6 of the EM illustrates this outcome.

The Bill amends paragraph 207-45(c) of the *Income Tax Assessment Act 1997 (ITAA 1997)* to include trustees assessed under section 101AA (Schedule 1, item 14). However, section 207-45 only provides a tax offset where a franked distribution flows indirectly to the relevant entity. Subsection 207-50(4), which determines when a franked distribution flows indirectly to a trustee, has not been amended to refer to section 101AA. As a result, it is unclear whether a franked distribution can flow indirectly to a trustee assessed under section 101AA for the purposes of Division 207.

The words 'directly or indirectly' in new subparagraph 207-45(2)(b)(iii) do not appear to address this issue. Rather, they refer to ownership of interests through interposed trusts and do not affect whether a franked distribution flows indirectly to a trustee under subsection 207-50(4).

This issue also affects the refundability rules in new subsections 67-25(1B) and (1BA), which similarly depend on the franked distribution flowing indirectly to the trustee under subsection 207-50(4). If subsection 207-50(4) does not apply, the refund of excess franking credits described in paragraph 1.79 of the EM would not be available either. We raised this issue in the exposure draft, and it has not been addressed. Accordingly, it is not clear that minimum tax trusts can use franking credits to offset their minimum tax liability, as the EM indicates they can.

Recommendation 9

Amend the Bill so that a franked distribution received by a minimum tax trust flows indirectly to the trustee for the purposes of Division 207 where the trustee is assessed under section 101AA, so that the outcome in Example 1.6 of the EM is achieved.

Apparent drafting error in proposed subsection 207-45(2)

Proposed subsection 207-45(2) of the ITAA 1997 reduces a beneficiary's franking tax offset where the franked distribution forms part of a minimum tax trust's minimum tax income. Where the relevant trust is not itself a minimum tax trust, paragraph (b) requires that another trust in the chain is a minimum tax trust and, under subparagraph (b)(iii), that 'the trustee of that other trust directly or indirectly (through one or more interposed trusts) owns units or interests in the relevant trust'.

This appears to be the wrong way around. Where income flows from an upstream minimum tax trust to a downstream relevant trust, it is the trustee of the relevant trust that holds interests in the minimum tax trust, not the reverse. As drafted, the provision may not apply in the very cases it is intended to cover.

Recommendation 10

Amend subparagraph 207-45(2)(b)(iii) of the ITAA 1997 to read: 'the trustee of the relevant trust directly or indirectly (through one or more interposed trusts) owns units or interests in that other trust', or otherwise confirm the intended operation of the provision.

Interaction with the minimum tax on capital gains in Division 119

A low-income individual beneficiary who receives a share of a trust capital gain may be taxed twice. The trustee pays minimum tax of 30 per cent under proposed section 101AA.

Division 119 of the ITAA 1997 then tops up the beneficiary to 30 per cent on the same gain, because the extra income tax under section 119-10 is worked out before tax offsets are applied.

Paragraph 1.67 of the EM confirms that the section 101AG offset can be applied by a beneficiary that is itself the trustee of a minimum tax trust against its own minimum tax liability. The EM says nothing about whether an individual beneficiary can apply the offset against extra income tax under Division 119.

Recommendation 11

Amend the Bill so that the section 101AG offset can be applied against extra income tax payable under section 119-10 or amend Division 119 to take into account minimum tax already paid by the trustee on the same capital gain.

Widely held trusts, managed investment trusts and the fixed trust definition

The Bill does not expressly exclude widely held trusts and MITs from being minimum tax trusts. Paragraph 1.26 of the EM states that these trusts 'would be expected to meet' the new fixed trust definition. Where they do not, the Minister may determine by legislative instrument that trusts with widely held membership are not minimum tax trusts (proposed subsection 101AB(2), EM paragraphs 1.27 and 1.32).

These trusts present no realistic risk of income splitting. An expectation in the EM, and a power that may or may not be exercised by the Minister, do not give trustees and investors the certainty they need.

More broadly, we welcome the principles-based fixed trust definition in proposed section 272-65 of Schedule 2F to the ITAA 1936. However, the test remains a question of fact and degree, without a safe harbour. Given the consequence of getting it wrong is a 30 per cent minimum tax, many trustees may restructure defensively. A trustee may also seek to satisfy the new definition by amending its deed. The EM's explanation of the new definition discusses powers to vary the trust deed (EM paragraph 1.89), but neither the EM nor the Bill addresses whether an amendment made to satisfy the definition may be treated as a resettlement. If it is, CGT event E1 or E2 may happen, consistent with the views in Taxation Determination [TD 2012/21](#), and duty may be payable.

The new fixed trust definition also applies across the tax law, not only for the minimum tax (proposed section 272-65 of Schedule 2F to the ITAA 1936 and the definition in subsection 995-1(1) of the ITAA 1997). It changes the definition used for the trust loss rules, including the 50 per cent stake test, the 45-day holding period rule for franking credits and other provisions. The EM does not indicate whether the effect of the change on these provisions has been assessed.

Recommendation 12

- Amend the Bill to expressly exclude widely held trusts, MITs and AMITs from being minimum tax trusts in the primary law.
- Provide a safe harbour or rebuttable presumption for fixed trust status, for example where entitlements have been applied consistently with unit holdings over three years.
- The ATO should provide a streamlined private binding ruling process for confirming fixed trust status.
- Provide guidance on when a deed amendment made to satisfy the new definition will not be treated as a resettlement and coordinate the duty treatment of such amendments with the states and territories.
- Seek confirmation from the Government that the effect of the new fixed trust definition on the trust loss rules, the 45-day holding period rule, and other provisions that rely on it has been assessed, and publish that assessment before the Bill is passed.

Testamentary trusts

We welcome the exclusion from minimum tax income of the net income of testamentary trusts established and administered for genuine testamentary purposes (proposed section 101AD of the ITAA 1936). We also welcome the addition of the trustee of a special disability trust as a permitted beneficiary. However, for a testamentary trust established on or after 1 July 2028, the exclusion only applies if, 'under the instrument establishing the trust estate', the beneficiary 'can only be' an individual, an exempt entity or the trustee of a special disability trust (proposed paragraph 101AD(1)(c)). The EM confirms that a testamentary trust with company or trust beneficiaries will be subject to the minimum tax (EM paragraph 1.38). On the EM's reading, the test therefore turns on the class of beneficiaries in the will, not on the distributions the trustee actually makes.

Many wills include company or trust beneficiaries for asset-protection, commercial and family law reasons. A will made today, with an entirely legitimate beneficiary class, will fail the test if the testator dies on or after 1 July 2028. This will significantly restrict succession planning. The gap between the property-injection date of 12 May 2026 (proposed subparagraph 101AD(1)(b)(ii)) and the beneficiary-restriction date of 1 July 2028 also remains.

Paragraph 1.36 of the EM states that a testamentary trust is generally established when property transfers to the trustee, as governed by existing trust, succession and property law. This should be stated in the law, not only the EM, given the consequences that turn on the date.

The drafting of proposed paragraph 101AD(1)(c) may also not reflect the EM. The paragraph refers to 'the beneficiary referred to in paragraph (b)', being the beneficiary for whose benefit the income is derived. On its terms, it arguably tests only that beneficiary, rather than every potential beneficiary under the will. Paragraph 1.38 of the EM, by contrast, states that the income will only be excluded 'if the beneficiaries under the trust instrument are individuals, exempt entities or a special disability trust'. Given the consequences that turn on this test, the drafting should be clarified. In our view, the narrower test, which looks to the beneficiary that actually benefits from the income, is generally the more appropriate one, and is consistent with an approach based on distributions actually made.

