Law Council
OF AUSTRALIA

22 September 2026

Minimum Tax on Discretionary Trusts Team
The Treasury
1 Langton Crescent
Parkes ACT 2600

By email: mintraxtrusts@treasury.gov.au

Dear Treasury

Minimum tax on discretionary trusts—exposure draft legislation

1. The Law Council of Australia welcomes the opportunity to respond to the Treasury's exposure draft legislation concerning the proposed minimum tax on discretionary trusts.

2. This letter focuses on input received from the Law Council's constituent bodies, namely the Law Institute of Victoria, the Law Society of New South Wales and the Queensland Law Society. The Law Council also **attaches**, for Treasury's consideration, separate comprehensive submissions that have been prepared by the Taxation Committee of the Law Council's Business Law Section and Law Council's National Elder Law and Succession Law Committee.

3. These separate submissions are reproduced in full (at **Attachments 1** and **2**) and address the exposure draft legislation in detail from each Committee's respective areas of expertise. Given the truncated timeframe provided for this consultation, it has not been possible for the Law Council to consolidate, and in some cases, reconcile all feedback into a single submission. Consequently, there may be some overlap and differing perspectives reflected in this letter and the attached submissions.

4. We strongly urge that consideration be given to the expert views expressed in the two attachments to this letter, as well as the covering letter itself. It is the concluding views of both the Business Law Section's Taxation Committee and National Elder Law and Succession Law Committee that the legislation is not yet ready for introduction, and more thorough consultation is required.

5. In this regard, we express our concern that the consultation period was too short having regard to the significance and technical complexity of the proposed reforms. The Law Council's Best Practice Legislative Checklist emphasises the importance of adequate consultation periods to support informed, meaningful and representative engagement on proposed legislation, particularly where reforms are complex,

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consequential and likely to affect a broad range of stakeholders.[1] A longer consultation period would have better enabled the Law Council to consolidate the extensive specialist input received, and provide Treasury with a single, fully integrated submission.

6. The Law Council acknowledges that the exposure draft legislation addresses some of the concerns raised in our previous submissions in response to Treasury's Consultation Paper on this topic in July and August 2026,[2] in particular, through a revised fixed trusts definition,[3] the introduction of the electable regime,[4] and the refundability of excess franking credits.[5] However, significant technical concerns and potential unintended consequences remain. These matters reinforce the need for sufficient time to consult on the complete legislative package.

Summary of recommendations from Law Council constituent bodies

7. We make the following key recommendations, drawing on the input received from our constituent bodies, while noting that the attached submissions contain additional recommendations:

- core liability and eligibility concepts that directly affect tax liability should be included in the primary legislation, rather than left substantially to ministerial instruments;
- the concept of "material discretionary elements" should be defined with greater precision, supported by objective statutory criteria and worked examples;
- consideration should be given to whether roll-over relief should be expanded to permit transfers to multiple eligible transferees and appropriate partial restructures, subject to continuity and integrity requirements;
- continuity requirements for trusts that are not family trusts should be included in the primary legislation, or at least governed by statutory principles supported by a Commissioner's discretion;
- consideration should be given to whether the electable regime should include more proportionate consequences for inadvertent or minor departures from an election nomination, and greater flexibility to accommodate significant family circumstances;
- consideration should be given to a non-refundable offset for corporate beneficiaries to avoid effective double taxation outside the Government's policy concern;
- the interaction between the minimum tax, Division 7A, Subdivision EA, section 100A and any legislative response to *Commissioner of Taxation v Bendel* (***Bendel***)[6] should be clearly addressed before commencement;
- consideration should be given to providing an express statutory exclusion—or confirmation of their exclusion in the explanatory materials—for legal profession

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1 Law Council of Australia, Best Practice Legislative Development Checklist (21 July 2025).
2 Law Council of Australia, Minimum tax on discretionary trusts (Submission, 31 July 2026); Law Council of Australia, Supplementary Submission: Minimum tax on discretionary trusts (Submission, 4 August 2026).
3 Minimum Tax Bill, Schedule 1, item 13, substituting proposed section 272-65 of Schedule 2F to the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**).
4 Electable Regime Bill, Schedule 1, item 2, inserting proposed Division 6F of Part III of the ITAA 1936.
5 Minimum Tax Bill, Schedule 1, items 15–18, amending Division 67 and Subdivision 207-B of the ITAA 1997.
6 [2026] HCA 18.

trust accounts, controlled money accounts and comparable regulated custodial arrangements;
- aspects of the testamentary trust exclusion should be clarified, including its application to mixed beneficiary classes and to replacement assets, reinvested proceeds and other derived property;
- clarification should be provided on whether arrangements have been, or will be, made with the States and Territories to provide relief from duty that may otherwise arise where trusts restructure to comply with the federal tax framework;
- Treasury or State and Territory revenue authorities should provide further guidance on the duty consequences, if any, of making an election under the electable regime;
- Treasury should clarify the application of the proposed charity, deductible gift recipient and exempt entity beneficiary exclusions to social enterprises operated through trust structures, including any treatment of income retained as working capital of reinvested in the enterprise; and
- unresolved technical issues should be addressed, and the complete legislative package consulted upon, before taxpayers are required to make decisions with long-term succession, governance and commercial consequences.

These recommendations are discussed in turn below.

Reliance on ministerial instruments

8. We are concerned that the Bills place considerable reliance on ministerial instruments to determine matters that are central to the operation of the proposed regime. These include, among other things, the types of trust estates that are not minimum tax trusts;[7] determining the conditions that must be met for beneficiary income not to be treated as minimum tax income;[8] matters relevant to determining whether there are no material discretionary elements affecting beneficiaries' entitlements or rights under a trust;[9] matters relevant to determining whether there are no material discretionary elements affecting members' rights or interests under the electable regime;[10] and continuity requirements for transactions involving trusts that are not family trusts.[11]

9. The input received suggests that core liability and eligibility concepts that directly affect a taxpayer's liability should be contained in the primary legislation. Leaving critical concepts to later ministerial determination may reduce parliamentary scrutiny, increase the prospect of later amendment, and create uncertainty for taxpayers making long-term succession and restructuring decisions.

Material discretionary elements and fixed trusts

10. We acknowledge that the revised fixed trust definition recognises that the existence of administrative, governance or amendment powers does not necessarily mean that

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7 See Minimum Tax Bill, proposed s 101AB.
8 Ibid, proposed s 101AE.
9 Ibid, proposed s 272-65.
10 See Electable Regime Bill, proposed s 102UYC.
11 See Roll-over Relief Bill, proposed s 126-440.

a trust contains material discretionary elements or permits discretionary allocation of income or capital.

11. However, the expression “material discretionary elements” performs a central function across the Bills and remains insufficiently precise. It may affect whether a trust is treated as fixed, whether a transferee structure is eligible for roll-over relief, whether a company is an eligible transferee, and whether the electable regime can operate. We believe that further clarification is needed as to how the concept of “material discretionary elements” applies to managed investment trusts, widely held trusts and other commercial trust structures, particularly where relevant powers are directed to ordinary administrative, governance, financing, investment or investor-protection purposes rather than discretionary allocation of income or capital.

12. This concept would benefit from clearer statutory boundaries. In particular, the legislation should distinguish between discretions directed to the allocation of income or capital, rights or powers included for ordinary governance, financing and investor-protection, and minor or remote discretionary powers that are unlikely to affect economic ownership of the relevant entity. Objective statutory criteria, supported by practical examples, would assist taxpayers and advisers to apply the rules with greater certainty.

Operation of the minimum tax and corporate beneficiaries

13. Under the exposure draft legislation, trustees of certain discretionary trusts would be liable to pay tax at a minimum rate of 30 per cent on minimum tax income, while beneficiaries would continue to be assessed under the ordinary trust taxation rules in Division 6 of the ITAA 1936. Beneficiaries who are eligible for the proposed offset may generally receive recognition for minimum tax paid by the trustee, although the offset would not be available to corporate beneficiaries.

14. We recognise that the exclusion of corporate beneficiaries from the offset is directed to preventing the use of companies to avoid the minimum tax. However, it may also affect arrangements established for legitimate commercial, asset-protection or succession-planning purposes. A corporate beneficiary may remain assessable without an offset for minimum tax paid by the trustee, with the result that the same income may effectively be taxed at both the trust and corporate levels.

15. It is suggested that Treasury consider whether a non-refundable offset for corporate beneficiaries could preserve the policy objective that relevant trust income bear tax at a minimum rate of 30 per cent, while avoiding effective double taxation in arrangements outside the Government’s policy concern. Further guidance is also sought on practical issues such as trustee liquidity where income has already been distributed, and the consequences of amended assessments that alter beneficiary entitlements after distributions have been made.

Roll-over relief

16. We support the inclusion of transitional roll-over relief as a necessary complement to the proposed minimum tax regime. However, we are concerned that the requirement that all relevant assets of a discretionary trust be transferred to the same single

transferee is unduly restrictive and may produce commercially inappropriate outcomes.

17. A discretionary trust may hold an active business, real property, passive investments and assets carrying materially different commercial risks. It may be appropriate, for asset-protection, financing, succession or governance reasons, to transfer those assets to different companies, fixed trusts or other eligible entities. The input received suggests that roll-over relief should be capable of applying to transfers to more than one eligible transferee, and to partial restructures involving a distinct business, investment activity or economic undertaking, where relevant continuity and integrity requirements are satisfied.

18. We are concerned that continuity requirements for trusts that are not family trusts are to be prescribed by ministerial instrument. Those requirements are central to the availability of the roll-over and should be included in the primary legislation. It is suggested that if a single statutory test cannot accommodate the range of relevant structures, the legislation could prescribe governing principles and provide a Commissioner's discretion for cases in which substantial continuity of economic ownership can be demonstrated.

19. It has further been raised that the four-year integrity rule in the Roll-over Relief Bill—particularly proposed subsection 126-430(5) of the *Income Tax (Transitional Provisions) Act 1997* (Cth)—may create uncertainty for transferees undertaking bona fide commercial transactions after a restructure. Capital raisings, the admission of new investors, management equity arrangements, private equity investment and succession transactions may require changes to rights or interests. The input received suggests that the integrity rule should be directed to arrangements that have a purpose or effect of recreating materially discretionary income or capital outcomes, and should include an exception for bona fide commercial transactions not entered into for that purpose.

20. Finally, concerns have been raised that it remains unclear whether arrangements have been, or will be, made with the States and Territories to provide relief from duty that may otherwise arise where trusts restructure to comply with the federal tax framework. Clarification of this issue before commencement would assist taxpayers in assessing whether restructuring is a practical option.

Excluded election trust regime

21. We welcome the policy intent of the excluded election trust regime, which may provide a viable and less costly alternative to a legal restructure where transfer duty, financing, contractual or asset-transfer constraints make restructuring costly or impractical. However, the regime may not suit trusts that require ongoing flexibility or cannot meet fixed entitlement requirements. The legislation should also avoid describing the regime as converting the trust into a fixed trust for all taxation purposes unless that is the intended legislative effect.

22. There is uncertainty about the State and Territory duty consequences of making an election under the electable regime. Although Treasury has indicated that the election is intended to operate without a restructure, further guidance from State and

Territory revenue authorities would assist taxpayers in assessing whether the electable regime is a practical alternative.

23. Further, we are concerned that the proposed rules for varying an election nomination are too narrow. The legislation could provide a controlled mechanism to vary a nomination following significant and objectively verifiable changes in family circumstances, including birth, adoption, death, incapacity and relationship breakdown, together with such other circumstances as the Commissioner considers appropriate. Treasury may also wish to consider whether variations should be available where a beneficiary's tax residency changes, or where continued adherence to a nomination would materially prejudice access to disability or other means-tested support.

24. Any variation mechanism could operate prospectively and be subject to continuity requirements and an anti-avoidance test, so that it facilitates genuine succession and family administration rather than annual tax-driven reallocations.

Consequences of non-compliance with an election

25. We are concerned that the consequences of a trustee failing to confer present entitlements in accordance with an election nomination are too severe. In particular, proposed subsection 102UYF(2) of the ITAA 1936 appears to provide for automatic revocation of an election in those circumstances, with proposed section 102UYG then potentially resulting in trustee liability on the trust's entire net income for the relevant income year. That consequence may be disproportionate where the departure is minor, inadvertent or capable of correction.

26. The input received suggests that the Bill include safe harbours, exceptions for minimal or non-consequential errors, and a Commissioner's discretion similar to section 109RB of the ITAA 1936. Such a discretion could permit the Commissioner to disregard or excuse a departure where the trustee acted honestly and the departure resulted from an inadvertent error, administrative oversight or circumstances outside the trustee's control. The legislation could also allow a trustee to correct a minor departure within a prescribed period, including by adjusting entitlements or making compensating payments, where doing so does not confer an unintended tax advantage.

Interaction with Bendel, Division 7A, Subdivision EA and section 100A

27. We note that the interaction between the proposed minimum tax and the Government's response to the decision in *Bendel* remains unresolved. The input suggests that the minimum tax regime should be considered together with any proposed response to *Bendel* and the existing operation of Division 7A, including Subdivision EA, and section 100A of the ITAA 1936.

28. Without coordinated drafting, the same underlying trust income may engage several overlapping liability and integrity regimes, with potentially cumulative or anomalous consequences. The legislation should clearly address whether and how the minimum tax applies where trust income is appointed to a corporate beneficiary; the treatment of unpaid or retained amounts to which a beneficiary is presently entitled; the interaction between trustee-level minimum tax, beneficiary assessment and any

Division 7A deemed dividend; the treatment of credits or offsets where more than one regime applies to the same economic income; and whether compliance with the minimum tax regime has any effect on the application of section 100A of the ITAA 1936.

29. The input received suggests that the minimum tax regime should not commence until exposure draft legislation addressing these interactions has been released, consulted upon and capable of being considered as part of the same legislative package.

Legal profession trust accounts and regulated custodial arrangements

30. In the absence of express clarification, the proposed framework could create uncertainty for trust accounts maintained under the Legal Profession Uniform Law, controlled money accounts and comparable regulated professional custodial arrangements. These accounts are closely regulated, are not established for income-splitting or tax-planning purposes, and generally do not permit discretionary allocation of income or capital.

31. For certainty, we recommend an express statutory exclusion for such accounts. Alternatively, the explanatory materials could confirm that these accounts fall outside the minimum tax regime, and include examples addressing unidentified, contingent and disputed entitlements.

Charitable, testamentary and exempt entity arrangements

32. We generally welcome the express exclusions for charitable trusts, distributions to registered charities and deductible gift recipients, deceased estates and genuine testamentary arrangements. However, we suggest that aspects of the testamentary trust exclusion require clarification. In particular, clarification is sought as to how the exclusion applies to trusts with both individual or exempt beneficiaries and non-exempt beneficiaries, including whether the minimum tax applies only to income distributed to non-exempt entities. Further clarification is also sought as to whether the exclusion extends to replacement assets, reinvested proceeds and other property derived from property originally held by the testamentary trust.

33. In addition, there is a specific question about social enterprises conducted through trust structures where the beneficiary is a charity, deductible gift recipient, not-for-profit or other income tax-exempt entity. Such structures may be adopted because of the income tax-exempt status of the beneficiary, even where the social enterprise itself operates as a profit-making activity.

