Law Council
OF AUSTRALIA

Minimum tax on discretionary trusts

Supplementary submission

The Treasury

4 August 2026

Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Contents

Acknowledgements 2

Introduction 3

Executive summary 4

Response to consultation questions 5

Q1—How should discretionary trusts be defined to appropriately distinguish them from fixed trusts for the purposes of the Minimum tax? 5

Q2—What is the appropriate minimum tax treatment for income-tax exempt entities? 7

Q3—Are there any other implementation matters that should be considered in designing the minimum tax on discretionary trusts? 7

Q4—Are the proposed rollover relief arrangements appropriate? 9

Q9—Having regard to tax system integrity, compliance costs and administrative simplicity, should excess franking credits be refundable to the trustee? 10

Q12—What additional safeguards, administrative modifications, or beneficiary notification requirements should be considered to support the effective operation and collection of the minimum tax, particularly for arrangements involving corporate trustees? 10

Q17—Are there any other issues or complications as a result of the High Court's decision in *Bendel* that should be considered as part of the design and implementation of the revised 2018–19 Budget measure? 11

About the Law Council of Australia 12

Acknowledgements

The Law Council thanks the Law Institute of Victoria for its preparation of this supplementary submission.

Introduction

On 31 July 2026, the Law Council of Australia provided a submission to the Treasury's consultation on the proposed minimum tax on discretionary trusts.

The Law Council has received additional input from the Law Institute of Victoria (LIV), which forms the substance of this supplementary submission. This supplementary submission is informed by the LIV's Taxation and Revenue Law Committee. Given the tight timing of the inquiry, the Law Council sets out the LIV's views in full below.

Executive summary

1. The LIV supports Treasury's objective to improve the integrity of the income tax system. However, it considers that the proposed minimum 30 per cent tax must be more precisely targeted to avoid unintended consequences for ordinary family, succession, charitable and commercial trusts.

2. In particular, the regime should develop a purpose-built 'discretionary trust' definition that specifically targets income or capital redirection between beneficiaries to avoid, or reduce, tax liability. A definition that only relies on the absence of fixed trust characteristics would risk capturing arrangements that are not the intended policy target.

3. The LIV also considers that the regime should preserve existing policy settings for arrangements that have historically been recognised as warranting concessional or exempt treatment. This includes distributions to charities and other tax-exempt entities, testamentary trusts, trusts established for vulnerable beneficiaries and beneficiaries who are 'excepted persons' under Division 6AA of the *Income Tax Assessment Act 1936* (Cth).

4. The LIV is also concerned by aspects of the proposal that may give rise to economic double taxation, particularly in relation to corporate beneficiaries and the treatment of excess franking credits. The minimum tax should operate as a tax floor rather than as a mechanism for imposing additional layers of tax on income that has already borne tax elsewhere in the system.

5. The LIV recommends Treasury consider adopting the following measures to better align the regime with its intended objectives whilst reducing uncertainty, compliance costs and unintended consequences for legitimate trust arrangements:

    - adopt a purpose-built definition of discretionary trust supported by clear commercial safe harbours;
    - exclude or provide appropriate relief for charities, testamentary trusts, vulnerable beneficiaries and excepted persons;
    - incorporate mechanisms to prevent double taxation of corporate beneficiaries and to recognise franking credits representing tax already paid;
    - provide broader and more flexible rollover relief, including a longer transition period and coordination with state tax and GST requirements; and
    - ensure the regime contains practical safe harbours, workable administration and collection mechanisms and clear ordering and transitional rules, including in relation to any future legislative response to *Bendel*.[1]

[1] *Commissioner of Taxation v Bendel* [2026] HCA 18 (***Bendel***).

Response to consultation questions

Q1—How should discretionary trusts be defined to appropriately distinguish them from fixed trusts for the purposes of the Minimum tax?

6. The LIV considers that Treasury should develop a clear, purpose-built definition of a discretionary trust that targets income splitting' as the policy objective. The reforms should not simply define a discretionary trust as any trust that is not a fixed trust.

7. Income tax law does not have a comprehensive and generally applicable definition of a discretionary trust. Current trust taxation provisions are based on concepts such as trust net income, present entitlement, trustee assessment and beneficiary assessment. By contrast, fixed trust concepts appear in specific regimes, including Schedule 2F to the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**) and related provisions of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**), which were enacted for specific policy purposes. Defining a new minimum tax regime by reference to what is not a fixed trust would import concepts developed for different legislative objectives and create uncertainty about the trusts intended to be covered.