In addition, because a testamentary trust is generally established when property transfers to the trustee (EM paragraph 1.36), a will executed well before 1 July 2028 may produce a trust that is established after that date, and is therefore subject to the beneficiary restriction, solely because of the timing of the testator's death or the administration of the estate. Many testators who have lost capacity, or who have died, will have no opportunity to revisit their wills. In our view, testamentary trusts arising under wills or codicils executed before 1 July 2028 should be protected, provided the relevant provisions are not later amended by a will or codicil executed on or after that date.

Recommendation 13

- Amend the exclusion to operate by reference to distributions actually made from deceased estate assets, rather than the potential class of beneficiaries in the will.
- Clarify the drafting of paragraph 101AD(1)(c), preferably so that it tests only the beneficiary that benefits from the income, consistent with an approach based on distributions actually made.
- Protect testamentary trusts arising under wills or codicils executed before 1 July 2028, provided the relevant provisions are not amended by a will or codicil executed on or after that date.
- State in the law when a testamentary trust is established for the purposes of the exclusion.
- Align the property-injection and beneficiary-restriction dates.

Vulnerable adults are not covered

The exclusions for vulnerable beneficiaries apply only to individuals under 18 years of age. Proposed paragraph 101AE(1)(b) excludes a minor's share of trust income where the minor meets any of the criteria in paragraphs 102AC(2)(c) to (g) of the ITAA 1936, which cover minors with a disability, minors receiving a carer allowance or disability support pension, and minors receiving a double orphan pension (EM paragraph 1.42). Proposed paragraph 101AE(1)(c) excludes a minor's income from property received as compensation, damages, insurance or superannuation death benefits, or on family breakdown.

An adult in the same circumstances receives no protection unless their interest is held through a special disability trust. Many families use discretionary trusts to provide for adult children with a disability, or to manage a compensation payment for an adult beneficiary, often because the special disability trust rules are too restrictive for their circumstances.

Recommendation 14

Extend the exclusions in paragraphs 101AE(1)(b) and (c) to adult beneficiaries who meet the criteria in paragraphs 102AC(2)(c) to (g), or who derive income from property of the kind described in paragraph 102AG(2)(c) of the ITAA 1936.

A simpler alternative design

A simpler way to achieve a minimum level of tax on trust income would be to tax the trustee in a manner similar to a company, or under the public trading trust rules in Division 6C of Part III of the ITAA 1936, with credits flowing to beneficiaries, while keeping the trustee's discretion over distributions. The Impact Analysis did not consider this approach, noting only that a proposal in the early 2000s to tax trusts like companies was withdrawn because of technical problems. In our view, that history does not justify ruling the approach out without fresh analysis. Division 6C already applies a company-style model to public trading trusts, and the approach would avoid much of the restructuring activity the Bill will trigger and preserve the operation of the imputation system for corporate beneficiaries.

Recommendation 15

The Committee should seek an explanation from the Government of why a simpler model of this kind was not adopted, including a comparison of its compliance costs with the model in the Bill.

Cap on distributions to exempt entities

Distributions to exempt entities that are not registered charities or DGRs are excluded only up to a cap to be set by the Minister (proposed paragraphs 101AE(1)(e) and 101AE(3)(b)). The Bill sets no test, ceiling or principle for the cap. The EM describes it as 'an important integrity mechanism' but does not say how it would be calculated (EM paragraphs 1.47 to 1.49).

The offset is also denied to exempt entities (proposed subparagraph 101AG(1)(d)(ii)). Any amount above the cap will therefore bear a final 30 per cent tax with no offset. The size of the cap will decide how much of a distribution to a sporting, cultural or community organisation is taxed in this way.

Further, the exclusions for registered charities and DGRs, and for other exempt entities, each require that 'the conditions determined under paragraph (2)(a) are met' (proposed subparagraphs 101AE(1)(d)(ii) and (e)(ii)). It is unclear whether these exclusions operate at all before an instrument is made under paragraph 101AE(2)(a). If not, distributions to charities may be subject to the minimum tax until the instrument is made.

Recommendation 16

- Set clear principles or a maximum for the cap in the Bill, or remove the power, consistent with the purpose of excluding these distributions from the minimum tax base. If the power is not removed, the instrument should be released in draft before the Bill is passed.
- Provide that the exclusions in paragraphs 101AE(1)(d) and (e) apply by default until conditions are determined, or ensure the instrument under paragraph 101AE(2)(a) is made before Schedule 1 commences.

Other matters raised in our September 2026 submission

The following matters also remain unresolved:

- trustee-level tax is lost where an interposed trust's liability is reduced by carried-forward losses, as the offset is not refundable (note to proposed subsection 101AG(2)), and the Bill does not allow any unused amount to be carried forward;
- for foreign residents, we welcome the new exclusions in proposed paragraphs 101AE(1)(g) to (i). However, the operation of the withholding exclusion through chains of resident trusts, the interaction with section 98 and Australia's tax treaties, and the position of foreign trusts under section 99B are deferred to future legislation (EM paragraph 1.100);
- the primary production exclusion is unchanged (proposed paragraph 101AE(1)(a)), so rent received by a land-owning trust from a related entity carrying on the primary production business does not appear to be excluded; and
- the EM does not address the interaction of the minimum tax with Division 7A, including unpaid present entitlements owed to corporate beneficiaries, or the High Court's decision in [Commissioner of Taxation v Bendel \[2026\] HCA 18](#). It refers to Division 7A only to confirm that a roll-over transfer to a shareholder of a private company is not treated as a payment under Subdivisions EA and EB (EM paragraph 2.69).

Schedule 2—Minimum tax on discretionary trusts—roll-over relief

We welcome the inclusion of roll-over relief to help trusts restructure. However, in our view, several features of the roll-over in proposed Subdivision 126-Z of the ITTP Act make it unworkable for many of the trusts it is intended to assist. Unless these issues are addressed, many trustees may conclude that the roll-over is not a feasible option.

Loss of the CGT discount on transfers to a company

The [Treasury Laws Amendment \(Tax Reform No. 1\) Act 2026](#) (Tax Reform No. 1 Act) replaced the CGT discount for individuals and trusts with cost base indexation from 1 July 2027, while applying the new arrangements prospectively to gains accruing on and after that date (EM paragraph 4.4). Gains accrued before 1 July 2027 therefore retain access to the discount.

For a trust, this is achieved by a deemed sale and reacquisition of each asset just before 1 July 2027, with the resulting gain deferred until a later realisation event (sections 112-165 and 112-170 of the ITAA 1997). The deferred gain retains access to the discount when the asset is later sold by the trust.

The roll-over window opens on the same day. Where a trust transfers an asset to a company under the roll-over, the company takes the trust's cost base (proposed section 126-955), but the Bill does not say what happens to the trust's deferred gain. A company is not entitled to the CGT discount. It appears that the discount on the pre-July 2027 gain is permanently lost. Paragraph 4.179 of the EM states that the CGT treatment of roll-overs will be addressed in a further tranche. Trustees deciding whether to use the roll-over need this answer before the roll-over window opens on 1 July 2027. The current position penalises trusts that restructure in response to the measure and works against the policy of encouraging restructuring.

Recommendation 17

Clarify in this Bill how a trust's deferred gain is treated when the asset is transferred under the roll-over and provide that the CGT discount on that deferred gain is preserved when the asset is later disposed of by a transferee company.

Share capital for transferred assets

It is not clear whether the transfer of assets under the roll-over will give rise to share capital in the transferee company that reflects the value of the assets transferred, because the shareholders have not contributed those assets to the company. If it does not, the value transferred would be recorded as retained earnings. Amounts later returned to shareholders would then be taxed as dividends, even though they represent the value of assets transferred in. If the company later transfers that amount from retained earnings to its share capital account, Division 197 of the ITAA 1997 may treat the account as tainted (section 197-50), with the same result. This would tax amounts that are, in substance, capital and can produce double taxation. For example, a trust may hold \$1 million of corpus that was settled on the trust as a gift of after-tax funds. While it remains in the trust, that amount could be distributed to beneficiaries tax-free. Once it is transferred to a company under the roll-over, it can only be returned tax-free through a capital reduction if it is recorded as share capital and the shareholders' cost base reflects it (see Recommendation 22). Otherwise, it can only be paid out as an unfranked dividend. This uncertainty should be resolved before the roll-over window opens.