34. We seek Treasury's clarification about whether the proposed minimum tax may have any flow-on effect for a charity, deductible gift recipient, not-for-profit or exempt entity beneficiary in these circumstances, including whether the arrangement would continue to achieve the tax-neutral treatment that would otherwise be expected where income is applied for charitable or not-for-profit purposes.

35. It would also be helpful for Treasury to clarify how income retained by the trust as working capital, or reinvested into the social enterprise, would be treated. Relatedly, any conditions determined by ministerial instrument in relation to the registered charity, deductible gift recipient or exempt entity beneficiary exclusions should

expressly take account of social enterprises established through trust arrangements, including whether any cap or methodology for determining a cap could adversely affect legitimate charitable or not-for-profit activities.

Administration, commencement and further consultation

36. We note the omission from the current exposure draft package of the director liability, PAYG instalment and statutory reimbursement measures that were canvassed in the Consultation Paper. The Law Council would welcome the opportunity to review and comment on any future administrative and integrity arrangements before they are finalised.

37. The proposed commencement and transitional timeframes make it especially important that the legislative framework and supporting guidance are settled well in advance of commencement. Taxpayers and advisers will need adequate time to assess whether to retain existing arrangements, restructure, or make an election under the electable regime. The input received suggests that unresolved technical issues should be addressed, and the complete legislative package consulted upon, before taxpayers are required to make decisions with long-term succession, governance and commercial consequences.

Contact

38. The Law Council appreciates Treasury's consideration of the points raised in this letter, including the attached submissions by the Law Council's Tax Committee of its Business Law Section and the National Elder Law and Succession Law Committee, which raise important matters in their own right. We would also welcome further engagement as the legislation continues to develop.

39. If you have any questions or if you would like to arrange a meeting, please contact Janina Richert, Senior Policy Lawyer [redacted] in the first instance.

Yours sincerely



Elizabeth Shearer
President-Elect

Attachment 1: Submission by the Taxation Law Committee of the Law Council of Australia's Business Law Section

This submission is by the Law Council's Taxation Committee of its Business Law Section. Due to the restrictive timeframe for responses, this input is provided to the Treasury in full and should be attributed to the Taxation Committee.

Executive summary

1. The Taxation Committee of the Law Council's Business Law Section (**Taxation Committee**) acknowledges that the exposure draft legislation addresses some of the concerns raised in the July 2026 Submission and by other stakeholders. In particular, the introduction of the electable regime and the revised fixed trust definition represent attempts to ameliorate the breadth of the proposed measure. However, significant problems remain, and the Taxation Committee considers that the legislation requires further amendment before it is introduced into Parliament.

2. The principal concerns addressed in this submission are as follows:

   (a) The failure to adopt a separate definition of "discretionary trust" remains a fundamental problem. The legislation continues to rely on the binary fixed/non-fixed trust distinction to determine scope, with the result that many trusts bearing no resemblance to an ordinary discretionary family trust are caught by the regime.

   (b) The new definition of "fixed trust" in proposed section 272-65 of Schedule 2F is overly complicated and uncertain. While the intention to broaden the definition is welcome, the concepts of "significantly vary", "significantly affect" and "material discretionary elements" are vague and provide insufficient certainty for trustees and their advisers.

   (c) Employee share trusts should be expressly excluded from the regime, not merely "generally" expected to satisfy the fixed trust definition. The administrative, warehousing, forfeiture, vesting and allocation features of these trusts mean they may fail the fixed trust test despite bearing no resemblance to a discretionary family trust.

   (d) The testamentary trust exclusion in proposed section 101AD remains too narrow. It does not adequately recognise the full range of trusts created under a will, the focus on assets held at death is unduly restrictive, and the requirements for post-1 July 2028 testamentary trusts are problematic.

   (e) The concessions for testamentary trusts fail to recognise that many such trusts are created under wills that have been in place for many years and, in some instances, cannot be modified because the testator has lost capacity. A trust that is yet to settle therefore cannot be modified to fall within the exemption. A general exemption should be provided for trusts created under wills executed before the announcement.

(f) The effective prohibition on distributions to corporate beneficiaries is excessive and disproportionate. The blanket denial of the tax offset to corporate beneficiaries produces double taxation or an effective rate materially exceeding 30 per cent, potentially approaching 60–70 per cent. A non-refundable class of credit should be adopted.

(g) The electable regime is welcome but does not solve as many problems as anticipated. Access depends on trustees forming a view about their powers under the trust deed; the nomination requirements are rigid; automatic revocation consequences are severe; and the eligible company requirements will exclude many private companies. We believe these should be modified by:

(i) Removing the penal provisions in the year of conversion if an elected trust moves out of the exemption back to a taxed trust.

(ii) Allowing greater flexibility if a nominee dies. The requirement that the new beneficiaries be beneficiaries under the will of the deceased is too narrow. At a minimum, it should permit the nomination of any member of the testator's family group.

(h) The family law breakdown and variation provisions for EET nominations are inadequate. They do not address loss of capacity, bankruptcy, non-residency, birth of children, changes in family circumstances, or genuine administrative errors.

3. The Taxation Committee continues to support appropriately designed measures to address the diversion of income through discretionary trusts to lower-rate beneficiaries. However, the legislation must be directed squarely at the identified mischief and should not impose a minimum tax on ordinary commercial, succession, employee equity, managed investment, estate planning and small business arrangements merely because a trust does not satisfy the technical definition of a fixed trust.

Introduction

4. On 31 July 2026 the Law Council of Australia lodged a detailed submission (**July 2026 Submission**) with Treasury responding to its consultation paper, *Minimum tax on discretionary trusts*. That submission identified a range of fundamental concerns about the design and scope of the proposed 30 per cent minimum tax on discretionary trusts.

5. Treasury subsequently released exposure draft legislation comprising four bills: the *Treasury Laws Amendment (Tax Reform No. 4) Bill 2026* (the **Main Bill**), the *Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026* (the **Imposition Bill**), provisions establishing an electable regime for excluded election trusts, and provisions for transitional roll-over relief. This submission responds to those exposure drafts.

6. The Taxation Committee acknowledges that the exposure draft legislation addresses some concerns raised in the July 2026 Submission and by other stakeholders. In particular, the introduction of the electable regime and the attempt to broaden the

fixed trust definition are welcome developments. However, significant problems remain.

7. This submission should be read together with the July 2026 Submission. Where a matter was addressed in that submission and remains unresolved in the exposure drafts, the Law Council continues to press its earlier recommendations. This submission from the Taxation Committee concentrates on issues arising from the specific legislative provisions now available for review.

8. The Taxation Committee's concerns about the exposure draft legislation are not confined to matters of policy. They extend to the quality of the legislation as enacted law. The Review of Business Taxation (the *Ralph Report*, 1999), the *Australia's Future Tax System* review (the *Henry Review*, 2010), and Treasury's own *Tax Design Framework* all identify simplicity, certainty and minimisation of compliance costs as fundamental requirements of sound tax legislation. The Ralph Report recommended that 'the tax law should be clear and certain, so that taxpayers can understand and apply it without the need for excessive professional advice' (*A Tax System Redesigned*, Recommendation 1.1). The Henry Review recommended that reform should 'support a simpler, more understandable and more certain tax system'. These are not aspirational statements; they are the accepted criteria by which Commonwealth tax legislation should be judged. As the sections that follow demonstrate, the exposure draft legislation does not meet these criteria, and the deficiencies go to the basis on which the legislation should be enacted.

The failure to adopt a separate definition of 'discretionary trust' remains a fundamental problem

9. In the July 2026 Submission, the Law Council recommended that Treasury develop a purpose-built statutory definition of a discretionary trust, rather than relying on the binary distinction between fixed and non-fixed trusts to determine the scope of the regime (July 2026 Submission, paragraphs 20–23). The exposure draft legislation does not adopt that recommendation.

10. The proposed minimum tax trust definition in section 101AB of the exposure draft of the Bill continues to treat every trust that is not a fixed trust as falling within the scope of the minimum tax, subject only to limited exclusions for special disability trusts, deceased estates and complying superannuation entities. This approach captures a far broader range of trusts than the policy objective requires.

11. Many trusts that fail the fixed trust test bear no resemblance to an ordinary discretionary family trust used for income splitting. These include:

- employee share trusts, which hold shares for employees under a formal scheme and distribute based on scheme entitlements, not family relationships;
- managed funds and other pooled investment vehicles, which operate for investors on a commercial basis;
- trusts with contingent beneficiaries, where interests are contingent on the occurrence of specified events unrelated to any exercise of discretion;
- commercial pooling trusts and securitisation vehicles;
- protective trusts established for the benefit of vulnerable persons; and

- trusts where interests are defeasible only in limited or technical circumstances.

12. The common characteristic of these trusts is that they do not involve the exercise of broad family-directed discretion to allocate income among lower-rate beneficiaries. The trustee does not stand in the position of a controller directing income to family members in order to exploit marginal rate differentials. The regime should be directed at the identified mischief, being the use of a trust to divert income from a higher-rate taxpayer to lower-rate family beneficiaries, not at every trust that fails a technical definition developed for a different purpose.

13. The Taxation Committee reiterates the Law Council's recommendation that a purpose-built definition of discretionary trust should replace the current binary approach. Such a definition should focus on whether the trustee holds and exercises a genuine discretion to allocate income among a class of beneficiaries connected by family or personal relationships, rather than merely asking whether the trust fails the technical requirements for fixed trust status.

Recommendation

The legislation should adopt a purpose-built statutory definition of "discretionary trust" directed at trusts where the trustee holds and exercises a genuine discretion to allocate income among family or related beneficiaries, rather than treating every trust that is not a fixed trust as within scope.

The new definition of "fixed trust" is overly complicated and uncertain

14. The exposure draft introduces a new section 272-65 in Schedule 2F to the *Income Tax Assessment Act 1936* (**ITAA 1936**), replacing the existing definition of fixed trust. The new provision establishes a two-limb test:

    - **Limb (a):** beneficiaries have fixed entitlements to all of the income and capital of the trust; or
    - **Limb (b):** there are no material discretionary elements affecting beneficiaries' entitlements or rights.

15. The second limb is supplemented by a non-exhaustive list of matters that "may suggest" there are no material discretionary elements. These include that beneficiaries have clearly defined and enforceable entitlements, that powers held by the trustee or other persons cannot significantly vary existing entitlements, and that the power to vary the trust instrument requires the consent of all beneficiaries.

16. The Taxation Committee acknowledges that the intention behind the revised definition is to broaden the concept of a fixed trust beyond the narrow technical requirements of vested and indefeasible interests. That intention is welcome and reflects concerns raised in the July 2026 Submission and by other stakeholders. However, the execution introduces unacceptable levels of uncertainty.

17. The concepts of "significantly vary", "significantly affect" and "material discretionary elements" are inherently vague. They require qualitative judgements about the degree to which a power might affect entitlements, without providing a clear threshold against which trustees and their advisers can measure their position. Whether a power can "significantly vary" an entitlement will depend on context, the nature of the power, the likelihood of its exercise and the potential consequences. These are all matters on which reasonable minds may differ.

18. The non-exhaustive nature of the list compounds the problem. Because the listed matters only "may suggest" that the test is satisfied, there is no safe harbour. A trust that satisfies each listed criterion may still fail the test if there exists some other, unlisted discretionary element that a court or the Commissioner considers material. Conversely, it appears that a trust may satisfy the test even if it does not meet all listed criteria, provided there are no material discretionary elements overall. This creates a highly fact-dependent inquiry that is ill-suited to a threshold compliance test with significant tax consequences.

19. The delegation to legislative instruments to determine further matters that may or may not constitute material discretionary elements adds an additional layer of ongoing uncertainty. The scope of the definition will be capable of alteration without primary legislation, leaving trustees unable to determine with confidence whether their trust qualifies as fixed at any given point in time.

20. The definition is too complicated and uncertain to provide real comfort to trustees and their advisers, many of whom will be unable to obtain or afford a definitive opinion on whether a trust satisfies the requirements. This is not merely a policy complaint; it is a deficiency in the quality of the legislation as enacted law. The Ralph Report's requirement that 'the tax law should be clear and certain, so that taxpayers can understand and apply it without the need for excessive professional advice' is directly engaged. A threshold compliance test that determines whether a 30 per cent minimum tax applies should not turn on qualitative judgements about which reasonable minds may differ. The Taxation Committee recommends that the definition be simplified, with clearer thresholds and a more prescriptive approach to the circumstances that qualify a trust as fixed.

The breadth of delegated legislative power is inconsistent with certainty

21. The proposed power to alter the operation of the regime by legislative determination is particularly concerning. A trust might initially be regarded as outside the regime, only to be brought within it by a later Ministerial determination that changes the scope of the rules or the income brought within the regime.

22. Taxpayers require stable statutory boundaries when they structure their affairs and assess the tax consequences of a trust. They should not be exposed to retrospective practical disruption because the executive later changes the scope of the regime, even if the determination is expressed to operate prospectively.

23. That risk is inconsistent with sound tax administration and the ordinary expectation that tax liabilities should be ascertainable from the legislation. The delegated power

should therefore be constrained and should not permit a later determination to unsettle arrangements entered into in reliance on the law.

24. The delegated legislative power should be constrained. Any determination should operate prospectively only, and a trust that has structured its affairs in reliance on the law should not be retrospectively brought within the regime by a later determination.

Recommendation

The new fixed trust definition in proposed section 272-65 should be simplified to provide greater certainty. The concepts of "significantly vary", "significantly affect" and "material discretionary elements" should be given clearer statutory content. The listed matters should constitute a safe harbour rather than merely indicative factors. Reliance on legislative instruments to determine the scope of the definition should be minimised.

The ambiguity about the exclusion of non-conventional trusts is concerning

25. The explanatory materials identify a number of categories of trust that are said to be excluded from the regime 'due to the operation of the law' (Explanatory Memorandum to the Treasury Laws Amendment (Tax Reform No. 4) Bill 2026, paragraph 1.22). The Taxation Committee does not accept the breadth of that statement. Whether a trust is excluded 'by operation of law' depends on whether it satisfies the new fixed trust definition. As this submission has explained, that definition is insufficiently certain to provide a reliable answer for many of the categories the explanatory materials identify. A trust is not excluded by operation of law merely because the Government expects or intends it to be; it is excluded only if it in fact satisfies the statutory requirements. The language of the explanatory materials itself demonstrates that there is doubt about whether these categories of trust will satisfy the definition.

26. The explanatory materials describe these exclusions in consistently qualified terms. Widely held trusts, managed investment trusts (**MIT**s) and attribution managed investment trusts (**AMIT**s) 'would generally be expected to meet' the fixed trust definition. Corporate Collective Investment Vehicles (**CCIV**s) and CCIV sub-funds 'are intended to be excluded'. Bare trusts, including solicitor and accountant trust accounts, 'are expected to come within' the new definition. Employee share trusts and worker entitlement funds 'would generally meet' the definition. Every one of these formulations is hedged: 'would generally be expected to meet', 'are intended to be excluded', 'are expected to come within' and 'would generally meet' are statements of expectation, intention and probability, not statements of legal effect.