Recommendation 18

Confirm that the transferee company can recognise share capital for the value of the assets transferred, without the share capital account being tainted under Division 197, subject to appropriate integrity rules.

Restrictions on who can hold interests in the transferee

A roll-over is not available if the transferee is covered by proposed section 126-935 at any time from the day after the last transfer until the end of 4 income years after that year (proposed subsection 126-905(5)). Section 126-935 applies where material discretionary elements are capable of significantly affecting the rights or interests of members of the transferee, looking through any interposed entities. In effect, a discretionary trust cannot hold interests in the transferee, directly or indirectly. Every member must be an individual or a fixed entity. A company with different classes of shares may not be able to hold an interest either.

Membership interests in the transferee are excluded assets that need not be transferred (proposed paragraph 126-905(4)(f)). However, paragraph 2.39 of the EM confirms that the transferor would need to transfer those interests to another entity to satisfy section 126-935. A minimum tax trust therefore cannot transfer its assets to an entity in which it continues to hold an interest.

This differs from existing roll-overs, which allow the trustee of a discretionary trust to hold shares in a company to which it transfers assets, for example Subdivision 122-A of the ITAA 1997 (although that roll-over does not apply to revenue assets). Unlike the fixed entitlement rules in section 272-5 of Schedule 2F to the ITAA 1936, section 126-935 gives the Commissioner no discretion to disregard a material discretionary element, such as a power in the company's constitution to pay dividends on one class of shares but not another. A trustee has no means of obtaining relief where the element is minor or has no practical effect.

The tests in the roll-over are also not consistent with the equivalent tests in the electable regime. For a transferee, a power to vary its constituent documents suggests there are no material discretionary elements only if it can be exercised through a process requiring 'the consent of all members' (proposed subparagraph 126-935(2)(c)(i)). For an eligible company under the electable regime, the consent of 'all or a majority of the members' or a special resolution is sufficient (proposed subparagraphs 102UYD(2)(c)(i) and (ii)). Company constitutions are ordinarily amended by special resolution. Similarly, a company with a discretionary trust as a shareholder may be a nominated company under the electable regime (EM paragraph 3.43), but the no material discretionary elements test for a roll-over transferee is applied through each level of the ownership chain (EM paragraph 2.89). The EM does not explain the reason for these differences.

Recommendation 19

- Allow a minimum tax trust to hold interests in the transferee, given income it derives from those interests remains subject to the minimum tax.
- Give the Commissioner a discretion to disregard a discretionary element in the transferee where it is appropriate to do so.
- Align subparagraph 126-935(2)(c)(i) with subparagraph 102UYD(2)(c)(i) and (ii), so that a power to vary a transferee's constitution that can only be exercised with the consent of a majority of members or by special resolution suggests there are no material discretionary elements.
- Explain why a discretionary trust may hold shares in a nominated company under the electable regime (EM paragraph 3.43) but not, directly or indirectly, in a roll-over transferee (EM paragraph 2.89), or align the two tests.

Restriction to a single transferee

The transferor may make only one choice, which must specify a single transferee for the assets of the trust (proposed paragraph 126-910(1)(b) and subsection 126-910(4)). All assets, other than excluded assets, must be transferred to that transferee (proposed subsection 126-905(3)). Our [September 2026 submission](#) recommended that this restriction be removed. There is no clear policy rationale for it. Provided the assets end up held in entities with fixed ownership interests, the policy objective is met regardless of how many transferees are involved.

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 Beneficiary 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.

Recommendation 20

Extend the roll-over to restructures involving more than one transferee, where the transfers form part of a single coordinated restructure.

An all-or-nothing roll-over with an extended period of uncertainty

The roll-over operates on an all-or-nothing basis:

- every relevant asset must be transferred by 30 June 2030, or the roll-over is lost for all of them (proposed subsection 126-905(3));
- the transferee must have no material discretionary elements for 4 income years after the income year of the last transfer (proposed subsection 126-905(5)); and
- the Commissioner may amend assessments of the transferor, beneficiaries, transferee and members within 4 years after notice of the assessment for the year of each transfer (proposed section 126-940).

These periods run concurrently, but from different starting points. Taken together, the outcome may not be certain for many years. For example, if the last transfer occurs in the 2029-30 income year, the transferee must have no material discretionary elements until 30 June 2034, and the Commissioner may amend the assessments for that year into 2035. A breach late in that period unwinds relief for every asset, and for every entity in the group. This is a long period of uncertainty for a measure intended to make restructuring easier.

The two periods may also not align. Paragraph 2.92 of the EM states that the four-year clawback period 'broadly aligns' with the ordinary amendment period. However, the clawback period runs to the end of 4 income years after the income year of the last transfer (proposed subsection 126-905(5)), while the extended amendment period runs for 4 years after notice of the assessment for each year in which a transfer occurs (proposed section 126-940). Where an asset is transferred in an early year and the last transfer occurs in a later year, the amendment period for the early year may end before the clawback period does. It is unclear how a breach late in the clawback period would then be given effect for that earlier year.

The all-assets requirement also creates difficulty for trusts that owe significant amounts to related companies under Division 7A compliant loans or unpaid present entitlements, which is common in large private groups. These obligations must be dealt with as part of any restructure. The Bill allows a trust to retain assets reasonably required to discharge its liabilities (proposed paragraph 126-905(4)(c)). However, it does not say whether a trust can instead transfer assets to the transferee for consideration and use, or assign, that consideration to repay the trust's lender companies. It also does not define the 'relevant trust assets' that must be transferred under paragraph 126-905(1)(a). Trustees therefore cannot be confident how the roll-over applies to a common way of settling these obligations, or whether a valuation will be required.

Recommendation 21

- Allow the roll-over to apply on an asset-by-asset basis, as recommended in our [September 2026 submission](#).
- Shorten the period in subsection 126-905(5) and limit the consequence of a later breach to the assets or entities affected.
- Align the amendment period in section 126-940 with the clawback period in subsection 126-905(5), for example by running it from the end of the clawback period.
- Clarify how Division 7A loans and unpaid present entitlements owed by the trust can be settled as part of a restructure, including whether assets can be transferred for consideration that is used to repay a lender.
- Define 'relevant trust assets' in paragraph 126-905(1)(a), and confirm its relationship with the excluded assets in subsection 126-905(4).

Cost base of membership interests

Members obtain a cost base in their interests in the transferee based on the roll-over cost of the transferred assets only where those interests 'constitute all or part of the consideration provided for the transfer of assets ... under the transaction' (proposed paragraph 126-965(1)(c) of the ITTP Act).

In a typical restructure, the trustee transfers the assets, but the interests in the transferee end up with family members. Because the transferee cannot be held through a discretionary trust (proposed section 126-935), the trust cannot keep the interests. There are two ways to reach this outcome, and both create uncertainty:

- Interests issued directly to family members. It is difficult to see how interests issued to someone other than the transferor constitute consideration for the transfer, unless a tripartite arrangement is put in place. If they do not, section 126-965 does not apply, and it is unclear what cost base the members have.
- Interests issued to the trust and then transferred to family members. Paragraph 2.83 of the EM envisages this approach. It states that the interests 'must be transferred to the members' before the end of the transitional period, and that the restructure 'is not intended to create any market-value uplift in the new membership interests ... when they are later transferred to the members'. However, subsection 126-905(5) applies the section 126-935 test from the day after the last asset transfer, not from the end of the transitional period. If the trust still holds the interests after that day, the roll-over may be lost. In addition, the roll-over applies only to assets transferred by the trust to the transferee (proposed subsection 126-905(1)). It does not appear to cover the trust's later transfer of the interests to its members, which may be a separate CGT event for the trust with no relief.

It is also unclear what cost base the trust and the family members have. Under section 126-965, the trust's cost base in the interests is the roll-over cost of the transferred assets, not their market value. When the trust then transfers the interests to family members, it would make a capital gain equal to the difference between their market value and that cost base, with no relief. This would trigger the very gain the roll-over is meant to defer. The EM states that no market-value uplift is intended, but the only way to avoid a gain for the trust would be such an uplift. The Bill does not contain a provision that gives effect to the outcome described in the EM, and the EM does not explain how the two-step approach is intended to work.

Recommendation 22

- Amend section 126-965 so that members obtain a cost base based on the roll-over cost of the transferred assets where interests in the transferee are issued to them as part of the restructure, whether or not they are the transferor.
- Where the liabilities a transferee undertakes to discharge exceed the roll-over costs and adjustable values of the transferred assets, as may occur for a geared business, confirm that the first element of the cost base of the membership interests under paragraph 126-965(1)(d) is nil and explain how the excess is treated.
- Clarify how the approach in paragraph 2.83 of the EM is consistent with subsection 126-905(5).
- Extend the roll-over to the transfer of interests in the transferee from the trust to its members during the relief period, consistent with paragraph 2.83 of the EM, so that the trust makes no gain, and the members take the trust's cost base in the interests.

Continuity requirements and deed amendments

For a family trust, every individual with a direct or indirect interest in the transferee must, just before the transaction, have been a beneficiary of the trust and a member of the family group (proposed subsection 126-925(1)). Where a trustee wishes to transfer assets to an entity held by a person who is not currently a beneficiary, it is unclear whether amending the deed beforehand to add that person is effective, or whether it risks a resettlement.

Trusts that are not family trusts, and family trusts that cannot meet subsection 126-925(1), cannot use the roll-over unless and until the Minister makes a determination (proposed subsections 126-925(2) to (5)). As we noted in our [September 2026 submission](#), the primary law should contain a default continuity test.

Recommendation 23

- Clarify whether a deed amendment made before a transfer to add a beneficiary is effective for the continuity test, and confirm that it will not, of itself, cause a resettlement and coordinate with the states and territories on its duty treatment.
- Include a default continuity test in the primary law for trusts that are not family trusts.

Timing and meaning of transfer

The transfer of each asset must occur between 1 July 2027 and 30 June 2030 (proposed paragraph 126-905(1)(b)). It is not clear whether an asset is transferred when the contract is entered into (the time of the CGT event) or when legal ownership passes. For land, registration can take some time after settlement.

Recommendation 24

Clarify in the law that an asset is transferred at the time of the relevant CGT event.

Trustee powers

Many trust deeds do not give the trustee clear power to undertake this type of restructure. Trustees may need to amend the deed or obtain advice from counsel on their duties before acting. This adds cost and delay, particularly for trustees seeking to complete transfers within the relief period.

Recommendation 25

Provide guidance on trustee powers and duties in this context, and work with the states and territories on whether statutory support for these restructures is needed.

Notification requirements and the offence for failing to notify

The transferor and transferee must notify the Commissioner of their choice by the return date for the year of the first transfer (proposed section 126-910). Where an asset is transferred in a later income year, the transferor must also notify the Commissioner that the restructure is in progress (proposed section 126-915). This is a condition of the roll-over (proposed paragraph 126-905(1)(d)). A trustee who overlooks a later-year notice will lose relief for assets transferred in that year. It is not clear why this further notice is needed, given the Commissioner has already been notified of the choice. It is also not clear whether a separate notice is required for each asset.

If the transferor does not transfer all relevant assets, or either party fails to satisfy any other condition, both must notify the Commissioner (proposed section 126-920). The note to that section states that failure to do so may be an offence against subsection 8C(1) of the *Taxation Administration Act 1953* (Cth) (**TAA**). There is no knowledge requirement. For example, during the 4-year period a member of the transferee may transfer shares to a discretionary trust, or the company may change its share structure, without the former trustee's involvement. The ATO may also later take a different view on whether an asset was reasonably required to discharge liabilities (paragraph 126-905(4)(c)), or whether an individual was a member of the family group. A trustee that is unaware it has breached a condition, and only learns of it during an ATO review, may already have committed an offence.

Recommendation 26

- Remove the requirement in section 126-915, or at least ensure that failing to give a progress notice does not of itself remove roll-over relief.
- Amend section 126-920 so that the obligation to notify arises only when the transferor or transferee becomes aware, or ought reasonably to have become aware, of the failure.

Interaction with the electable regime

A trustee cannot choose the roll-over if it has already made an EET election, even if that election has since been revoked (proposed subsection 126-910(3)). Equally, a trustee cannot make an EET election if the roll-over applies to the trust's assets (proposed paragraph 102UYC(7)(b) of the ITAA 1936). Both choices are effectively irrevocable. A roll-over choice cannot be revoked (proposed subsection 126-910(2)), and a revoked EET election cannot be remade (proposed paragraph 102UYC(7)(a)).

The two windows overlap. The roll-over is available from 1 July 2027 to 30 June 2030, and the EET election must be made in the first income year starting on or after 1 July 2028 (proposed paragraph 102UYC(5)(c)). A trustee that makes an EET election and later finds it unworkable, for example because of a relationship breakdown, a death or a change in the family business, may still be inside the roll-over window. However, it cannot access the roll-over. Its options at that stage are to:

- keep the unworkable EET election;
- revoke the election and become a minimum tax trust, with the trust's net income for that year taxed under section 99A; or
- restructure without any income tax relief and with no certainty of duty relief.

The position is also unclear in the other direction. A trustee cannot make an EET election if a roll-over 'applies in respect of the assets' of the trust (paragraph 102UYC(7)(b)). If the trustee chooses the roll-over but the restructure fails during the election window, relief is lost for all assets. This could happen for reasons outside trustee's control, for example where a lender refuses consent to the transfer of an asset or a continuity requirement is not met, relief is lost for all assets. It is not clear whether the roll-over is still taken to 'apply' for this purpose. If it is, the trust loses the roll-over and also cannot make an EET election.

This has three consequences:

- Trustees may have to make a permanent choice before the administrative and collection rules, and the legislative instruments the regime relies on, are released.
- It discourages use of the electable regime. The EM presents the electable regime as an option that ‘is expected to reduce restructuring costs’ (Attachment 1 to EM). However, a trustee that makes an election gives up the option of using the roll-over later. Many advisers may therefore recommend a full restructure as the safer course, even though it is likely to cost more.
- The inflexibility of the EET election penalises changes in circumstances outside the trustee’s control.

Recommendation 27

- Allow a trustee that revokes an EET election to use the roll-over within the remaining relief period.
- Confirm that a trust whose roll-over fails is not prevented from making an EET election by paragraph 102UYC(7)(b), if the election window is still open.

State and territory duties

The roll-over provides income tax relief only. Duties are a state and territory matter, and the EM confirms that duties continue to apply in the ordinary way (EM paragraph 2.70). As our [July 2026 submission](#) noted, in many jurisdictions, duty concessions for corporate reconstructions do not generally apply to discretionary trusts.

On 15 October 2026, the NSW Government [announced](#) that, if re-elected, it will amend existing regulations to make clear that the initial choice to become an EET is not a taxable event. We understand that the WA Government has since taken a similar position. On 27 October 2026, the Victorian Government announced that, if re-elected, it will legislate a three-year stamp duty moratorium for eligible discretionary trusts that restructure, with eligibility based on qualifying for the Commonwealth roll-over relief. While we welcome these announcements, we note that they are conditional on re-election of those Governments. We also note that Victoria is the only state so far to have proposed duty relief for restructures. Queensland has indicated that duty may apply to trusts accessing the roll-over, depending on the particular facts and circumstances, and the other states and territories have not yet announced their position. Given the potentially high imposts, families need certainty on duty before they can decide whether to restructure. Because duty outcomes will differ between states and territories, a coordinated approach is needed so that families in similar circumstances are treated consistently.