27. The concern about the reliability of these statements is underscored by the example of AMITS) The explanatory materials include AMITs in the list of trusts that 'would generally be expected to meet the definition of fixed trust'. But AMITs are already deemed to be fixed trusts by section 276-55 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**). The Bill itself acknowledges this: the note to item 19 of Schedule 1 to the Main Bill, which inserts the new definition of 'fixed trust' into

subsection 995-1(1) of the ITAA 1997, expressly states 'AMITs are treated as fixed trusts (see section 276-55)'. AMITs are not trusts that 'would generally be expected to meet' the fixed trust definition; they are trusts that the existing law already deems to be fixed trusts. The use of hedged, qualified language to describe entities that already have an existing statutory deeming provision demonstrates that the explanatory materials cannot be relied upon as an accurate guide to the scope of the exclusion. If the explanatory materials describe the position inaccurately for AMITs (where the answer is settled by an express statutory deeming), there is no reason for confidence that the qualified language used for other categories of trust, which do not have the benefit of a deeming provision, reflects a correct assessment of their position under the new definition.

28. Employee share trusts illustrate the problem clearly. The explanatory materials state that employee share trusts 'would generally meet the definition of fixed trust, since distribution to beneficiaries is based on rules and entitlements under the scheme, rather than an absolute discretion of the trustee' (paragraph 1.22). But as explained in detail below, many employee share trusts have warehousing, forfeiture, vesting, allocation and amendment features that may constitute 'material discretionary elements' under the new definition. The assertion that they will 'generally' qualify is not an acceptable statutory standard. If the Government accepts that employee share trusts should not be within the regime, the legislation should say so expressly, and should not leave the question to depend on a trust-by-trust analysis against an uncertain definition.

29. If the Government accepts that a category of trust should not be within the regime, but the legislation does not clearly exclude it, and the explanatory materials can do no better than say it will 'generally' or 'expectedly' be outside the regime, then the legislation has not achieved its stated objective. That gap between policy intention and legislative execution is precisely where disputes arise, compliance costs accumulate and taxpayer confidence is lost. Each of the categories identified in the explanatory materials involves trusts that are used in ordinary commercial, regulatory or professional settings and that raise no income splitting concern. The fact that the legislation cannot unequivocally exclude them is itself evidence that the fixed trust definition is insufficiently precise for the purpose it is now required to serve.

Employee share trusts should be expressly excluded

30. The explanatory materials to the exposure draft state that employee share trusts "would generally meet the definition of fixed trust" because distributions are based on rules and entitlements under the scheme rather than absolute trustee discretion (Explanatory Memorandum, paragraph 1.22). The Taxation Committee considers this assurance inadequate.

31. Employee share trusts have a range of administrative, warehousing, forfeiture, vesting and allocation features that may mean beneficiaries do not have vested and indefeasible interests at any given time. Common features include:

    - shares held in warehouse pending satisfaction of vesting conditions;
    - forfeiture provisions that operate on cessation of employment, whether through resignation, termination or redundancy;

- allocation mechanisms that are determined by employer-set criteria, performance hurdles or trustee administrative decisions;
- trustee discretions relating to the timing and manner of distribution;
- provisions for dealing with fractional entitlements, tax withholding and scheme administration; and
- the capacity for the employer or plan administrator to amend the terms of the scheme.

32. Any one of these features may be sufficient to cause the trust to fail the fixed trust test, whether under limb (a) (because entitlements are not vested and indefeasible) or under limb (b) (because the features constitute "material discretionary elements"). The assertion that employee share trusts will "generally" qualify provides no comfort to the many trusts whose particular features place them in doubt.

33. The policy case for excluding employee share trusts is clear. Their beneficiaries are employees or scheme participants, not family members. The trustee's powers are directed at implementing an employee share plan, not at splitting family income. There is no primary higher-rate taxpayer whose income is being diverted through the trust to lower-rate family beneficiaries. Imposing a minimum 30 per cent rate on these trusts would interfere with the ordinary commercial operation of employee equity arrangements without addressing any income splitting mischief.

34. A trust that satisfies the statutory sole purpose test under the employee share scheme provisions should be expressly excluded from the regime. A statement in explanatory material that share plan trusts will "generally" be unaffected is not an acceptable statutory standard. Arrangements should not depend on an impressionistic assessment that they will "probably" be excluded; the exclusion should turn on an objective statutory test.

35. The Taxation Committee reiterates the Law Council's recommendation from the July 2026 Submission (paragraphs 27–28) that the legislation should contain an express statutory exclusion for conventional employee share trusts, including any trust satisfying the statutory sole purpose test under the employee share scheme provisions, rather than leaving them to rely on satisfying uncertain technical fixed trust rules.

The impact on the funds management industry requires specific attention

36. The Taxation Committee acknowledges that the new fixed trust definition in proposed section 272-65 represents an improvement on the previous position, under which managed funds were required to rely on the Commissioner's Practical Compliance Guideline (**PCG**) to obtain comfort that they fell outside the scope of the fixed trust definition. Under the PCG framework, the principal consequence of failing the fixed trust test was a compliance risk, namely the risk that the Commissioner might take a different view of the trust's status in the course of an audit or review. Under the proposed regime, the consequence shifts fundamentally: the consequence of failing the fixed trust test is a substantive tax liability at a minimum rate of 30 per cent. The stakes are therefore qualitatively different, and the level of certainty required is correspondingly higher.

37. However, the improvement in the statutory definition, while welcome, is of comparatively limited relevance to the funds management industry. The new definition introduces the concept of 'no material discretionary elements' as an alternative pathway to fixed trust status, which addresses some concerns about the narrowness of the vested-and-indefeasible-interests test. But the concepts of 'significantly vary', 'significantly affect' and 'material discretionary elements' remain vague and fact-dependent. The non-exhaustive nature of the indicative list means that a fund cannot be certain it satisfies the definition without a detailed analysis of its constitution, powers and operational arrangements. That analysis may produce different results for different funds and may be contested by the Commissioner.

38. Managed funds are commercially offered products marketed to retail and wholesale investors. They are subject to regulation by the Australian Securities and Investments Commission, product disclosure requirements, financial services licensing obligations and, in many cases, specific taxation regimes including the AMIT regime for qualifying trusts. They are not, and have never been, vehicles for family income splitting. Any risk, however remote, that a commercially offered managed fund could fall within the scope of the minimum tax regime would be commercially unacceptable.

39. The commercial consequences of uncertainty in this area are severe and wide-ranging. They include: the need for responsible entities to obtain and update legal opinions on fixed trust status for each fund at significant cost; the potential need to amend product disclosure statements to disclose the risk that the minimum tax could apply; a requirement for fund administrators to build systems capable of calculating minimum tax income and applying the regime; an adverse impact on investor confidence, particularly among institutional and foreign investors who rely on the certainty of the existing tax framework; a potential impact on product pricing and investor returns if the regime applies or if compliance costs are passed through to investors; and the risk that Australia's competitive position as a destination for managed fund domiciliation and foreign investment is undermined.

40. Even if the Government's policy intention is that managed funds should fall outside the regime, the risk that the Commissioner might take a strict view of the fixed trust requirements in the course of an audit or compliance review would itself be commercially problematic. If the Commissioner were to form the view, on a retrospective basis, that a particular fund's constitution or operational arrangements included a 'material discretionary element' (for example, a streaming power, a power to issue or redeem units, a power to amend the constitution, or a power to determine whether receipts are income or capital), the consequence would be a 30 per cent minimum tax liability assessed against the trustee of the fund, potentially for multiple prior income years.

41. The prospect of retrospective application of the regime based on an interpretive disagreement between the Commissioner and the responsible entity would fundamentally undermine certainty and confidence in managed funds. It would be destructive of the settled expectations of investors, trustees and responsible entities who structured their affairs on the basis of the law as it stood. It would create a significant disincentive for fund managers to establish or maintain trust-based fund structures in Australia and would damage Australia's reputation as a stable and

predictable jurisdiction in which to establish and administer collective investment vehicles.

42. The managed investment trust withholding tax regime, which provides concessional withholding tax rates for distributions to non-resident investors, is a fundamental component of Australia's international investment framework. Substantial amounts of foreign capital have been committed to Australian investment vehicles on the basis of those statutory settings. Any suggestion that the minimum tax regime could interfere with those settings or create additional uncertainty for non-resident investors would undermine confidence in Australia's taxation framework and could adversely affect capital flows into Australian managed funds.

43. Managed funds do not raise any integrity concern that the minimum tax regime is designed to address. They do not involve the exercise of discretion by a trustee to allocate income among family members at different marginal rates. Distributions from managed funds are determined by the fund's constitution, the terms of issue of units and the operational rules of the fund, not by a trustee's unfettered discretion in the manner of a family discretionary trust. The constitutions of managed funds routinely include amendment powers, streaming discretions, unit issue and redemption powers, powers to classify receipts as income or capital, and other ordinary commercial features. These are not the discretions at which the proposed regime is directed, and their presence should not expose a fund to the minimum tax.

44. The exclusion of managed funds from the regime should be clear and unequivocal. It should not depend on a fund-by-fund assessment of whether the trust's constitution contains any feature that might be characterised as a 'material discretionary element'. Requiring responsible entities to undertake that assessment for each fund, at significant cost, in circumstances where the Government does not intend those funds to be captured, is the very kind of unnecessary compliance burden that the Henry Review identified as a deficiency in tax design and that Treasury's own regulatory impact principles require to be avoided. The Taxation Committee recommends that the legislation contain an express statutory exclusion for all trusts that are registered managed investment schemes under the Corporations Act 2001, trusts that qualify as managed investment trusts for the purposes of the AMIT regime, and widely held trusts that are offered on a commercial basis to retail or wholesale investors. The exclusion should stand independently of the general fixed trust definition.

Recommendation

Conventional employee share trusts, including any trust satisfying the statutory sole purpose test under the employee share scheme provisions, should be expressly excluded from the proposed regime by means of a specific statutory exclusion, rather than left to rely on satisfying the technical fixed trust rules.

Problems with the testamentary trust exclusion continue

45. The exposure draft includes a testamentary trust exclusion in proposed section 101AD of the Main Bill. While the inclusion of a testamentary trust exclusion is welcome, the exclusion as drafted remains too narrow and does not adequately address the concerns raised in the July 2026 Submission (paragraphs 32–38).

The range of trusts created under a will

46. The exclusion does not adequately recognise the diversity of trusts that may be created under or arise from a will. These include:

- deceased estates during the period of administration;
- conventional discretionary testamentary trusts giving the trustee broad distributive discretion;
- trusts for children or grandchildren, often with accumulation and maintenance powers;
- protective trusts established for vulnerable beneficiaries, including those with disabilities, substance abuse issues or other vulnerabilities;
- life interest trusts, including trusts for a surviving spouse with remainder to children;
- trusts with contingent remaindermen, where the identity of ultimate beneficiaries depends on future events;
- trusts for blended families, where the testator seeks to balance the interests of children from different relationships;
- trusts with capital preservation requirements, where the trustee is directed to preserve the corpus for future generations; and
- trusts with powers of advancement or maintenance, where the trustee has power to apply capital or income for the benefit of beneficiaries before their interests vest.

47. Each of these trust types serves a genuine testamentary purpose and reflects considered estate planning decisions. None involves the kind of discretionary family income splitting at which the proposed minimum tax is directed. A single, narrow concept of “discretionary testamentary trust” is unlikely to operate satisfactorily across all of these arrangements.

The focus on assets held at death is too narrow

48. The exclusion appears to be conditioned on income relating to assets of the deceased estate. This focus is unduly restrictive. Estates and testamentary trusts routinely dispose of original assets for reasons including:

- payment of the debts of the estate;
- satisfaction of family provision claims;
- meeting tax liabilities, including capital gains tax on death and income tax on estate income;
- compulsory acquisition, takeover or scheme of arrangement;
- prudent asset management, including diversification and rebalancing; and

- funding a beneficiary's maintenance, education or support, as required by the trust terms.

49. A rule that protects only income from the original assets held at the date of death would not accommodate any of these ordinary events. The legislation should make clear on its face that the exclusion asks whether property is held in connection with the deceased estate or will trust, so that substituted property, replacement assets, reinvested estate property, proceeds of sale and assets acquired in the course of administration are all covered, regardless of whether the precise original asset survives.

Restrictions on post-1 July 2028 testamentary trusts

50. The exposure draft provides that testamentary trusts established after 1 July 2028 can only qualify for the exclusion if beneficiaries are individuals or exempt entities. This prevents the use of corporate beneficiaries in testamentary trusts.

51. Corporate beneficiaries are frequently included in wills for legitimate asset protection and estate planning purposes. For example, a testator may direct that business assets pass to a company to protect them from the personal liabilities of individual beneficiaries, or may establish a corporate trustee for a sub-trust. The blanket exclusion of corporate beneficiaries from post-1 July 2028 testamentary trusts is inconsistent with modern estate planning practice.

Grandfathering of wills executed before Budget night

52. Wills executed before Budget night should be grandfathered even if the trust created under the will does not come into existence until after 1 July 2028. A testator who has executed a will and subsequently lost testamentary capacity should not be penalised by changes to the tax law that he or she is unable to respond to. Similarly, a testator who dies shortly after the commencement date should not find that carefully planned testamentary arrangements are undermined by the new regime where the will was executed in reliance on the pre-existing law.

Fiduciary duties and the reality of beneficiary disputes

53. The EET election assumes that a trustee can exclude other beneficiaries, or refrain indefinitely from exercising discretion in their favour, without meaningful challenge. That assumption is unsafe in the context of testamentary trusts and family arrangements.

54. It fails to recognise the reality of contentious estates, family disputes and relationship breakdowns. An election made in apparently settled circumstances could later become the subject of a challenge by a dissatisfied beneficiary. The Rinehart litigation illustrates the practical risk that trustees cannot safely assume that exercises of discretion or exclusions of beneficiaries will remain uncontested. A trust litigator has advised that the proposed framework is likely to generate disputes.

55. Trustees owe fiduciary duties to all beneficiaries. Making an EET election that effectively excludes certain beneficiaries from distributions, or constrains the trustee's

future exercise of discretion in their favour, may itself expose the trustee to claims for breach of fiduciary duty.

Recommendations

The testamentary trust exclusion should be broadened to cover the full range of trusts created under a will, including trusts with contingent, successive or defeasible interests.

The focus on assets held at death should be replaced with a connection-based test covering substituted and replacement property, which is clearly articulated on the face of these provisions.

Restrictions on corporate beneficiaries in post-1 July 2028 testamentary trusts should be reconsidered. Testamentary trusts created by wills executed before Budget night should be grandfathered even if the testamentary trust does not come into existence until later.

The effective prohibition on distributions to corporate beneficiaries is excessive

56. Under the exposure draft, corporate beneficiaries are denied the tax offset available to non-corporate beneficiaries in respect of minimum tax paid by the trustee (Explanatory Memorandum, paragraph 1.56). The Law Council raised this issue in detail in the July 2026 Submission (paragraphs 40–47) and the Taxation Committee continues to regard the blanket denial of credit recognition as disproportionate.