Recommendation 28

The Government should lead a coordinated national approach to the duty consequences of roll-over restructures and EET elections, through the Council on Federal Financial Relations or otherwise, including considering whether the Commonwealth should share the cost. It should report to the Parliament on its findings before the relief period begins on 1 July 2027.

Family trust distribution tax

We welcome proposed section 126-950, which ensures that a transfer under the roll-over does not give rise to FTDT. However, the broader FTDT reforms recommended in our [September 2026 submission](#) have not been addressed and remain a source of great angst for many families and their advisers. These include aligning the FTDT amendment period with the standard period and giving the Commissioner discretion for honest and inadvertent mistakes. The Bill accepts the case for such a discretion in the electable regime (proposed section 102UYH). We consider the same should be afforded under the FTDT regime.

Recommendation 29

Apply the approach in section 102UYH to the FTDT regime and align the FTDT amendment period with the standard amendment period, as part of these reforms or under a committed timetable.

Other matters raised in our September 2026 submission

The Bill does not provide GST relief for transfers under the roll-over (EM paragraph 2.70), or a specific deduction for restructuring costs incurred by trusts that do not carry on a business and cannot rely on section 40-880 of the ITAA 1997. The tracing of indirect interests through a second family trust with a different test individual, and the underlying gap in the family group definition, also remain unresolved (proposed subsection 126-925(1)).

Schedule 3—Minimum tax on discretionary trusts—electable regime

We welcome the new discretion for the Commissioner to negate an automatic revocation where it would be unreasonable for the event to cause the revocation (proposed section 102UYH of the ITAA 1936), which responds to concerns we raised about inadvertent breaches. We also welcome the confirmation in paragraph 3.23 of the EM that an EET election and nomination do not, of themselves, result in changes to the trust or trustee powers or require a resettlement of trust property. However, several significant issues remain.

When a voluntary revocation takes effect

The drafting does not make clear when a voluntary revocation takes effect, and therefore which year section 99A applies to:

- subsection 102UYG(1) allows a trustee to revoke if it 'decides to do so before the end of a year of income for any future year of income', but does not state when the revocation takes effect;
- subsection 102UYI(1) applies the section 99A consequences by reference to the year of income in which the election 'is revoked'; and
- paragraph 102UYJ(1)(b) provides that the election remains in force until the end of the year of income in which the trustee decides to revoke it.

The EM is also inconsistent. Paragraph 3.10 states that the trustee must pay tax at the top marginal rate on the trust's net income in the year in which the election is revoked. Paragraphs 3.76 and 3.77 state that the revocation applies from the following income year, and that the consequences of revocation apply in that following year. On one reading, section 99A could apply to the year in which the election is still in force. On another, it could apply to the following year.

Recommendation 30

Amend section 102UYG so that a voluntary revocation takes effect from the start of the income year after the year in which the trustee decides to revoke, consistent with paragraph 102UYJ(1)(b) and EM paragraphs 3.76 and 3.77, and amend section 102UYI so that section 99A does not apply to a voluntary revocation.

Application of section 99A on revocation

Where an EET election is revoked, other than on the trust being wound up or vesting, beneficiaries are taken never to have been presently entitled for that year and all of the trust's net income is assessed to the trustee under section 99A (proposed section 102UYI). This applies to voluntary revocation as well as automatic revocation. The Commissioner's discretion in section 102UYH does not extend to voluntary revocation, or to automatic revocation on events affecting a nominated company (proposed paragraphs 102UYG(2)(e) and (f)).

Given how strict the EET rules are, we do not consider this reasonable. A trustee may decide in good faith, some years after making the election, that remaining an EET is no longer viable. In that case, the election should remain in force for the year in which the trustee decides to revoke it, and the trust should become a minimum tax trust from the following year. Section 99A should not apply to the trust's net income for either year.

Example

Family Trust L made an EET election nominating two adult children, each entitled to 50 per cent of the trust's income and capital. Several years later, one child moves overseas, and the family decides the nomination no longer suits its circumstances. The trustee voluntarily revokes the election. The trustee is assessed on the trust's entire net income for that year at the top marginal rate plus the Medicare levy under section 99A, rather than the trust simply becoming a minimum tax trust.

Recommendation 31

- Amend the Bill so that a voluntary revocation results in the trust becoming a minimum tax trust from the following income year, without section 99A applying.
- Extend the Commissioner's discretion in section 102UYH to automatic revocations under paragraphs 102UYG(2)(e) and (f).

Limits on election timing and the Commissioner's discretion

Notice of an EET election must be given by the earlier of the due date and the lodgment date for that year's return (proposed subsection 102UYC(6)). Unlike the roll-over choice (proposed paragraph 126-910(1)(c)), there is no power for the Commissioner to allow further time. A trustee that misses this date, for example because of illness, a death in the family or administrative oversight, loses access to the regime permanently.

Similarly, the application for the Commissioner's discretion must be made by the date the trustee must notify the revocation event (proposed paragraph 102UYH(1)(a)). That may be shortly after the trustee discovers the error, and the Commissioner has no power to accept a late application.

Recommendation 32

- Amend subsection 102UYC(6) to add the words 'or within such further time as the Commissioner allows', consistent with paragraph 126-910(1)(c).
- Allow an application under section 102UYH to be made within 60 days after the trustee becomes aware, or could reasonably be expected to have become aware, of the event, or within such further time as the Commissioner allows.
- The ATO should publish guidance on how the discretion in section 102UYH will be exercised before the first election year.

New features of the electable regime

The Bill introduces several features that were not in the exposure draft:

- a trustee may nominate an 'eligible class of beneficiary' made up of DGRs or registered charities (proposed section 102UYA and subsections 102UYE(4) and (7));
- amounts for such a class must be paid or applied before the end of the following year (proposed paragraph 102UYE(5)(b));
- where the election is automatically revoked because of a payment failure, it ceases to be in force earlier than for other revocations (proposed paragraphs 102UYJ(1)(c) and (d)). For example, if the revocation happens in the 2032-33 income year, a payment failure ends the election at the end of 2030-31, while any other automatic revocation ends it at the end of 2031-32;
- section 95A is extended to capital (proposed paragraph 102UYE(1)(b)); and
- the obligations in subsections 102UYE(3) to (7) apply where the trustee 'decides' the election is to be in force for a year (proposed subsection 102UYE(2)).

We welcome the ability to nominate charities and DGRs. However, the interaction between the payment timing rule and the backdated revocation in paragraph 102UYJ(1)(c) needs clarification. It is also unclear whether subsection 102UYE(2) allows a trustee to treat an election as not in force for a particular year without revoking it, and what the consequence would be.

Recommendation 33

The EM should explain, with worked examples, how the eligible class of beneficiary rules, the payment timing rule, and the revocation end dates in subsection 102UYJ(1) operate, and confirm the effect of subsection 102UYE(2).

Legal effect of the nomination

Proposed subsection 102UYE(3) provides that each nominated beneficiary 'must become presently entitled, or specifically entitled', in accordance with the nomination. As noted in our [September 2026 submission](#), this language of obligation invites uncertainty about whether the election or nomination changes beneficiaries' equitable interests, which may be relevant for state and territory duty purposes. We welcome the statement in paragraph 3.23 of the EM that the election and nomination do not change the trust or trustee powers and do not require a resettlement. However, the Bill does not reflect this; it does not address CGT events E1 and E2, and it does not bind state and territory revenue authorities.

Recommendation 34

- Confirm in the Bill, rather than only in the EM, that making an EET election and complying with an EET nomination:
 - do not change the equitable interests of beneficiaries or the interests of takers in default;
 - are not an exercise of a power of variation, resettlement or appointment under the trust deed; and
 - do not result in a resettlement of the trust, or give rise to CGT event E1 or E2.
- Redraft subsection 102UYE(3) to state directly that a departure from the nomination results in automatic revocation under paragraph 102UYG(2)(b), rather than framing it as an obligation on the trustee.
- The ATO should publish guidance on what a trustee resolution must achieve to give effect to an EET nomination, so that well-intentioned drafting does not inadvertently change beneficiaries' interests.

Notification of automatic revocation

Where an automatic revocation event happens, the trustee must notify the Commissioner by the return date for that year. The note to subsection 102UYG(4) states that failure to do so may be an offence against subsection 8C(1) of the TAA. As with the roll-over, there is no knowledge requirement. A trustee may not know that an event has occurred, for example where a share in a nominated company is transferred to another person without the trustee's involvement (which itself causes automatic revocation under paragraph 102UYG(2)(f)).

Recommendation 35

Amend subsection 102UYG(4) so that the obligation to notify arises only when the trustee becomes aware, or ought reasonably to have become aware, of the event.

No variation for new family members

An EET nomination can only be varied on the death of a nominated beneficiary or a relationship breakdown (proposed section 102UYF). A beneficiary must also have been capable of benefiting under the trust on 1 July 2028 (proposed paragraph 102UYC(3)(a)). A child or grandchild born after that date can never be added to the nomination, even where the trust deed already allows them to benefit.

The 1 July 2028 date serves to confine the election to trusts already in existence. That purpose does not require the class of beneficiaries to be frozen. Allowing the nomination to reflect the ordinary growth of the family the trust already serves does not expand the population of trusts that can access the regime.

Recommendation 36

- Allow an EET nomination to be varied on the birth or adoption of a child or grandchild, or the marriage or new de facto relationship of a of a nominated beneficiary, where the trust deed already allows that person to benefit.
- Allow the eligible beneficiary pool to be updated after 1 July 2028 for those categories of beneficiary.

Interaction with family trust elections and family trust distribution tax

Many trusts that will consider an EET election have also made a family trust election (FTE). Apart from the overlap discussed below, the Bill does not coordinate the two regimes. Paragraph 3.34 of the EM states only that a trustee 'should have regard to' any FTE or interposed entity election in force, and should consider whether nominated beneficiaries are members of the family group.

The two regimes can pull in opposite directions. Where a nominated beneficiary ceases to be a member of the family group, for example after a relationship breakdown involving another family member, distributing in line with the nomination may give rise to FTDT. Withholding the distribution to avoid FTDT would breach the nomination and cause automatic revocation of the EET election. Paragraph 3.102 of the EM deals with one overlap, by ensuring income on which FTDT has been paid is not also taxed under section 99A on revocation. However, it does not resolve the underlying conflict.

The interaction with the small business CGT concessions, which rely on an FTE to identify a significant individual (section 152-70 of the ITAA 1997), is not addressed either.

Worked example: the family trust election and excluded election trust issue

A family trust has made an FTE 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 relationship breakdown variation does not resolve this. It only allows the trustee to change the shares of the two individuals involved in the order, X and Y, or to remove one of them from the nomination (proposed subsections 102UYF(3) and (4)). It does not allow the shares of Y's siblings to be changed, because they are not parties to the order.

Recommendation 37

- Provide a variation ground, or a Commissioner's discretion, where complying with an EET nomination would give rise to FTDT.
- Confirm how an EET nomination interacts with section 152-70, so that a family trust that confines its nomination to family group members retains access to the small business CGT concessions.

Eligible companies

A company can only be nominated if there are no material discretionary elements capable of significantly affecting the rights or interests of its members (proposed section 102UYD). Subsection 102UYD(2) lists matters that suggest there are no such elements, and the Minister may add further matters by legislative instrument. It is still not clear what a company constitution must, or must not, contain for the company to qualify. As noted in our [September 2026 submission](#), many family companies use alphabet share structures for reasons unrelated to income splitting, such as managing control and succession.

Whether a company qualifies is tested on an ongoing basis. A nominated company may cease to qualify if, for example, it amends its constitution, issues a new class of shares, or exercises a power to issue, redeem or buy back shares in a way that significantly affects members' rights (see paragraphs 102UYD(2)(b) and (c)). If this happens, the election is automatically revoked (proposed subparagraph 102UYG(2)(e)(iv)), even where the change is made by the company without the trustee's involvement.

Recommendation 38

- Provide guidance, or publish a draft legislative instrument, on the company constitution features that will and will not prevent a company from qualifying.
- Confirm that alphabet shares do not of themselves amount to a material discretionary element, where the discretion is constrained in practice.

State and territory duties

We welcome the Government's statement that state and territory duties are not expected to be payable on making an EET election. We also welcome the announcements by the NSW, Victorian and WA Governments, discussed under Schedule 2 above. However, we note that these commitments are tied to re-election, the other states and territories have not confirmed their position, and in any case, state revenue authorities are not bound by the Government's statement or by the EM or Bill. Our recommendation for a coordinated national approach to duties is set out under Schedule 2.

Recommendation 39

Seek confirmation from the states and territories, or through the Council on Federal Financial Relations, that making an EET election and complying with a nomination will not of themselves be dutiable.

Other matters raised in our September 2026 submission

The following concerns raised in our September 2026 submission have not been addressed in the Bill:

- the election can still only be made in the first income year commencing on or after 1 July 2028 (proposed paragraph 102UYC(5)(c));
- a nomination still cannot be varied for insolvency of a beneficiary, or periodically re-confirmed (proposed section 102UYF) ;
- a variation on death must still be notified within the return period for the year of death (proposed paragraph 102UYF(2)(e))the relationship breakdown variation still requires both individuals to be nominated beneficiaries (proposed paragraph 102UYF(4)(a));
- transfers of shares in a nominated company within the family group still cause automatic revocation (proposed paragraph 102UYG(2)(f) and subsection 102UYG(3)), as does the winding up of a nominated company (proposed paragraph 102UYG(2)(e)); and
- a trustee must still decide to revoke before the end of an income year, separately from notifying the Commissioner (proposed paragraph 102UYG(1)(a)).

We note that the Bill has modified the requirement in the exposure draft that each nominee's share of capital equals their share of income. A nominee's share of 'non-income earnings' must now equal their share of income (proposed subparagraph 102UYC(2)(b)(ii)).

Non-income earnings are amounts included in the trust's assessable income that are not income of the trust, such as capital gains and franked distributions that are not trust income (proposed section 102UYA, EM paragraphs 3.21 and 3.22). A share of corpus must match only where a nominee becomes entitled to corpus for the year (proposed subsection 102UYE(6)).

This is an improvement. However, it does not fully resolve the concern in our September 2026 submission. Any distribution of corpus must still follow the income shares, and capital gains cannot be allocated differently from income. Many deeds provide for capital to pass to a different class of beneficiary from income.

Schedule 4—CGT adjustments

Loss of the main residence exemption for individuals overseas on 30 June 2027

The Bill extends the deemed sale and reacquisition rule in section 112-155 of the ITAA 1997 to individuals who are not Australian residents on 30 June 2027 but were residents at any time during their ownership period (Schedule 4, item 20, new paragraphs 112-155(1)(b) to (d)). This will affect outbound Australian expatriates who are foreign residents on 30 June 2027 and own a former main residence.

Under the current law, such a person who sells while a foreign resident is generally denied the main residence exemption. A person who returns to Australia and sells as a resident can still access it, if the other requirements are met. The Bill appears to remove the exemption on the entire pre-July 2027 gain for the second group, even though they return and sell as residents and would have otherwise qualified for the main residence exemption.