57. The practical effect of denying the offset to corporate beneficiaries is to produce double taxation or an effective rate materially exceeding 30 per cent. If a trustee pays 30 per cent minimum tax and distributes the after-tax income to a corporate beneficiary, the corporate beneficiary pays 30 per cent company tax on the distribution without any credit for the tax already paid at the trust level. The effective tax rate on the income before any distribution to individual shareholders approaches 51 per cent. If the corporate beneficiary subsequently distributes the remaining amount as a fully franked dividend to individual shareholders, the aggregate tax burden in the hands of those individuals can approach 60–70 per cent, a result that is plainly disproportionate to any income splitting concern.

58. The Taxation Committee acknowledges the legitimate policy concern that animates this restriction: that allowing corporate beneficiaries unrestricted access to the minimum tax offset could permit the conversion of the trustee-level tax into refundable franking credits, which could then be passed through to non-corporate shareholders in a refundable form, undermining the object of the proposed measure.

59. However, the appropriate response to that concern is to confine the restriction to the refundability of the credit, not to deny credit recognition altogether. The Taxation Committee continues to recommend the adoption of a separate, non-refundable class of credit for minimum tax paid by trustees, which would:

    - be available to corporate beneficiaries to offset their own tax liability on the trust distribution;
    - be recorded separately in the company's tax accounts;
    - be capable of being passed through to shareholders as a non-refundable credit, in a form that reduces the tax otherwise payable by them but is not capable of generating a refund; and
    - preserve the integrity of the measure by preventing the conversion of trustee-level tax into refundable franking credits.

60. Such a system would not be dissimilar to the original franking credit system. Two separate credit systems would not be unknown to the tax system, as the historic use of franking credits at different rates demonstrates.

61. Trusts with corporate beneficiaries are commonly used for legitimate asset protection purposes: to ensure that individuals exposed to commercial, professional or personal risk do not hold valuable assets directly and that profits and non-business assets are kept separate from third-party claims. The blanket denial of credit recognition penalises these ordinary commercial arrangements in a manner that cannot be justified by reference to the income splitting mischief.

62. The Australian tax system has previously operated with different classes of franking credits, and there is no technical barrier to introducing a non-refundable credit of this kind. The design would preserve the trustee's tax as a genuine credit against tax already paid on the same income, prevent refundability, and avoid the double taxation or excessive effective rate that the current design would otherwise produce.

Recommendation

Treasury should adopt a separate, non-refundable class of credit for minimum tax paid by trustees, available to corporate beneficiaries and capable of being passed through to shareholders in a non-refundable form. Credit recognition should not be denied in a way that produces double taxation or an effective rate materially exceeding 30 per cent.

The electable regime is welcome but does not solve as many problems as anticipated

63. The introduction of the electable regime, under which trusts existing at 1 July 2028 may elect to be an excluded election trust (**EET**), is a welcome development. The Taxation Committee acknowledges that the electable regime is intended to provide a practical mechanism for existing trusts to exit the minimum tax regime where the trust is willing to lock in its beneficiary structure. However, the regime as drafted has a number of significant limitations that will restrict its utility in practice.

Uncertainty about the trustee's power to make the election

64. Access to the electable regime depends on the trustee forming the view that it has the power under the trust deed to make the EET election and to comply with its requirements, including the nomination of beneficiaries and the restriction on future variations. In many cases, this will not be straightforward. Trust deeds vary widely in the breadth and specificity of the powers they confer on trustees. Many older trust deeds do not contemplate elections of this kind and may not clearly authorise the trustee to restrict the class of beneficiaries or to bind future trustees. Whether a trustee has the requisite power will be a question of construction in each case, potentially requiring legal advice and exposing the trustee to the risk that a beneficiary may later challenge the validity of the election.

Stamp duty consequences

65. In many cases, the making of an EET election may give rise to a residual stamp duty liability at the state or territory level. The narrowing of the beneficial class or the nomination of specific beneficiaries may constitute a dutiable event under state and territory transfer duty legislation, depending on the jurisdiction and the particular terms of the trust. The Commonwealth legislation does not and cannot eliminate these state and territory consequences, and no coordinated approach to this issue has been announced. Trustees will need to obtain state- and territory-specific stamp duty advice before making an election, adding cost and complexity to the process.

Rigidity of nomination requirements

66. The EET nomination requirements are rigid. Beneficiaries and their proportions must be locked in at the time of election, with variation permitted only in the narrow circumstances of death of a nominated beneficiary or relationship breakdown between two nominated beneficiaries resulting in a court order, binding financial agreement or award. This rigidity does not reflect the reality of family and commercial life, where circumstances change for a wide variety of reasons unrelated to tax.

One-shot opportunity and mutual exclusivity

67. The election is a one-shot opportunity, available only in the 2028–29 income year, and is mutually exclusive with the transitional roll-over relief. A trustee that elects into the EET regime cannot also access roll-over relief for a restructure of the trust's affairs. This forces trustees to make a binary choice at a single point in time, without the benefit of experience as to how the new regime will operate in practice. The Taxation Committee considers that further thought should be given to the interaction between the electable regime and roll-over relief, and to whether the election window should be extended or reopened in appropriate circumstances.

Automatic revocation consequences

68. The consequences of automatic revocation of the EET election are severe. If the election is revoked, whether through a breach of the nomination requirements, a failure to comply with the conditions of the regime, or the occurrence of a revocation event, the trustee is liable at the top marginal rate plus Medicare levy for the

revocation year, and the trust is then subject to the minimum tax in future years. This punitive consequence acts as a cliff-edge risk that may deter trustees from making the election even where it would otherwise be appropriate. The design is inconsistent with the principle, endorsed by the Ralph Report and the Inspector-General of Taxation, that tax penalties should be proportionate and that the tax system should not punish taxpayers who act in good faith but fail to satisfy complex technical requirements. The Taxation Committee recommends that the revocation consequences be moderated, for example by providing a cure period for inadvertent breaches or by applying the minimum tax rate rather than the top marginal rate in the revocation year.

Recommendation

The revocation consequences should be moderated, for example by providing a cure period for inadvertent breaches or by applying the minimum tax rate rather than the top marginal rate in the revocation year.

Cumulative eligibility requirements and latent defects

69. The regime contains numerous cumulative eligibility requirements. If a named person does not qualify, or one condition fails, the concession can be lost and penalty tax can arise from the first year.

70. The Australian Taxation Office (**ATO**) may not identify some defects until it conducts a review many years later. Taxpayers may make elections as a protective measure, as frequently occurs with family trust elections, without appreciating that the new election creates a different and potentially more serious set of risks.

Replacement elections should be permitted

71. If an election has been revoked, whether voluntarily or automatically, a trustee should be permitted to make a replacement election on revised terms rather than being permanently locked out of the regime.

72. The one-shot nature of the election, combined with the severe consequences of revocation, creates a disproportionate penalty for trustees who acted in good faith but whose elections fail because of changed circumstances or inadvertent non-compliance.

Eligible company requirements

73. The requirements for a company to be an eligible company for EET purposes include the absence of material discretionary elements affecting members' rights. This requirement will exclude many private companies that use alphabet shares, multiple classes of shares or director discretion over dividends, all of which are common features of private company constitutions. The effect is to prevent trusts with these kinds of corporate beneficiaries from accessing the electable regime, even where the arrangements serve legitimate commercial or asset protection purposes.

Trust-to-trust distributions and unrecognised tax

74. If a trust subject to the 30 per cent minimum tax distributes income to another trust that has made the EET election, it is uncertain whether the tax paid by the distributing trust, or any associated credit, will be recognised when the receiving trustee is not itself taxed under the election.

75. This structure may produce an unrecoverable tax cost or effective double taxation. The issue can arise in ordinary structures, including service entities conducted through discretionary trusts. The interaction between elected and non-elected trusts requires detailed clarification and may influence whether an election should be made.

Variation on death of a nominated beneficiary is too narrow

76. As currently proposed, if a nominated beneficiary in an election dies, the trust may make a new election. The class of beneficiaries is, however, restricted to the other parties nominated under the EET, those nominated in the deceased person's will and the beneficiaries of the trust. That class is too narrow. If the deceased has passed their assets to a testamentary trust for the benefit of their family, none of those parties would be a beneficiary directly under the will, and each would therefore be excluded from being added as a replacement beneficiary in the EET. The class should be broadened to include any beneficiary or family member of the deceased, so allowing the trustee appropriate flexibility.

The regime effectively fetters trustee discretion and imposes a tax penalty on the discharge of fiduciary duties

77. The trustee of a discretionary trust holds a fiduciary power. That power must be exercised in the interests of the beneficiaries as a whole, and not for the trustee's own benefit or for an improper purpose. The trustee must act within the terms of the trust instrument and according to equitable principles when deciding whether, and in what proportions, trust income or capital should be allocated among the beneficiaries.

78. A cardinal principle of trust law is that a trustee must not fetter the future exercise of a discretionary power. A trustee that binds itself in advance to exercise, or not to exercise, a discretion in a particular way acts inconsistently with the duty to give real and genuine consideration to the exercise of the power as the circumstances exist at the time. In *Karger v Paul* [1984] VR 161, McGarvie J held that a trustee of a discretionary trust must give real and genuine consideration to whether the discretion should be exercised and, if so, in whose favour. The trustee must consider the range of objects of the power and the appropriateness of individual claims when the power falls to be exercised; it cannot discharge that duty by adopting a predetermined course without considering the merits of each decision as it arises.

79. The same principle is reflected in *Lutheran Church of Australia South Australia Inc v Farmers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628. The High Court confirmed that a trustee must exercise a discretionary power personally and cannot delegate or fetter it. Barwick CJ, with whom the other members of the Court agreed, held that a trustee cannot bind itself as to the future exercise of a fiduciary power. The rule protects the beneficiaries by ensuring that each exercise of the

power is made by the trustee, for the proper purpose, and in light of the circumstances then existing.

80. The EET regime creates a direct tension with that principle. To make an EET election, the trustee must specify in advance each beneficiary to whom it may confer a present entitlement and the proportion of the trust's income and capital to which that beneficiary is to be entitled for the income year of election and each future income year for which the election remains in force. The nomination must allocate 100 per cent of the income and 100 per cent of the capital, with corresponding proportions for each beneficiary. The framework therefore requires the trustee to state, prospectively and on an indefinite basis, how its distributive power will be exercised.

81. Although the trustee retains the legal power to distribute inconsistently with the nomination, doing so automatically revokes the election. The trustee is then assessed on all of the trust's net income for the revocation year at the top marginal rate plus Medicare levy, and the trust is subject to the minimum tax in later years. Any departure from the predetermined allocation therefore carries a consequence far more serious than loss of a concession on the amount redirected: it puts the entire trust's tax position at risk. The explanatory materials state, at paragraph 1.21, that the EET nomination "does not restrict the trustee's discretion to determine who is entitled to a share of the income and capital of the trust". That statement is formally correct, because the trustee retains the legal power, but it is misleading in substance: the automatic revocation and penalty-tax consequences operate as a de facto fetter that makes the nominal retention of discretion illusory.

82. Example 1: A trust has three adult children as nominated beneficiaries, each allocated one-third of its income and capital. In a later year, one child develops a serious illness or disability and requires substantial care. The trustee properly considers the circumstances of the beneficiary class and concludes that the trust income should be directed primarily to that child. Exercising the discretion in that way is what trust law requires; but under the EET regime it would be inconsistent with the nomination, automatically revoke the election and expose all of the trust's net income for that year, not merely the amount redirected, to tax at the top marginal rate plus Medicare levy.

83. Example 2: One nominated beneficiary has accumulated substantial personal wealth while another faces financial hardship. A trustee acting in accordance with its fiduciary duties would ordinarily have regard to the relative needs and circumstances of the beneficiary class and could conclude that an unequal distribution is appropriate. Under the EET regime, the trustee must choose between making the distribution that the circumstances and its duties require and preserving the favourable tax treatment of the election. The regime thus places the trustee in an impossible position: it must either fetter its discretion to preserve the tax concession or discharge its fiduciary duties and accept the punitive tax consequence. That choice is inconsistent with the equitable principles governing fiduciary powers.

84. The case law also demonstrates that the problem is not theoretical. In *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2001] FCA 1628; (2001) 188 ALR 566, Finkelstein J considered the nature of a trustee's discretionary powers and confirmed that a trustee must not fetter its discretion by making binding promises about future

distributions. A statutory regime that makes the tax outcome depend on adherence to such a promise risks turning an impermissible fetter into the practical price of obtaining the concession.

85. The principle has also been applied in the context of family trusts. In *Hancock v Rinehart* [2015] NSWCA 140, the New South Wales Court of Appeal considered challenges by beneficiaries to the exercise and non-exercise of trustee discretions. The litigation illustrates the practical reality that beneficiaries can and do challenge the manner in which trustees exercise, or fail to exercise, distributive powers. A trustee cannot safely assume that an arrangement excluding or marginalising particular beneficiaries will remain uncontested, or that a distribution which appeared appropriate when the nomination was made will remain appropriate when the discretion must later be exercised.

86. Taxation law should not require or incentivise a trustee to act inconsistently with its fiduciary obligations under trust law. The tax system operates on the assumption that trustees will comply with their duties under general law; the consequences of taxation should accommodate, rather than conflict with, the proper discharge of those duties. The July 2026 Submission identified this concern in the context of the then-proposed irrevocable election (paragraphs 87–88). The exposure draft legislation has not resolved it. By attaching severe tax consequences to the proper exercise of trustee discretion, the EET regime creates an incentive for trustees to act inconsistently with their fiduciary obligations. That outcome is incompatible with the general law of trusts and should not be permitted.

87. The electable regime should be refined to address limitations relating to trustee power, stamp duty consequences, rigid nomination requirements, interaction with roll-over relief, punitive revocation consequences, narrow eligible company requirements, replacement elections, trust-to-trust distributions and relief for latent defects in elections.

Recommendation

The electable regime should be refined to address limitations relating to trustee power, stamp duty consequences, rigid nomination requirements, interaction with roll-over relief, punitive revocation consequences, narrow eligible company requirements, replacement elections, trust-to-trust distributions and relief for latent defects in elections.

The family law breakdown provisions are inadequate and need to be extended and expanded

88. The variation provisions for EET nominations permit changes in only two circumstances: the death of a nominated beneficiary, or relationship breakdown between two nominated beneficiaries resulting in a court order, binding financial agreement or award under the *Family Law Act 1975* (Cth). These provisions are too narrow and do not reflect the range of genuine, non-tax-motivated circumstances in which a variation may be necessary.