Why this happens

Subsection 112-155(2) treats the individual as having sold the asset just before 1 July 2027, for its market value or an amount worked out under the apportioning method, and reacquired it just after that sale. This applies for the purposes of Part 3-1, which includes Division 118. Subsections 118-110(3) and 118-185(3) deny the exemption if, 'at the time the CGT event happens', the individual is a foreign resident who does not satisfy the life events test. For the deemed sale, that time is 30 June 2027 (Note 1 to subsection 112-155(2)). The exemption therefore does not apply to the deferred gain, even though no actual sale occurs at that time.

The Bill fixes this timing problem for other exemptions. New subsections 112-160(7) to (9) test a 'deferral exemption' at the realisation event, and apply it to the deferred gain and the realisation gain together. Paragraph 4.128 of the EM explains that without this, 'the time at which the exemption criteria must be satisfied (at deemed sale or realisation event) may be uncertain'. Example 4.7 of the EM applies the Subdivision 152-B conditions at the realisation event. However, Subdivision 118-B is not included in the list of deferral exemptions in new subsection 112-152(2).

Paragraph 4.133 of the EM states that exemptions are included as deferral exemptions 'only where this is required to ensure they operate consistently with the policy intention of the deemed sale and reacquisition'. In our view, Subdivision 118-B meets that test. The deemed sale is a mechanism to fix a cost base for indexation. It is not intended to remove the main residence exemption from an individual who returns and sells as a resident. The list of deferral exemptions was revised between the exposure draft and the Bill, but Subdivision 118-B remains omitted. If the omission is deliberate, the EM should explain the rationale.

An asymmetric outcome

Testing residency on 30 June 2027 is appropriate for the CGT discount, which is apportioned by days of residency (EM paragraphs 4.169 to 4.171). The main residence rules for foreign residents operate differently. They are an all-or-nothing denial tested at the time of sale, aimed at individuals who dispose of the dwelling while a foreign resident. Testing that denial on 30 June 2027 means the outcome turns on the individual's residency on a single day. It produces outcomes that are inconsistent with the current law:

- an individual who becomes a foreign resident before 30 June 2027 and returns to sell as a resident loses the pre-July 2027 exemption, which is worse than the current law; and
- an individual who becomes a foreign resident after 30 June 2027 and sells while a foreign resident keeps the pre-July 2027 exemption, which is better than the current law.

The Bill also treats foreign residency differently depending on the outcome. Section 855-10 is a deferral exemption, so residency is tested at the actual sale, where that favours the taxpayer. Where foreign residency disadvantages the taxpayer under subsection 118-110(3), it is fixed at 30 June 2027. The outcome also appears to be inconsistent with new paragraphs 102-6(2)(e) and (4)(e), which seem to assume that Subdivision 118-B applies to the deferred gain on a day-count basis.

Example

An individual buys a home in 2018 for \$600,000 and lives in it. In 2023 they move overseas and rent it out. They return in 2030, move back in and sell in 2032 for \$1.2 million. Under the current law, the gain is fully exempt under the 6-year absence rule. Under the Bill, if the exemption is tested on 30 June 2027, the pre-July 2027 gain of around \$300,000 is assessable, less a pro-rated discount. This is around \$217,000 of additional assessable gain, arising solely from where the individual was on one day. This is the fact pattern of Example 4.8 of the EM, except that the property is the individual's main residence.

Related issues

It is unclear how the rules apply where spouses own a main residence as tenants in common, and only one becomes a foreign resident before 30 June 2027. New section 112-195 attributes another individual's residency status in limited cases, but only for section 112-155 and indexation, not Division 118.

It is also unclear how the rules interact for an individual who has returned to their main residence but has lost part of the exemption under section 118-145, for example because the property was rented for more than 6 years. Nothing in the Bill states that the absence period stops on 30 June 2027, but the deemed reacquisition may have that effect.

Recommendation 40

- Add Subdivision 118-B to the list of deferral exemptions in new subsection 112-152(2), so that the main residence exemption is applied once, at the realisation event, to the deferred gain and the realisation gain as a single gain, consistent with Example 4.7 of the EM.
- Alternatively, amend section 112-160 so that, for the purposes of subsections 118-110(3) and 118-185(3), the deemed CGT event is treated as happening on the day the realisation event happens.
- Confirm in the EM that:
 - the deemed sale and reacquisition do not start a new ownership period for the purposes of sections 118-110, 118-125, 118-145 and 118-185, so the 'main residence throughout' test, the 6-year absence limit and the partial exemption apply across the actual period of ownership;
 - for the partial exemption in section 118-185, the deferred gain is apportioned by days up to 30 June 2027 and the realisation gain by days from 1 July 2027, consistent with paragraphs 102-6(2)(e) and (4)(e); and
 - the deemed sale is a CGT event to which Subdivision 118-B applies.

- At a minimum, recommend that the EM confirm the issue is within the further tranche foreshadowed at paragraph 4.179 of the EM ('remaining aspects of the application of the CGT reforms to foreign, mixed and temporary residents'), and that it is resolved before 1 July 2027.

Loss ordering amendments limited to superannuation entities

As noted in the EM (paragraphs 4.99 and following), the Tax Reform No. 1 Act introduced a codified order for applying capital losses. Those changes were not intended to apply to complying superannuation funds, which remain entitled to a one-third CGT discount (EM paragraph 4.101). The Bill therefore allows complying superannuation entities, and trusts connected with them, to choose the capital gains against which their losses are applied (new section 102-35 of the ITAA 1997). It also gives complying superannuation entities an additional capital loss where they are entitled to a share of a capital gain of a trust (new section 295-500).

Life insurance companies

Both new provisions apply only to a 'complying superannuation entity'. That term is defined in subsection 995-1(1) of the ITAA 1997 to mean a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust. It does not include the complying superannuation class of a life insurance company.

Like superannuation funds, life insurance companies were not intended to be affected by the Tax Reform No. 1 Act. The EM to that Act states that the changes 'do not apply to capital gains made directly or indirectly by: ... companies, superannuation funds and life insurance companies', because 'these entities were not previously entitled to the CGT discount or have their own discrete CGT treatment' (paragraphs 1.25 and 1.26). The same unintended impact of the loss ordering rules therefore arises for the complying superannuation class of a life insurance company.

Individuals and other trusts

Individuals and other trusts do not get the same choice. They remain subject to the loss ordering rules, which apply losses first against deferred capital gains (EM paragraph 4.100). Deferred gains carry the CGT discount on the pre-July 2027 gain. Applying losses against them ahead of gains that are not eligible for the discount reduces the value of the discount the Government has chosen to retain. This is the same problem the EM identifies for superannuation entities.

Recommendation 41

- Extend new sections 102-35 and 295-500 to the complying superannuation class of a life insurance company.
- The Committee should seek an explanation from the Government as to why the choice in section 102-35 is not extended to individuals and other trusts, and consider extending it.

1 July 2027 valuations where the apportioning method is not available

New subsections 112-155(3A), 112-165(3A) and 112-175(3A) make the apportioning method unavailable for units, interests and shares whose cost base is adjusted under CGT events E4, E10 or G1 at any time from 1 July 2027 until the realisation event (Schedule 4, items 22, 23, 31, 32, 41 and 42). New subsections 112-165(3A) and 112-175(3A) also make the method unavailable for MITs and AMITs whose trustees must value trust assets under accounting standards (EM paragraphs 4.111 to 4.116).

The EM acknowledges that affected holders will need to determine the market value of these assets on 1 July 2027 (EM paragraph 4.113). This will be a significant compliance task for investors in unit trusts and companies that make returns of capital or non-assessable distributions. Many will not know on 1 July 2027 whether they need a valuation. The apportioning method is lost if a CGT event E4, E10 or G1 adjustment happens at any time before sale, which often depends on decisions of the trust or company (EM paragraph 4.111). Holders may then need a retrospective valuation years later which may be costly and unreliable.

Recommendation 42

The ATO should publish practical guidance, well before 1 July 2027, on obtaining 1 July 2027 market values for units, interests and shares that cannot use the apportioning method.

Recommendations from our 21 August 2026 submission

In our [August 2026 submission](#), we recommended a *de minimis* threshold so that the 30 per cent minimum tax on capital gains does not fall hardest on small-scale and first-time investors. We also asked whether a capital gain under CGT event K7 for a depreciating asset used in a residential rental property is a residential or non-residential gain for the purposes of section 102-6 of the ITAA 1997. Neither concern has been resolved in Schedule 4 or the EM.

Recommendation 43

Adopt a *de minimis* threshold for the minimum tax on capital gains and clarify the treatment of CGT event K7 gains.

Schedule 5—Negative gearing

Transition from the Ministerial determination power

Schedule 5 repeals the Ministerial powers in paragraph 26-155(2)(c) and section 26-160 of the ITAA 1997 and legislates the definitions instead (new sections 960-580 and 960-590, and the list in new paragraphs 26-155(2)(c) and (d), and subsection 26-155(3A)). We support this approach. Setting these definitions in the primary law gives taxpayers greater certainty than a legislative instrument.

However, the amendments apply from the 2027-28 income year (Schedule 5, item 9), while Schedule 5 commences on the first 1 January, 1 April, 1 July or 1 October after Royal Assent. If the Bill is delayed past 1 July 2027, it is not clear which definition applies in the meantime. Section 26-160 currently requires the Minister to determine requirements, so a gap would need an interim instrument. Taxpayers would then face one set of rules under the instrument, and another applied retrospectively once the Bill passes. It is also not clear whether the draft determination released in the Tranche 2 consultation will be withdrawn.

Recommendation 44

- Confirm whether the draft determination released in the Tranche 2 consultation will be withdrawn.
- Confirm which definition will apply if the Bill does not receive Royal Assent before 1 July 2027, and ensure taxpayers who rely on any interim instrument are not disadvantaged by the retrospective application of the new definitions.

Matters raised in our August 2026 submission

In our [August 2026 submission](#), we sought clarification of when a building is sufficiently condemned or derelict to be treated as though there is no residential dwelling on the land. The EM now explains that the general case extends to land with a building that is condemned or derelict, 'as those buildings are not fit for habitation' (EM paragraphs 5.28 to 5.30). We welcome this. However, whether a building is fit for habitation remains a matter of judgement, and the EM does not indicate what evidence will be accepted.

We also asked whether losses from balancing adjustment events for depreciating assets are subject to the quarantining rules in section 26-155 of the ITAA 1997. Neither Schedule 5 nor the EM addresses this.

Recommendation 45

- The ATO should publish guidance, before 1 July 2027, on when a building will be treated as condemned, derelict or not fit for habitation, including the evidence that will be accepted.
- Clarify whether losses from balancing adjustment events for depreciating assets are subject to the quarantining rules in section 26-155.

Schedule 6—Transitional relief for excess concessional contributions

Transitional relief for individuals who receive additional contributions

Schedule 6 acknowledges that the move from quarterly superannuation guarantee contributions to the Payday Super regime can cause employees to exceed their concessional contributions cap for the 2026-27 income year, through no fault of their own or their employer's. Contributions for the June 2026 quarter may be made in July 2026, in the same income year as the new, more frequent payday contributions (EM paragraphs 6.2 and 6.8).

We welcome the transitional relief, which applies automatically and does not require the taxpayer to apply for it, or show special circumstances (EM paragraph 6.14). However, it does not cover several adverse scenarios that may arise from the transition. In particular:

- **Relief is only granted for FY27** (proposed subsection 291-25(2) of the ITTP Act). When the Payday Super legislation was introduced, the market became aware of the potential ‘15-month problem’: superannuation contributions for a 15-month wages period could be received by funds within a single fiscal year. In some cases, employers attempted to mitigate the potential impact and changed their superannuation pay frequency in an effort to have all FY26 contributions received in FY26. For employees in these circumstances, they may have unintentionally breached their FY26 concessional contribution cap. To be prevented from obtaining relief when they and their employers have followed the legislation is an inequitable outcome, inconsistent with the purpose of the relief. There are two main reasons why employers may have changed their payment cycle, impacting employees’ FY26 concessional contribution caps, rather than their FY27 caps.

The transitional Payday Super provisions automatically first allocate any superannuation contribution received in the period 1-28 July 2026 to the June 2026 quarter. Almost every employer would have had a pay run under the Payday Super provisions that required a superannuation contribution to be able to be allocated before 28 July 2026. As such, almost every employer that was yet to make their June 2026 quarter payment (as they were permitted to do) would have had their July superannuation contribution allocated to their June 2026 quarter, creating an automatic superannuation guarantee charge liability for the July pay run. To avoid confusion between contributions for the June 2026 quarter and any pay run under the Payday Super regime, many employers proactively paid their June 2026 quarterly contributions before the end of FY26. As such, for employees of these businesses, concessional relief is required for FY26, not FY27.

The ATO [advised](#) employers that they did not need to wait until 1 July 2026 to start paying Payday super, and encouraged them to prepare early. For any employer that was in a position to adopt the new timing requirements early, they will have brought forward the ‘15-month problem’ into FY26. As such, employers that have tried to follow the ATO’s advice and been conscientious will not have any FY26 contributions flow into FY27; instead, their employees will need relief in FY26.

- **Salary sacrifice contributions are excluded** (proposed paragraph 291-25(3)(b) of the ITTP Act). Paragraph 6.24 of the EM states that salary sacrificed contributions should be excluded from relief because employees can adjust the timing and amount of sacrificed contributions. However, sacrificed contributions for the June 2026 quarter were set under arrangements made before the transition and before the draft transitional relief legislation as released. In the June 2026 quarter, employees did not know that salary sacrifice contributions would not be eligible for relief and sufficient notice was not given to employees to change arrangements that were already in place.

While employees have control over when contributions are sacrificed from their wages, they do not have control over when their employer remits those contributions. It would be reasonable for an employee to assume that amounts sacrificed from April, May, or June 2026 wages would be contributed to their funds in the same financial year that the salary sacrifice was made. However, the employer was under no obligation to do so and lawfully had until 28th July to pass the contributions along. Contributions that were salary sacrificed from wages paid in the June 2026 quarter should also be eligible for transitional relief in the same way as employer mandatory contributions.

Further, if salary sacrificed contributions are excluded from relief, employees will not have had access to their total concessional contribution caps for the impacted years.

- **Industrial instrument contributions must be made by 28 July 2026** (proposed subsection 291-25(4), definition of industrial instrument contribution). A contribution required by an industrial instrument for the June 2026 quarter but made after that date, for example because of a payroll delay, is not covered, even though it causes the same overlap.
- **Only contributions covered by the Payday Super transitional rules qualify** as June quarter superannuation guarantee contributions (proposed subsection 291-25(4)). Other mandatory employer contributions for the June 2026 quarter that are made in the 2026-27 income year, such as late contributions, appear to fall outside the relief.

Recommendation 46

- Extend the relief to contributions made in the 2025-26 income year.
- Extend the relief to sacrificed contributions.
- Extend the relief to all mandatory employer contributions relating to the June 2026 quarter that are made in the 2026-27 income year, rather than only those made by 28 July 2026.
- In addition, the ATO should confirm that it will treat the transition to Payday Super as a special circumstance under section 291-465 of the ITAA 1997, so that individuals who exceed their cap because of the transition but fall outside the relief can apply to have the contributions disregarded or allocated to another year..