89. The following circumstances, among others, are not addressed by the current variation provisions:

- **Loss of legal capacity by a beneficiary.** A nominated beneficiary may lose legal capacity through illness, injury or ageing. The trustee may need to vary the nomination to direct distributions to a guardian, attorney or statutory manager acting on the beneficiary's behalf, or to redirect distributions to other family members who are assuming responsibility for the incapacitated person's care.
- **Bankruptcy of a beneficiary.** If a nominated beneficiary enters bankruptcy, distributions to that beneficiary will vest in the trustee in bankruptcy. The trustee of the trust may need to vary the nomination to protect the trust assets from claims by the bankrupt beneficiary's creditors and to preserve the assets for the benefit of the broader family.
- **A beneficiary becoming a non-resident.** If a nominated beneficiary permanently emigrates from Australia, continuing to distribute income to that beneficiary may create cross-border taxation complications. The trustee should be able to vary the nomination to accommodate this change in circumstances. Many trusts preclude distributions to non-residents because of state duty requirements.
- **Birth of children or grandchildren after the election.** Family trusts commonly include future-born descendants as potential beneficiaries. A rigid nomination locked in at the time of election cannot accommodate children or grandchildren born after 2028–29. This will be a significant practical problem for younger families.
- **Changes in family circumstances.** A wide range of changes in family circumstances may warrant a variation, including marriage of a beneficiary, adoption, changes in the dependency or care needs of a beneficiary, or a beneficiary reaching a milestone age specified in the trust deed. These changes are ordinary incidents of family life and are unrelated to tax planning.
- **Genuine administrative errors.** The original nomination may contain errors, for example an incorrect beneficiary name, a mathematical error in proportions, or the omission of a beneficiary who was clearly intended to be included. There should be a mechanism to correct genuine errors without triggering revocation.
- **Family succession planning.** As families evolve over time, succession planning needs change. A nomination locked in at a single point cannot accommodate the legitimate, ongoing need to adjust the beneficial structure to reflect changing family dynamics, generational transitions and the evolving needs of family members.

90. The Taxation Committee recommends that the variation provisions be expanded to permit variation in a broader range of genuine, non-tax-motivated circumstances. This could be achieved by specifying additional categories of permitted variation in the legislation, or by conferring a discretion on the Commissioner of Taxation to approve variations where satisfied that the variation is not primarily motivated by a purpose of obtaining a tax benefit. The Commissioner-approval model has precedents elsewhere in the tax law and would provide a practical mechanism for accommodating genuine changes in circumstances while preserving the integrity of the regime.

91. While a Commissioner's discretion would be better than no relief, it remains inferior to clear legislative design. Reliance on an administrative discretion would leave taxpayers dependent on the Commissioner's approach rather than on an entitlement in the legislation. The legislation should therefore provide clear categories of permitted variation as the primary mechanism, with a residual Commissioner's discretion as a safety valve.

Compliance cost and sound tax administration

92. The proposed regime will impose substantial additional compliance costs on trustees and their advisers. Trust tax returns will require income to be divided into different categories, with the tax treatment recalculated by reference to beneficiaries and the status of relevant trusts and elections. These are not merely practical inconveniences. They represent a structural deficiency in the legislation that is inconsistent with the standards that successive reviews of the Australian tax system have established. The Ralph Report identified compliance cost as a fundamental criterion of good tax design. The Henry Review recommended that reform 'support a simpler, more understandable and more certain tax system'. Treasury's own *Tax Design Framework* recognises that taxpayers must be able to determine their obligations from the statute and that the system should not impose unnecessary costs on taxpayers who are not the target of a particular measure. The *Australian Government Guide to Regulatory Impact Analysis* requires that the burden of new regulation be proportionate to the risk it addresses. The Inspector-General of Taxation has consistently identified compliance cost and administrative complexity as priorities for reform.

93. The exposure draft legislation does not meet these standards. The fixed trust definition requires qualitative judgements on which reasonable minds may differ. The electable regime imposes rigid requirements with punitive consequences for inadvertent non-compliance. The delegated legislative power permits the scope of the regime to be altered without primary legislation. And the regime as a whole requires trustees to determine, for each income year, whether the trust is a minimum tax trust, whether the EET election is in force and properly complied with, whether each category of income is minimum tax income, and how the tax treatment of each beneficiary is affected, all by reference to definitions and conditions that this submission has shown to be uncertain. These are not merely matters of policy preference; they go to whether the legislation, as enacted, meets the standards of clarity, certainty and proportionality that the Parliament and the Government have repeatedly endorsed as the basis on which tax law should be made.

94. The compliance burden will be particularly difficult for smaller trustees and advisers if they must obtain bespoke interpretive advice to determine whether the fixed trust definition, an exclusion or an election applies. Standardised reporting frameworks and practical guidance can assist administration, but they cannot cure uncertainty in the underlying liability rules.

Recommendation

The variation provisions for EET nominations should be expanded to permit variation in a broader range of genuine, non-tax-motivated circumstances, including loss of legal capacity, bankruptcy, non-residency, birth of children or grandchildren, changes in family circumstances, genuine administrative errors, and family succession planning. The legislation should either specify additional categories of permitted variation or confer a discretion on the Commissioner to approve variations in appropriate cases.

Conclusion

95. The Taxation Committee of the Business Law Section supports appropriately designed measures to address the diversion of income through discretionary trusts to lower-rate beneficiaries within a family group. The Taxation Committee has been constructively engaged with Treasury throughout the consultation process and welcomes the opportunity to comment on the exposure draft legislation.

96. However, the exposure draft legislation as currently drafted continues to cast the net too broadly. The measure proceeds from the binary fixed/non-fixed trust distinction, which captures a far wider range of trusts than the policy objective requires. The new fixed trust definition, while well-intentioned, introduces unacceptable uncertainty. Employee share trusts, testamentary trusts, trusts with corporate beneficiaries and trusts that would otherwise access the electable regime are all subject to limitations that require further attention.

97. The Taxation Committee urges the Government to address the deficiencies identified in this submission and in the July 2026 Submission before the legislation is introduced into Parliament. Getting the design right is essential, both to ensure that the regime achieves its policy objective and to minimise unintended adverse consequences for the many taxpayers who use trusts for legitimate commercial, succession, asset protection and estate planning purpose.

Attachment 2: Submission by the Law Council of Australia's National Elder Law and Succession Law Committee

This submission has been prepared by the Law Council of Australia's National Elder Law and Succession Law Committee. Due to the restrictive timeframe for responses, this input is provided to the Treasury in full and should be attributed to the National Elder Law and Succession Law Committee.

Introduction

1. This submission by the Law Council of Australia's National Elder Law and Succession Law Committee (**NELSC**) addresses the four exposure drafts and three accompanying explanatory memoranda comprising the minimum tax, the tax imposition measure, the transitional roll-over and the excluded election trust (**EET**) regime.

2. The NELSC supports appropriately targeted measures that promote the equity and integrity of the taxation system. It also welcomes aspects of the package that recognise the distinct position of deceased estates and testamentary trusts, provide broad Commonwealth income tax roll-over relief, refund excess franking credits and offer an elective alternative to restructuring.

3. However, the package is not yet sufficiently certain or complete to support enactment. Important questions remain about the trusts brought within the regime, the operation of the testamentary trust exclusion, the treatment of other genuine post-death trusts, the legal effect of an EET nomination, the practical accessibility of the roll-over, and the interaction of the reforms with existing taxation, trust, succession and State and Territory duty laws.

4. Those issues are not merely matters for administrative guidance. They concern the legal criteria for liability, the nature of property and beneficial interests, the powers and duties of trustees, and the consequences of decisions that may be difficult or impossible to reverse. The operative rules should therefore be clear on the face of the primary legislation.

5. The NELSC recommends that the Government not introduce the Bills until the complete legislative and administrative package has been exposed for a further reasonable period of consultation. Revised drafts should be tested through targeted technical consultation involving taxation, trust, succession, estate administration and State and Territory duty specialists.

Principal recommendations

6. The principal recommendations of this submission are that the legislation should:

   (a) define the intended scope of a minimum tax trust by reference to a substantive power to allocate income or capital among alternative beneficiaries or in differing proportions, and protect ordinary governance, protective and succession powers;

   (b) grandfather testamentary trust arrangements contained in wills executed before 1 July 2028 and define, for all other cases, when a testamentary trust is taken to be established;

   (c) express the testamentary trust exclusion through objective source and function criteria and confine the integrity rules to contrived arrangements entered into for a principal or dominant purpose of obtaining the exclusion;

   (d) regulate actual benefits provided to companies and other trusts instead of disqualifying a testamentary trust because its drafting includes unused beneficiary classes, remote gift-over provisions or unexercised powers;

   (e) extend equivalent treatment to genuine post-death trusts funded by superannuation death benefits, life insurance proceeds, employment death benefits and comparable death-related property;

   (f) replace the proposed fixed-percentage EET model with a permitted-beneficiary-class model that preserves genuine trustee discretion, accumulation and existing streaming rules;

   (g) clarify whether an EET nomination creates, alters or recognises a legal, equitable or proprietary interest and resolve the resulting trust, succession, capital gains tax and duty consequences;

   (h) make the variation, revocation and correction rules proportionate and prospective, preserve trustee discretion over the reallocation of a deceased nominee's percentage, accommodate consequential changes following relationship breakdown and other genuine changes in family, vulnerability, succession and commercial circumstances, and provide a reasonable opportunity to correct inadvertent non-compliance before revocation;

   (i) allow roll-over restructures involving more than one transferee, reasonable retention of assets that cannot practically be transferred, deferred roll-over relief for assets initially retained to meet liabilities, and limited extensions where completion is prevented by genuine impediments;

   (j) secure consistent State and Territory duty relief for qualifying restructures, the making or revocation of an EET election and the making, variation or reallocation of its nomination, or provide equivalent Commonwealth relief;

   (k) include clear coordination rules for the proposed trust minimum tax, the separate capital gains minimum tax, Division 6, Division 6AA, Division 7A,

capital gain and franked distribution streaming, and trustee and beneficiary assessments;

(l) place substantive liability and eligibility rules in primary legislation; and

(m) undertake a further consultation process consistent with the Law Council's Best Practice Legislative Development Checklist.

7. The recommendations are directed to achieving the stated policy objectives without unnecessarily disturbing ordinary succession planning, fiduciary administration and long-standing family and business arrangements.

Succession law context

The character and purpose of testamentary trusts

8. Testamentary trusts are materially different in origin and function from inter vivos discretionary trusts. A testamentary trust arises because a person has died and is part of the legal machinery by which that person's property is administered and applied under a will, codicil, intestacy or court order. It is inherently confined by the property available from the deceased estate and cannot be repeatedly established and funded with newly generated wealth in the manner of an inter vivos structure.

9. That distinction is reflected in the existing income tax law. Division 6AA of Part III of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) distinguishes certain income derived from deceased estates and property passing on death, including through paragraph 102AG(2)(a) and subsection 102AG(2AA). The proposed section 101AD sensibly draws upon those existing source concepts, although it requires further refinement.

10. Testamentary trusts are commonly used as one component of a broader estate plan. The same plan may include enduring powers of attorney, enduring guardianship or health instruments, superannuation death benefit nominations, life insurance, life interests, appointments of guardians for minor children and arrangements for the control and succession of family assets. The trust should be understood in that wider succession framework rather than treated as an isolated taxation structure.

11. The central value of a discretionary testamentary trust is its capacity to respond to circumstances that cannot reliably be predicted when a will is made. The interval between execution of a will, the testator's death, completion of administration and the life of the trust may extend for decades. Family composition, health, capacity, relationships, commercial circumstances and beneficiary needs may change substantially during that period.

12. Testamentary trusts may protect and support adults living with cognitive impairment, acquired brain injury, autism, mental illness or degenerative conditions who do not satisfy the narrow eligibility conditions for a special disability trust. They may also protect beneficiaries affected by addiction, gambling, coercion, financial abuse, bankruptcy, creditor risk, family violence or relationship breakdown.

13. The protective function is not limited to persons who can be placed within a statutory category of vulnerability. A surviving spouse or child may need staged access to capital, direct payment of expenses, independent administration or protection from future circumstances that were unknowable at the date of the will. The trustee's discretion is often the mechanism that makes that protection effective.

14. Where a parent dies prematurely, the property available to support a surviving family may consist substantially of an ordinary home, modest savings, superannuation death benefits and life insurance intended to replace the deceased's income and discharge debt. Flexibility may be required to meet education, medical, housing and care costs over many years while preserving an appropriate balance between the needs of the surviving spouse and children.

15. Testamentary trusts also serve legitimate succession and asset-preservation functions for ordinary families. They may preserve inherited property across generations, support the orderly succession of a family business or farm, and reduce the risk that inherited assets are dissipated through poor financial decision-making or exposed unnecessarily to future claims. Those purposes should not be equated with artificial income splitting merely because the trust has discretionary powers or produces taxation consequences under the ordinary law.

16. Fixed entitlements are not an equivalent substitute. A fixed trust may require property or income to be provided when doing so is contrary to a beneficiary's welfare or the intended protection of the inheritance. A discretionary testamentary trust permits the trustee to respond to actual circumstances, including by accumulating income, paying third-party expenses, staging assistance and protecting capital.

17. The proposed law should accordingly preserve the distinction between genuine succession arrangements and discretionary trusts used principally to divert current family income. The relevant inquiry should focus on the source and function of the arrangement and on what the trustee actually does, supported by targeted integrity rules.

Deceased estates and other post-death trusts

18. A testamentary trust is not the only fiduciary arrangement that may arise because of death. Superannuation death benefits, life insurance proceeds, employment death benefits and other death-related payments may be paid to a legal personal representative, directly to an eligible recipient, or to a trustee under an authorised death-benefit arrangement.

19. The administrative route may depend upon the terms of the governing instrument, a binding or non-binding nomination, trustee discretion, the identity of the recipient and the needs of surviving family members. Economically and functionally equivalent death-related property should not receive materially different treatment merely because it passes outside the deceased estate rather than through it.

20. Post-death trusts can perform the same functions as testamentary trusts. A superannuation proceeds trust may hold death benefits for a surviving spouse, minor children, an adult child with disability or another dependant. A trust funded

from life insurance or employment death benefits may replace the income of a deceased parent, protect property for children and provide independent management where a direct payment would be unsuitable.

21. The proposed exclusions for certain income derived for minors do not resolve the issue. They do not comprehensively protect surviving spouses, adult children with disability, dependent adults or trusts designed to serve a family group following death. The legislation should contain a coherent exclusion for genuine post-death fiduciary arrangements, defined by objective source and function criteria.

Scope of the minimum tax

Minimum tax trusts and fixed trusts

22. Proposed sections 101AA to 101AG of the ITAA 1936 establish the substantive minimum tax rules. A central threshold question is whether a trust is a minimum tax trust under proposed section 101AB. The draft largely answers that question by excluding trusts that satisfy an expanded conception of a fixed trust.

23. The attempt to accommodate some administrative powers in the fixed trust definition is welcome. Nevertheless, an exclusionary definition may capture a trust that lacks the substantive discretionary allocation power at which the measure is directed. A single-class unit trust under which income and capital follow unit holdings, for example, should not become a minimum tax trust merely because its deed contains an amendment, appointment or protective power that does not alter members' substantive economic entitlements.

24. The NELSC considers that the better approach is a positive statutory test directed to whether the trustee or another person has a present substantive power to allocate trust income or capital among alternative beneficiaries or in differing proportions. At a minimum, a trust should not be a minimum tax trust unless such a power exists.

25. The legislation should also provide a safe harbour for ordinary powers to amend a deed, replace a trustee or appointor, correct drafting errors, respond to legal change, facilitate succession of control and protect beneficiaries or trust property. The legal existence of those powers does not necessarily provide any capacity to alter substantive economic entitlements.

26. Clear examples are required for unit trusts, hybrid trusts and trusts containing broad amendment, appointor, guardian or succession provisions. The examples should distinguish a power affecting economic allocation from a power concerned only with governance, administration or protection.

Excluded and mixed income

27. The NELSC supports the proposed exclusions for taxable primary production income and qualifying income attributable to charities, deductible gift recipients and other exempt entities in proposed section 101AE. The substantive entitlement to an exclusion should, however, be contained in primary legislation. Legislative instruments should be confined to verification, administration and appropriately targeted integrity matters. The exposure draft permits substantive conditions,

processes and caps affecting these exclusions to be prescribed by legislative instrument. Any proposed cap or other substantive condition should be exposed for consultation before the Bill is introduced and should preserve ordinary testamentary and inter vivos philanthropic arrangements.

28. The primary production exclusion should operate coherently for common family structures in which land, operating assets and the primary production business are held by different entities for risk-management or succession reasons. Economically equivalent businesses should not receive materially different treatment solely because the asset-holding trust derives rent or licence fees rather than directly conducting all operating activities. The legislation should include appropriately targeted tracing or attribution rules for income derived from assets used in a primary production business conducted within the relevant family group. The Explanatory Memorandum should also include worked examples addressing landholding and operating trusts, partnerships, related family entities, mixed-use assets and structures in which the land, operating assets and primary production activities are held separately.

29. A trust may derive both excluded and non-excluded income. It may hold mixed-use assets, receive income through another trust or partnership, incur common expenses or reinvest proceeds from assets of different origins. The operative legislation should contain workable rules for tracing, allocation and apportionment of income, deductions, capital gains, losses and franked distributions. Reasonable methods should be available where direct tracing is not practicable.

Testamentary trust exclusion

Meaning of established and transitional protection

30. Proposed paragraph 101AD(1)(a) identifies a trust established as a result of a will, codicil, intestacy or an order of a court mentioned in paragraph 102AG(2)(a) of the ITAA 1936. Proposed paragraph 101AD(1)(c) then imposes an additional beneficiary condition if the trust was established on or after 1 July 2028. The draft does not define when establishment occurs.

31. A testamentary trust might, depending on the terms of the will and the context, be said to be established when the will is executed, when the will-maker dies, when probate is granted, when property vests in the legal personal representative, when the representative assents to or appropriates property for the trust, when property is transferred to a separate trustee, or when estate administration is completed. The Explanatory Memorandum's statement that the trust is established as a result of a will, codicil, intestacy or court order does not answer the temporal question.

32. The uncertainty is particularly serious because estate planning decisions are made while the testator has capacity, often many years before death. A person who has executed a will containing testamentary trust provisions may lose testamentary capacity before 1 July 2028 and be unable to revise the plan. In South Australia, for example, the only mechanism for altering the testamentary arrangements of a person who lacks testamentary capacity would be an application for a statutory will under section 7 of the *Succession Act 2023* (SA). That process is contested, costly and success is not certain merely because an estate plan has been overtaken by a later

tax change. The same concern arises where legally binding mutual wills or comparable arrangements limit the person's ability to alter the agreed scheme.

33. The NELSC recommends that testamentary trust arrangements contained in wills executed before 1 July 2028 be grandfathered. The protection should continue if the testator dies, probate is granted or property is appropriated or transferred after that date. It should also accommodate a later codicil or replacement will that does not materially alter the relevant testamentary trust provisions.

34. If that recommendation is not accepted, the legislation must expressly identify a single establishment event and include transitional rules that protect existing estate plans and persons who cannot amend their wills. Leaving the question to general law or future administrative practice would not provide the certainty required for instruments intended to operate after death and over long periods.

Genuine testamentary purpose

35. The Explanatory Memorandum repeatedly describes the exclusion as applying to trusts established and administered for genuine testamentary purposes. That expression is not defined in proposed section 101AD. Instead, the section uses source conditions and broad scheme-based integrity provisions.

36. The concept should not become a separate, subjective threshold under which a trustee, beneficiary or adviser must prove vulnerability, establish that asset preservation was the sole or dominant purpose of the trust, or show that taxation consequences played no part in the estate plan. Taxation is routinely and properly considered in preparing wills and administering estates. That consideration does not convert an orthodox succession arrangement into an avoidance scheme.

37. The NELSC recommends an objective source and function test. A trust should be conclusively treated as serving a genuine testamentary purpose where it arises from, or is funded by, assets derived from a deceased estate or another qualifying death-related source and is established or maintained for the succession, administration, preservation, management or maintenance of those assets for beneficiaries.

38. The test should recognise purposes including orderly succession, long-term stewardship, protection from financial exploitation or relationship breakdown, disability and incapacity planning, provision for minors and surviving spouses, management of blended-family arrangements, and preservation of a family business or farm. It should not be confined to a statutory category of vulnerability.

39. Artificial injection of unrelated property can be addressed directly through the source rule in subsection 102AG(2AA), proposed paragraph 101AD(1)(b) and appropriately confined integrity rules. The law should distinguish an arrangement used in a manner materially inconsistent with its post-death character from ordinary investment, reinvestment, refinancing and administration of estate-derived property.

Integrity rules

40. Proposed subsections 101AD(2) to (5) are intended to prevent the testamentary trust exclusion from being obtained through a relevant scheme. The draft can apply where obtaining the exclusion is one purpose of a scheme; only a merely incidental purpose is disregarded.

41. Ordinary testamentary planning and estate administration commonly comprise a sequence of legally connected steps: execution or amendment of a will, transfer of property to a legal personal representative, administration, appropriation or transfer to a testamentary trustee, investment decisions and distributions. Without clear limits, the breadth of the statutory concept of scheme and the low purpose threshold may invite examination of conventional arrangements even where there is no relevant avoidance mischief.

42. The NELSC recommends that the integrity provisions be confined to contrived arrangements where obtaining the exclusion is a principal or dominant purpose, or where the arrangement would not reasonably have been entered into but for the intended operation of the exclusion. This would align the rule more closely with familiar anti-avoidance thresholds and provide greater certainty without protecting artificial arrangements.

43. At a minimum, statutory safe harbours should confirm that the following do not, without more, attract the integrity rules:

    (a) making, amending or replacing a will in the ordinary course of estate planning, including a court-authorised will;

    (b) establishing, funding and administering a trust contemplated by a will;

    (c) selling, retaining, investing, reinvesting, refinancing or substituting estate-derived property;

    (d) undertaking ordinary transactions intended to preserve or increase the value of a person's estate;

    (e) implementing a bona fide family provision settlement, construction order or estate compromise; and

    (f) acting for genuine succession, asset protection, maintenance, disability, incapacity or family governance purposes.

44. The statement in paragraph 1.88 of the Explanatory Memorandum that activities undertaken to increase the value of an estate are protected is helpful. That protection should appear in the operative provisions, together with a safe harbour for agreements, arrangements or understandings entered into in the course of ordinary family or commercial dealing.

Beneficiary classes and actual benefits

45. Proposed paragraph 101AD(1)(c) appears to focus on the person for whose benefit the relevant assessable income is derived. On that reading, income for the benefit of an individual or exempt entity may qualify even if the trust's broader potential beneficiary class includes a company or another trust.

46. Paragraph 1.38 of the Explanatory Memorandum states, however, that if a testamentary trust has beneficiaries that are corporate entities or other trusts, its net income will be subject to minimum tax. The apparent difference between the operative text and the explanation should be resolved.

47. Professionally drafted wills commonly use broad beneficiary definitions, default provisions, remote gift-overs, related or successor trusts and powers to add or remove beneficiaries. Those provisions preserve flexibility over a period that may extend for decades. Their existence is not evidence that a company or trust has received, or will receive, a benefit.

48. The NELSC considers that the integrity concern should be addressed by reference to actual distributions, entitlements or benefits. The inclusion of a non-qualifying entity in a potential class, an unused gift-over or an unexercised power should not disqualify the trust or its income. The legal personal representative or deceased estate of an individual beneficiary, another qualifying testamentary trust created under the same will and a special disability trust for an individual beneficiary should also be permitted recipients.

49. If a trust-level restriction is retained, a trustee should be able to remove or irrevocably exclude prospectively a corporate or trust beneficiary under an express power or court order without the amendment itself engaging the integrity provisions, causing the loss of the exclusion or creating an unintended resettlement. The legislation should distinguish a genuine curative amendment from an arrangement that introduces unrelated property or benefits.

Post-establishment changes and estate administration

50. Testamentary trusts may require amendment or court-ordered variation to correct an error, respond to changed law, protect a beneficiary or implement an estate settlement. The draft should confirm the treatment of amendments under an express power and variations under applicable State or Territory trustee legislation.

51. For a trust established before 1 July 2028, a bona fide amendment should not of itself cause the trust to be treated as newly established or subject it to the later beneficiary restriction unless the amendment creates a new trust. For a later trust, a prospective amendment removing a non-qualifying beneficiary should be effective without disturbing the prior treatment of otherwise qualifying income.

52. A comparable legislative recognition of prospective trust amendments appears in the *Property Law Act 2023* (Qld), which permits an existing trust, where the governing instrument and applicable law allow, to adopt the longer statutory perpetuity period through the exercise of a power, beneficiary consent or a court order. Although the

context is different, it demonstrates that an amendment made in response to changed statutory requirements need not itself be treated as objectionable.

53. The legislation should also address family provision settlements, construction orders, compromises, deeds of family arrangement and court-authorised wills. A trust or entitlement produced by a court order or bona fide compromise should not be disadvantaged merely because the final legal pathway differs from the terms of the original will.

Estate-derived property, substitution and accumulation

54. The use of subsection 102AG(2AA) recognises that qualifying property is not confined to the identical asset held at death. The Explanatory Memorandum also indicates that the exclusion extends to accumulated income and capital and to replacement assets acquired in an ordinary arm's-length transaction.

55. The operative rules require greater detail for successive reinvestment, mixed estate and non-estate funding, improvements funded from several sources, borrowings and refinancing, assets acquired partly from accumulated income, trust-to-trust transfers authorised by a will and proportionate tracing.

56. A source-based exclusion will become difficult to administer over the long life of a trust unless reasonable tracing and apportionment rules are included in the legislation. The rules should preserve the character of substituted and reinvested estate-derived property while proportionately excluding income attributable to later, non-qualifying additions.

Other genuine post-death trusts

57. The proposed section 101AD is principally confined to a trust established as a result of a will, codicil, intestacy or specified court order. That boundary excludes or leaves uncertain several orthodox fiduciary arrangements arising directly because of death, including superannuation proceeds trusts, life insurance proceeds trusts, employment death benefit trusts and other trusts funded directly or indirectly from death-related benefits.

58. Superannuation death benefits may be paid to the deceased's legal personal representative and then held under a testamentary trust. They may instead be paid directly to a trustee under a binding or non-binding death benefit nomination or trustee discretion, or held under a superannuation proceeds trust established for a surviving spouse, minor child, adult child with disability or other dependant.
A superannuation proceeds trust may also hold a combination of superannuation, life insurance and other death-related proceeds. These arrangements are particularly important where the trust is used to protect death benefits for survivors of family and domestic violence. Treasury is consulting separately on measures to prevent perpetrators of family and domestic violence from accessing victims' superannuation death benefits, and taxing a superannuation proceeds trust at 30 per cent would directly cut across that protective objective by taxing the very mechanism used to preserve the proceeds for the intended dependants.[12]

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[12] Law Council of Australia, Consultation paper: Preventing perpetrators from accessing victims' super death benefits (1 June 2026).

59. Similar issues arise for life insurance proceeds trusts, employment death benefit trusts and other trusts established to hold payments or benefits arising because of a person's death. The fact that property does not first vest in the legal personal representative does not alter its death-related origin or the protective and succession function for which it is held.

60. The NELSC recommends that proposed section 101AD be extended, or that proposed section 101AE include a corresponding exclusion, expressly covering:

    (a) superannuation proceeds trusts;

    (b) life insurance proceeds trusts;

    (c) employment death benefit trusts; and

    (d) other trusts funded directly or indirectly from prescribed death-related payments.

61. The same tracing, substitution, reinvestment and mixed-funding rules recommended for testamentary trusts should apply. Where a trust contains both qualifying death-related property and other property, the exclusion should apply proportionately rather than disqualifying the whole trust.

62. The exclusion should be framed by objective statutory criteria rather than an undefined label or broad administrative discretion. Families commonly make death-benefit nominations and estate planning decisions many years before death and require a rule capable of being applied when the arrangement is made.

Choices for existing discretionary trusts

Three pathways

63. The package presents an existing discretionary trust with three interrelated pathways:

    (a) remain subject to the minimum tax;

    (b) make an EET election; or

    (c) restructure using the transitional roll-over.

64. Each pathway has materially different taxation, trust law, commercial and administrative consequences. The appropriate pathway will depend upon the terms of the trust deed, the nature and location of the trust assets, the identity and circumstances of the beneficiaries, existing financing and contractual arrangements, succession objectives and the trustee's capacity to satisfy the relevant requirements over time.

65. A trust that remains within the minimum tax regime may preserve its existing structure and the trustee's discretionary powers. However, it may become liable for minimum tax each year, require ongoing identification and tracing of excluded and non-excluded income and be affected by the unresolved interaction between the

minimum tax, beneficiary assessments, corporate beneficiaries, Division 7A and the separate minimum taxation of capital gains.

66. An EET election may allow the trust to retain its assets and avoid the immediate transaction costs associated with restructuring. However, it requires the trustee to nominate particular beneficiaries and fixed percentages of income and capital and may expose the trust to automatic revocation and permanent loss of the election. The election may also affect the trustee's duties, the operation of the trust deed and the legal character of beneficiaries' interests.

67. Restructuring under the transitional roll-over may allow assets to be transferred from the discretionary trust without specified Commonwealth income tax consequences. However, it may require significant changes to the ownership and operation of the family or business structure and may involve State or Territory duty, refinancing, third-party consents, contractual restrictions and substantial professional and implementation costs. Some trusts may be unable to transfer all relevant assets or satisfy the continuity and post-restructure integrity requirements.

68. These pathways are not necessarily complete substitutes for one another. A trustee may need to retain some assets within the trust while restructuring other parts of an enterprise. A trust may also commence a restructure that cannot be completed because of circumstances outside the trustee's control. The general prohibition against coordinated or sequential use of the EET and roll-over regimes may therefore prevent a trustee from adopting the most commercially and legally appropriate response, even where no duplication of relief would arise.

69. A trustee cannot make a responsible choice without knowing the complete rules, the status of legislative instruments, the tax and duty consequences, the effect on financing and commercial arrangements, and whether the decision is consistent with the trust instrument and fiduciary duties. The trustee must also understand the administrative requirements and the consequences of failing to comply with the chosen pathway over time. The choices should not be forced within a compressed period while those matters remain unresolved.

EET model

Design of the proposed model

70. The elective pathway is welcome in principle because it may avoid the immediate transfer of assets, refinancing of liabilities and transaction costs associated with a restructure. The model in proposed Division 6F of Part III of the ITAA 1936 is nevertheless too rigid to provide a sustainable alternative for many family trusts.

71. Proposed section 102UYB requires the trustee to nominate particular beneficiaries and fixed percentages of both income and capital. Those percentages must be the same for income and capital and must total 100 per cent. If the trustee decides to keep the election in force for an income year, proposed subsection 102UYD(2) requires present entitlements to be conferred in accordance with the nomination.

72. The model requires a family to predetermine economic participation, potentially for the remaining life of the trust. It does not adequately accommodate the birth or

adoption of children, disability, illness, loss of capacity, entry into or departure from a family business, financial hardship, bankruptcy, family violence, estrangement, relationship changes, succession of control or later changes to taxation, corporations, trust or succession law.

73. The NELSC recommends a permitted-class model. The trustee should nominate a defined class of permissible beneficiaries and retain discretion over whether, when and in what proportions income and capital are applied within that class. Minimum tax could apply to a distribution outside the class without invalidating distributions made within it.

74. If fixed nominations are retained, separate percentages should be permitted for income and capital. The law should also allow prospective variations for genuine family, vulnerability, succession and commercial reasons, subject to notice and an appropriately targeted integrity rule.

Accumulation, capital and streaming

75. A requirement to allocate 100 per cent of income and capital is inconsistent with ordinary trust administration. Trustees may need to accumulate income to retain working capital, fund investment or future expenditure, meet liabilities and contingencies, comply with financing arrangements, preserve liquidity or avoid a distribution that would harm a vulnerable beneficiary.

76. The regime should permit accumulation without revoking the election. Accumulated amounts should remain trust property and be capable of later application within the nominated class.

77. Requiring income and capital to follow identical percentages also conflicts with trusts that distinguish between income and capital beneficiaries or that stream capital gains and franked distributions under Subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997* (Cth) ("**ITAA 1997**"). The legislation should specify the amount against which percentages are tested and preserve lawful streaming and the existing specific-entitlement rules.

78. The apparent annual requirement to confer present entitlement to 100 per cent of trust capital is especially problematic. A deed may not authorise such an appointment while the trust continues. The requirement may also conflict with vesting provisions, takers in default and separate capital entitlements. The regime should not require annual present entitlement to all trust capital.

Trustee duties and the legal effect of a nomination

79. The EET Explanatory Memorandum states that a nomination does not restrict the trustee's discretion and that the trustee retains the capacity to act under the trust deed.

80. There are two competing views about the legal effect and practical operation of those provisions.

81. On one view, an EET nomination operates only as a taxation election. Proposed paragraph 102UYB(2)(a) refers to each beneficiary to whom the trustee "may confer"

a present entitlement. The note to proposed subsection 102UYD(2) and proposed paragraph 102UYF(2)(a) also expressly contemplate the trustee deciding not to act in accordance with the nomination. The consequence is automatic revocation of the election rather than invalidity of the trustee's exercise of discretion. On this construction, the provisions prescribe the taxation consequences of the trustee's decision but do not amend the trust deed or alter the trustee's powers under it.

82. On the competing view, an EET nomination may legally fetter the trustee's discretion. The difficulty arises from the trustee choosing, when making the election, to identify particular beneficiaries and commit to predetermined percentages of income and capital that may apply in every subsequent income year. If the trustee decides that the election is to remain in force, proposed subsection 102UYD(2) requires the trustee to confer present entitlements in accordance with that prior nomination. The ability to depart from the nomination and accept automatic revocation may not answer the concern that the trustee has impermissibly committed itself in advance as to how its discretionary powers will be exercised.[13]

83. A family trust election establishes a tax boundary around a family group without requiring predetermined annual allocations. By contrast, the EET nomination identifies particular beneficiaries and percentages for income and capital, whereas departure may lead to automatic revocation and assessment under section 99A of the ITAA 1936.

84. A trustee may therefore be regarded as having predetermined the future exercise of discretionary powers. Alternatively, the trustee may remain legally free to depart from the nomination but face taxation consequences so severe that the choice is not meaningful in practice. Either characterisation creates uncertainty about the trustee's continuing duty to exercise powers in good faith, for a proper purpose and upon real and genuine consideration of relevant circumstances. A repeated pattern of distributions in predetermined proportions would not, without more, establish a failure to exercise discretion. However, particularly in the absence of evidence of fresh consideration in each income year, it may support a contention that the trustee did not genuinely reconsider the exercise of its discretion or the circumstances of relevant beneficiaries.[14]

85. The proposed law should not place a trustee in an enduring conflict between preserving the election and responding to the interests and circumstances of beneficiaries under the deed. If the fixed-percentage model is retained, the legislation should permit departure or variation where compliance would conflict with the trustee's duties or proper administration, and should protect an otherwise reasonable exercise from retrospective tax consequences. The existence of competing interpretations also places advisers in a difficult position when recommending whether a trustee should enter the regime. Advisers should not be expected to resolve this fundamental uncertainty through qualifications in their advice. Trustees should not be required to accept unresolved trust-law and litigation risks as the price of accessing the regime.

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[13] See *Dagenmont Pty Ltd v Lugton* [2007] QSC 272.
[14] See *Karger v Paul* [1984] VR 161 and *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142.

86. Experience with family trust and interposed entity elections provides an important warning. Trustees and advisers may be required to address historical elections, incomplete records, changes in family circumstances and substantial liabilities many years after the original advice was given. That experience demonstrates the risks of introducing another potentially permanent election without clear rules, reasonable variation rights and effective correction mechanisms. The intended legal effect of an EET nomination and its interaction with the trustee's discretionary powers and fiduciary duties should be clarified before the regime commences.

Nature of the nominated beneficiaries' interests

87. The draft also does not identify the legal character of the interest of a nominated beneficiary. Under general trust law, the nature of a beneficiary's interest depends on the terms of the trust and the rights thereby conferred. It is not determined simply by describing the person as a beneficiary.[15]

88. It is unclear whether the nomination is only a statement of intended future exercises and a condition of tax treatment, or whether the statutory obligation to confer fixed entitlements creates, alters or recognises a vested, proprietary or otherwise enforceable interest in trust income or capital. The answer may differ at the date of nomination, the start of an income year, the trustee's annual decision to continue, the distribution resolution and payment.

89. This uncertainty has consequences beyond income tax. An interest may be a CGT asset within section 108-5 of the ITAA 1997, may form part of a beneficiary's estate on death, and may be created, varied or extinguished when an election is made or revoked or a nomination is made, varied or reallocated. It may also affect rights on vesting, default beneficiary provisions and State or Territory duty.

90. Proposed section 102UYE allows a deceased beneficiary's percentage to be reallocated only to specified persons connected with the deceased estate and the trust. The legislation should explain whether the deceased beneficiary held an interest that passed to the legal personal representative, formed part of the estate or could be dealt with by will, and the CGT, cost base and duty consequences of the reallocation. Even if the nomination does not create a continuing legal, equitable or proprietary interest, the connection between the permitted recipients and the deceased beneficiary's estate creates uncertainty about the intended legal character of the nominated percentage and the consequences of the beneficiary's death.

91. The NELSC recommends an express statutory statement of whether a nomination creates, alters or recognises any legal, equitable or proprietary interest, when present entitlement arises, and whether an interest forms part of a nominated beneficiary's estate. Consequential CGT, succession and duty rules should follow that characterisation. The regime should ensure that no CGT arises merely because an EET election is made or revoked or a nomination is made, varied or reallocated. The Commonwealth should also seek coordinated State and Territory relief from any duty arising solely because a taxpayer participates in the regime.

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[15] See CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic) (2005) 224 CLR 98.

Variation, revocation and correction

92. Proposed section 102UYE permits variation only following the death of a nominated beneficiary or a qualifying relationship breakdown involving two nominated beneficiaries. Those grounds do not reflect the range of legitimate events affecting a trust over time. Further, the permitted variations following either event are themselves unduly restricted.

93. Following the death of a nominated beneficiary, only that beneficiary's percentage may be reallocated. The replacement nominee must be an individual who is both a beneficiary of the deceased nominee's estate and capable of benefiting under the trust. Requiring the replacement nominee to be a beneficiary of the deceased nominee's estate may allow the nominated beneficiary, through the terms of their will, effectively to determine the class of persons among whom their percentage can be reallocated after death. The eligible class may instead be determined by the intestacy rules if the beneficiary dies without a valid will.

94. That outcome is inconsistent with the discretionary nature of the trust and may displace the trustee's assessment of the circumstances and needs of the trust's beneficiaries. It may also produce arbitrary outcomes where the deceased nominee made only specific gifts, excluded relevant family members, died intestate or their estate becomes subject to a family provision claim. The trustee should retain discretion to reallocate the deceased nominee's percentage among persons otherwise eligible to benefit under the trust, subject to appropriately targeted integrity requirements.

95. The relationship-breakdown mechanism is also unduly restricted. Where the percentage of one party to the former relationship is reduced, the reduction must be reallocated in its entirety to the other party. The trustee cannot reallocate it to another beneficiary or make consequential changes to other nominated beneficiaries whose continued nomination may no longer be appropriate following the breakdown.

96. This may create particular difficulties where the trust has made a family trust election. For example, an EET may nominate a husband, wife and the wife's sister, with the husband as the test individual under the family trust election. Following the relationship breakdown, the wife's sister may cease to fall within the relevant family group. Although the husband's and wife's nominated percentages may be varied, the wife's sister cannot be removed or replaced under the EET variation provisions. The trustee may then be required to choose between complying with the EET nomination and potentially incurring family trust distribution tax, or departing from the nomination and triggering automatic revocation of the EET election.

97. The variation provisions should permit consequential changes to other nominated beneficiaries and the addition of replacement beneficiaries where reasonably necessary to implement a court order or agreement, reflect changed family circumstances, or maintain consistency with an existing family trust election or interposed entity election.

98. Variation should also be available for birth or adoption, disability or incapacity, marriage or divorce, the beginning or ending of a de facto relationship, entry into or departure from a family business, material financial hardship, bankruptcy or cessation

of bankruptcy, exposure to creditors, family violence, estrangement, succession changes, the establishment or termination of a suitable company or trust beneficiary, changes in relevant taxation law, corporations law, trust law or succession law, and other genuine family or commercial circumstances. The trustee should retain discretion to determine the beneficiaries among whom a percentage is reallocated, provided each replacement nominee is otherwise eligible to benefit under the trust and any applicable integrity requirements are satisfied. A general prospective variation power, supported by notice and an anti-avoidance rule, would be simpler and more workable.

99. Proposed subsection 102UYF(2) includes automatic revocation triggers relating to distributions and changes affecting nominated companies and trusts. Some events may occur without the trustee's immediate knowledge. A later conclusion that an election was revoked in an earlier year could expose the trustee and beneficiaries to amended assessments, interest, penalties and consequential accounting problems.

100. Under proposed section 102UYG, revocation may deem beneficiaries never to have been presently entitled for the relevant year and expose all of the trust's net income to assessment under section 99A. That consequence is disproportionate where the breach is inadvertent, immaterial or beyond the trustee's control.

101. The NELSC recommends that revocation be reserved for deliberate or repeated material non-compliance. The law should provide a correction period, Commissioner discretion to disregard a breach where fair and reasonable, notice before adverse treatment, prospective operation and reinstatement after remediation. A distribution outside the nomination could instead bear minimum tax without disturbing otherwise valid entitlements.

Corporate nominees and changes in control

102. Proposed section 102UYC defines an eligible company by reference to the absence of material discretionary elements affecting members' rights or interests. Company constitutions commonly contain powers concerning dividends, capital, share issues, redemptions, rights and governance. The concept may be difficult to apply, especially to family companies with more than one class of shares.

103. The NELSC recommends that eligibility requirements with potentially permanent consequences be objective and in primary legislation. Ordinary private companies with one class of ordinary shares should have a safe harbour. A company eligible when nominated should remain eligible unless a material change is initiated by the company or members. Later legislative instruments should not retrospectively destabilise an election. Ordinary events, including the issue, redemption or transfer of shares, bucket-company succession planning, the winding up or deregistration of a nominated company or the winding up or vesting of a nominated trust, may otherwise cause automatic revocation, including where the trustee is not immediately aware that the event has occurred. Those events should be subject to a reasonable notification and correction period rather than resulting in automatic and irreversible loss of the election.

104. The legislation should also explain the effect of a change of trustee, appointor or controller caused by death, incapacity, retirement, removal or ordinary succession. A change should not itself affect the election, and incoming officeholders should receive a reasonable period to identify the nomination, notify the Commissioner and correct inadvertent non-compliance.

State and Territory duty and family law

105. The Commonwealth fact sheet's expectation that an EET election will not result in State or Territory duty is not a substitute for statutory relief or a published position from each revenue authority. Duty consequences depend upon whether the nomination creates, alters or extinguishes a legal, equitable or beneficial interest and upon the legislation of each jurisdiction.

106. On one view, the nomination is a taxation election only. It does not itself amend the trust deed, exercise a power under the deed or confer the nominated present entitlements. On that construction, it does not alter the interests of discretionary objects or takers in default and would not constitute a dutiable transaction.

107. On the competing view, proposed subsection 102UYD(2) requires the trustee, if the election is to remain in force, to confer present entitlements to predetermined shares of trust income and capital. The statutory scheme may therefore create, recognise or alter interests in a manner relevant to State and Territory duties legislation, even though the trust deed is not formally amended. The result may depend upon the trust deed, the form of the nomination and whether the nomination is accompanied by an exercise of a power or an amendment enabling the trustee to comply with the regime.

108. The issue is material in jurisdictions whose duties legislation applies to changes in beneficial ownership or equitable interests, including New South Wales,[16] Victoria[17] and Tasmania.[18] South Australia applies broad provisions to instruments affecting interests in trust property, including potential beneficial interests.[19] Western Australia[20] and Queensland[21] contain specific trust acquisition and trust surrender provisions relevant to takers in default. If an EET nomination is expressed as, or accompanied by, a declaration, resolution or deed amendment locking in income and capital entitlements, it may also raise questions as to whether there is a new declaration of trust or resettlement, or whether landholder duty arises.

109. The concern is not that every EET nomination will necessarily attract duty. It is that trustees and advisers cannot presently determine with sufficient certainty whether duty will arise when an election is made or revoked, when a nomination is made, varied or reallocated, when beneficiaries are effectively excluded, or when a deed is

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16 *Duties Act 1997* (NSW) s 8(1)(b)(ix) and s 8(3). See also https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/cpn-025-change-in-beneficial-ownership.

17 *Duties Act 2000* (Vic) s 7. See also https://www.sro.vic.gov.au/buying-property/land-transfer-stamp-duty/transaction-types/changes-beneficial-ownership-without-changing-legal-ownership.

18 *Duties Act 2001* (Tas) ss 6-9.

19 *Stamp Duties Act 1923* (SA) ss 71(3)(a) and 71(5)(i).

20 *Duties Act 2008* (WA) ss 54–62. See also Department of Treasury Western Australia, "Discretionary trusts: duty requirements", which expressly addresses acquisitions and surrenders of interests by takers in default.

21 *Duties Act 2001* (Qld) ss 55–63. See also s 117.

amended to accommodate the regime. The answer may differ between jurisdictions and according to the terms of the particular trust.

110. Before enactment, the Commonwealth should consult each State and Territory revenue authority, publish the position of each authority and secure consistent relief for duty arising solely because a taxpayer participates in the Commonwealth regime. If consistent relief cannot be secured, the Commonwealth should provide an equivalent credit or other relief.

111. An EET nomination may also affect the treatment of the trust in later family law proceedings. That may be so even if the nomination does not create a fixed proprietary interest. The nomination, resulting present entitlements, pattern of distributions and beneficiary's relationship to control may provide evidence of expected access to the trust or of an economic benefit or financial resource. It may therefore alter the risk profile of a trust established for a wider family group. That issue cannot be resolved solely by the tax legislation, but it reinforces the need for flexibility and fully informed decision-making.

Election period and complete rules

112. The election is available only to a trust in existence on 1 July 2028 and, under proposed subsection 102UYB(4), must be made in the first income year commencing on or after that date. The election can be made only once and the trust generally cannot combine the election with the transitional roll-over. A trust may initially remain within the minimum tax regime but later find that an EET election is appropriate because of changed family, succession, commercial or financial circumstances.

113. The NELSC recommends that trustees be permitted to make a prospective election in a later year and, subject to integrity rules, remake an election after revocation. A later election would not provide relief for earlier income years and could be subject to appropriately targeted integrity rules. There is therefore no apparent need to confine access to the EET regime permanently by reference to the trustee's decision in the first income year. No decision period should begin until the legislation, regulations, legislative instruments, approved forms and necessary administrative guidance are final.

Transitional roll-over

Scope and accessibility

114. The NELSC supports the breadth of the proposed Commonwealth income tax relief in Subdivision 126-C of the *Income Tax (Transitional Provisions) Act 1997* (Cth), including its application to CGT assets, trading stock, revenue assets, depreciating assets, membership interests and family trust distribution tax consequences.

115. The utility of the roll-over will depend on whether trusts can satisfy the eligibility, continuity, completion and post-restructure conditions. The Explanatory Memorandum confirms that the roll-over does not compel a trustee to restructure and operates only to the extent the trustee can lawfully undertake the relevant transfers. That limitation is important but does not resolve the practical barriers.

All relevant assets and completion

116. Proposed subsection 126-430(3) generally requires all relevant assets to be transferred during the transitional period, subject to limited exceptions. A complete transfer may be prevented by financing or security arrangements, contractual assignment restrictions, regulatory licences, third-party or co-owner consent, litigation or a prohibition under the trust instrument.

117. An integrated restructure may also require different assets to be transferred to different replacement entities or to pass temporarily through an intermediate owner. The legislation should permit more than one eligible transferee and reasonable intermediate steps where continuity of economic ownership is preserved.

118. A trustee should be able to retain an asset that cannot reasonably or commercially be transferred. The Commissioner should have a confined discretion to extend the completion period where genuine impediments exist and the parties have taken reasonable steps to complete the restructure.

119. The draft also does not adequately address assets that must initially remain in the original trust because they are reasonably required to meet existing liabilities. Those liabilities may include secured or unsecured external debt, beneficiary loans and unpaid present entitlements. An asset may become capable of transfer only after the relevant liability has been discharged or otherwise provided for, by which time the ordinary roll-over period may have ended.

120. Deferred roll-over relief should be available for an asset identified during the original restructure period but necessarily retained to meet an existing liability. The trustee should be permitted to transfer the asset within a reasonable period after that liability has been discharged or otherwise provided for, subject to appropriate tracing, continuity and integrity requirements. Income and gains derived from the asset while it is necessarily retained should also be excluded from minimum tax. The Explanatory Memorandum should include worked examples addressing secured and unsecured liabilities, beneficiary loans, unpaid present entitlements and assets retained to meet those liabilities before being transferred after the liabilities are discharged.

Continuity and post-restructure integrity

121. The objective of preserving continuity of underlying economic ownership is appropriate. However, beneficiaries of a discretionary trust do not ordinarily hold fixed proprietary interests before the restructure. It may therefore be difficult to identify the interests against which continuity is to be measured or to demonstrate that substantially the same economic ownership has been maintained. The continuity test must accommodate multigenerational family groups, corporate and trust beneficiaries, succession arrangements, vulnerable beneficiaries and transfers to more than one replacement entity.

122. Proposed subsection 126-430(5) and related provisions restrict material discretionary elements in the replacement entity for four income years. Ordinary governance and commercial flexibility should not cause the roll-over to fail. A power concerning governance, amendment, succession, capital management or another ordinary

commercial matter may nevertheless be characterised as a material discretionary element. If that occurs during the four-year period, roll-over relief may be lost after the trustee has completed an irreversible restructure and incurred the associated duty, financing and implementation costs.

123. Trustees must be able to determine before commencing a restructure whether the replacement entity and the proposed transaction will satisfy the continuity and post-restructure integrity requirements throughout the four-year period. The substantive requirements and objective statutory safe harbours should therefore be enacted before the transitional period begins. A later legislative instrument or integrity amendment should not retrospectively alter the conditions attaching to a completed restructure or cause previously available rollover relief to be lost.

Duty and implementation costs

124. The roll-over does not affect liabilities under other laws, as paragraph 1.64 of its Explanatory Memorandum acknowledges. State and Territory transfer duty, landholder duty and related transaction taxes may make a restructure involving land or substantial business assets commercially impracticable.

125. The Commonwealth should seek coordinated duty relief for transactions qualifying for Subdivision 126-C. If that is not achievable, consideration should be given to a credit, offset, grant or deduction for unavoidable duty incurred directly because of a qualifying restructure.

126. Affected trusts will also incur legal, taxation, accounting, valuation, refinancing, regulatory and implementation costs. These costs arise even where the trustee ultimately decides to remain in the minimum tax regime. The Government should publish realistic estimates of those costs and consider proportionate assistance for reasonable expenditure directly attributable to the transition.

Coordination with the election

127. The drafts generally prevent a trust from using both the roll-over and EET regimes. A trustee may need to retain some assets while restructuring other parts of an enterprise, or may commence a restructure that cannot be completed for reasons outside its control. Coordinated or sequential use should be permitted where it does not duplicate relief.

Interaction with other taxation rules

Capital gains minimum tax

128. The proposed trust minimum tax commences on 1 July 2028, while the separate 30 per cent minimum tax on certain capital gains is proposed to commence on 1 July 2027. Although directed to different tax bases and advanced through separate legislative packages, the measures may apply to the same trust, assets, fiduciaries and beneficiaries.

129. In its submission on the capital gains tax and negative gearing Tranche 2 legislation, the Law Council's Business Law Section welcomed the exclusion for qualifying

deceased estates and testamentary trusts and recommended practical tracing rules for replacement assets, mixed funds and estate-derived property.[22] The Law Council also expressed concern that the associated scheme-purpose test was too low and uncertain for ordinary estate planning and administration.

130. Those concerns apply with equal force here. Definitions of testamentary trust, establishment, estate-derived property and permitted beneficiary treatment should operate consistently across both regimes. Rules governing accumulation, substitution, reinvestment, mixed funding and post-death trusts should not produce contradictory outcomes.

131. An amount or gain protected under one regime should not attract an unintended liability or stranded credit under the other. The final legislation should explain the interaction between proposed section 101AA, trustee assessments under sections 99 and 99A of the ITAA 1936, beneficiary offsets under proposed section 101AF, and the CGT minimum tax provisions.

132. The explanatory materials should include integrated examples applying both minimum tax regimes to the same testamentary trust, including the sale and reinvestment of estate property, accumulation, later distribution and mixed estate and non-estate funding.

Corporate beneficiaries and Division 7A

133. Proposed section 101AF provides an offset to a beneficiary for minimum tax paid by the trustee but excludes a corporate beneficiary. Trust income distributed to a company may therefore bear minimum tax at trustee level and company tax at beneficiary level without a corresponding corporate credit.

134. The same entitlement may also engage Division 7A of Part III of the ITAA 1936 if it remains unpaid or trust funds are later provided or applied for a shareholder or associate. The High Court's decision in Commissioner of Taxation v Bendel does not itself resolve the cumulative operation of the new minimum tax, company tax and Division 7A.[23]

135. The legislation should contain ordering and anti-duplication rules, recognise minimum tax paid in calculating tax payable by a corporate beneficiary and address existing unpaid present entitlements. Any integrity protection should be directed to inappropriate benefits rather than denying a credit in all cases.

Franked distributions and assessments

136. The NELSC supports refunding excess franking credits to the trustee rather than requiring indefinite carry-forward. Any additional integrity rule should preserve ordinary refunds and coordinate with Subdivision 207-B of the ITAA 1997.

137. More generally, the package should identify how minimum tax income and offsets interact with Division 6, Division 6AA, section 100A, Division 7A, trust losses, family

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[22] Law Council of Australia, Business Law Section, *Submission on Capital Gains Tax and Negative Gearing Tranche 2 Legislation* (26 August 2026), paras 39-50.

[23] Commissioner of Taxation v Bendel [2026] HCA 18.

trust and interposed entity elections, Subdivisions 115-C and 207-B, and non-resident beneficiary rules. Clear ordering is essential to prevent duplicated liabilities or credits that cannot be used.

Administration and legislative design

Complete rules in primary legislation

138. The exposure drafts leave substantive matters to legislative instruments, approved forms and later amendments. These include aspects of fixed trust status, excluded income, eligible companies, roll-over integrity, notifications and collection.

139. The NELSC submits that a legislative instrument may appropriately deal with detailed administration. It should not determine a core question of whether a taxpayer is liable, excluded from liability or entitled to transitional relief, particularly after the taxpayer has made an irrevocable election or undertaken a restructure. Those criteria should appear in primary legislation and be stable for existing arrangements.

140. All proposed instruments, forms and material administrative rules should be released with revised exposure drafts. Trustees should not be required to make enduring decisions while the conditions and reporting obligations remain incomplete.

Administration, compliance and worked examples

141. Compliance will not be confined to the transition. Depending on the pathway, trustees may have to trace excluded property and mixed funds, reconcile trustee and beneficiary offsets, monitor nominated percentages and company eligibility, identify revocation events, satisfy post-restructure conditions and retain historical records over long periods. The Australian Taxation Office will accordingly need to administer and verify those matters, including by examining wills, trust deeds, company constitutions, succession arrangements and historical transactions.

142. The burden will be particularly significant where administration depends upon evaluative concepts such as “material discretionary elements”, “genuine testamentary purposes” and the legal effect of an EET nomination. These matters may involve questions of trust law, property law, succession law, corporations law and State and Territory revenue law that cannot be resolved through administrative guidance alone. Unless the operative legislation provides sufficient certainty, they are likely to generate private ruling applications, objections, reviews and litigation.

143. The administrative framework should minimise unnecessary compliance. Notification and calculation requirements should be integrated into existing trust returns and beneficiary reporting. Duplicate reporting should be avoided, materiality and correction rules should apply to inadvertent errors and transitional record-keeping rules should accommodate circumstances in which historical information is not reasonably available.

144. Comprehensive worked examples are also required to demonstrate how the interrelated provisions apply in common factual circumstances. Those examples should address at least:

(a) a deceased estate selling property and retaining proceeds while liabilities and claims are resolved;

(b) the transfer of property from an estate to a testamentary trust, followed by reinvestment and accumulation;

(c) mixed estate-derived and later contributed property;

(d) superannuation, insurance and employment death benefits paid through different legal pathways;

(e) broad beneficiary classes, remote gift-overs and a later curative amendment;

(f) an EET with accumulation, capital gains, franked distributions, a vulnerable beneficiary and a change of control;

(g) the death of a nominated beneficiary and reallocation of the percentage;

(h) revocation caused by an inadvertent or immaterial breach;

(i) a roll-over involving multiple transferees and a non-transferable asset; and

(j) the simultaneous operation of the trust and CGT minimum tax regimes.

Consultation process

145. Stakeholders have been allowed 15 days to consider four exposure drafts, three explanatory memoranda and three interrelated pathways, together with amendments across the ITAA 1936, ITAA 1997, *Income Tax Rates Act 1986* (Cth) and *Income Tax (Transitional Provisions) Act 1997* (Cth).

146. The legal and practical consequences extend beyond Commonwealth taxation to trust law, succession law, estate administration, corporations law, family law, financing arrangements and State and Territory duty. Some central rules are incomplete or deferred. That consultation period is not sufficient to test the provisions against the range of circumstances in which they must operate.

147. The Law Council's *Best Practice Legislative Development Checklist* states that best practice consultation generally involves transparent, broad-based and accessible processes which are not rushed, and that, in most circumstances, six weeks is the minimum appropriate period for stakeholders to comment.[24] It also asks whether stakeholders have been given a reasonable opportunity to comment, whether significant changes have been exposed for detailed feedback, and whether input has been adequately accounted for in the final legislation.

148. The process for this package should meet those standards. The need for iterative amendments shortly after enactment would create uncertainty, increase compliance costs and require executors and trustees to administer estates and trusts under incomplete or changing rules.

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[24] Law Council of Australia, *Best Practice Legislative Development Checklist* (25 June 2025), Consultation and Implementation.

149. Repeated compressed consultation periods for substantial and overlapping reforms also place a significant burden on the relatively small group of practitioners with the specialist experience required to identify their technical and practical consequences. Over time, that burden risks reducing participation and depriving the legislative process of important expertise. The risk is compounded where stakeholders receive limited feedback about how earlier concerns have been considered and must raise and explain the same issues during successive consultation periods.

150. The NELSC recommends that Treasury:

    (a) extend the present consultation period;

    (b) conduct targeted technical roundtables involving trust, tax, succession, estate administration and State and Territory duty specialists;

    (c) publish a response identifying the principal issues raised, indicating how those issues have been addressed and stating whether relevant recommendations have been accepted, rejected or remain under consideration;

    (d) release revised exposure drafts together with all proposed legislative instruments and administrative rules; and

    (e) allow a further consultation period of at least six weeks before a Bill is introduced.

151. The final package should also allow sufficient lead time after enactment for trustees, beneficiaries and advisers to understand the rules, review trust instruments, obtain advice and implement decisions. Consistent with the Checklist, the commencement arrangements should give stakeholders sufficient time to digest the implications and prepare for compliance, and the legislation should provide for an independent post-implementation review.

Conclusion

152. The exposure draft package contains constructive elements, including recognition of qualifying testamentary trusts, a broad Commonwealth income tax roll-over, refundable excess franking credits and an elective pathway. Those elements do not yet form a coherent and sufficiently certain framework.

153. The succession law issues are central, not peripheral. Testamentary and other genuine post-death trusts protect families, preserve inherited assets and enable fiduciaries to respond to needs that may emerge long after an estate plan is made. Their treatment should be determined by clear source and function rules rather than undefined concepts, unused drafting powers or a low and uncertain purpose threshold.

154. Existing discretionary trusts should not be required to choose between remaining subject to minimum tax, making an enduring fixed-percentage election and undertaking an asset restructure until the trust law, succession, CGT, duty and administrative consequences are resolved. The EET regime requires substantial

redesign, and the practical availability of the roll-over depends upon flexibility and coordinated duty relief.

155. The NELSC recommends a further round of consultation on revised and complete exposure drafts before the legislation is introduced. and would welcome the opportunity to participate in targeted technical consultation.