8. The LIV considers that any definition should focus directly on the feature that appears to underpin the policy proposal. That is, the ability to determine which beneficiaries receive income or capital from year to year to circumvent or reduce tax liability. If flexibility is the concern, the legislation should specify that a discretionary trust is one where a trustee, appointor or other person has an ability to redirect or influence allocation of income or capital among trust beneficiaries.

9. A definition based solely on the absence of fixed trust characteristics risks capturing many ordinary commercial trust arrangements that are not the intended target of the measure. Commercial trusts commonly contain powers to amend trust deeds, add beneficiaries, issue further interests or vary entitlements to facilitate legitimate operational requirements. These powers do not necessarily indicate discretionary income-splitting or tax avoidance behaviour.

10. Relevant to the legal profession, the LIV's members routinely hold client monies on trust in transactions, settlements and estates, without any discretion as to beneficial entitlement. Where a discretionary trust is defined largely by reference to what is not a fixed trust, it is inevitable that some arrangements outside the policy intent will be inadvertently captured by the proposed tax. This reinforces the need for a purpose-built definition and clear exclusions.

Safe harbours for commercial and non-family trusts

11. The LIV considers that any definition should be accompanied by clear safe harbours to ensure that the regime remains targeted and administrable.

12. Consideration should be given to excluding:

    - unit trusts and other commercial trusts where economic interests are fixed by reference to issued units or objectively determined interests;
    - trusts with amendment powers that are administrative, regulatory, compliance or operational in nature;
    - trusts with multiple classes of interests where the rights attaching to each class are clearly defined and objectively ascertainable;
    - managed funds, property syndicates, joint venture trusts and similar commercial arrangements that are not used for family income-splitting purposes; and
    - deceased estates, charitable trusts and other categories already recognised in the Consultation Paper.

13. A trust should not be brought within the regime if it only contains orthodox amendment powers, mechanisms to issue additional units or interests, trustee discretions of an administrative nature or other features commonly required to govern modern commercial trust structures.

Testamentary trusts and vulnerable beneficiaries

14. The LIV supports the proposed exclusions for testamentary trusts and arrangements established for vulnerable beneficiaries but considers that these exclusions must be practical and administratively workable.

15. Testamentary trusts frequently receive and deal with multiple categories of assets over time, including insurance proceeds, superannuation death benefits, compensation payments and proceeds from the sale and reinvestment of estate assets. A rigid injected-assets rule risks creating significant tracing obligations, higher compliance costs and outcomes that are inconsistent with the policy intent of the exclusion.

16. The LIV considers that the Treasury should therefore provide:

    - clear tracing rules;
    - deemed substitution rules for reinvested estate assets;
    - safe harbours for modest family contributions used for maintenance, education, medical or disability-related expenses; and
    - grandfathering arrangements for existing testamentary trusts.

Q2—What is the appropriate minimum tax treatment for income-tax exempt entities?

17. The LIV considers that distributions to registered charities, deductible gift recipients and other income tax-exempt entities should be excluded from the minimum tax regime. Alternatively, the regime should incorporate a refundable trustee-level mechanism that preserves the value of the existing exemption.

18. Without such protection, the proposal may undermine established tax settings that support charitable giving and the not-for-profit sector. Trustees may be discouraged from making distributions to charitable entities or may be compelled to restructure solely to avoid an inappropriate tax cost.

19. The minimum tax should therefore not apply to income validly distributed to entities that are registered with the Australian Charities and Not-for-profits Commission or otherwise fall within a clearly defined class of exempt entities. Any integrity concerns could be addressed through targeted measures directed at reimbursement agreements, circular arrangements and other artificial schemes, without affecting genuine charitable distributions.

Q3—Are there any other implementation matters that should be considered in designing the minimum tax on discretionary trusts?

Excepted persons under Division 6AA of the ITAA36

20. The LIV also considers the Treasury must consider the proposal's interaction with Division 6AA of the ITAA36, which was introduced to discourage tax avoidance through 'income splitting' via trust distributions to beneficiaries that are minors. In brief, this Division establishes a higher tax rate for those under 18 years of age who receive trust income. Currently, those captured under Division 6AA have a lowered tax-free threshold to $416 (rather than $18,200), then pay tax at 66 per cent of income earned between $416 and $1,307, and then 45 per cent of income earned above $1,307. Effectively, Division 6AA discourages income splitting by imposing higher tax thresholds on all income directed to minors through a trust arrangement.

21. However, Division 6AA recognises there are categories of persons who may receive trust distributions for reasons other than income splitting. Section 102AC carves out minors who are 'excepted persons' from the higher taxation rates. This includes:

    - a minor who is a full-time worker;
    - the principal beneficiary of a special disability trust;
    - a person who is entitled to a disability support pension or someone who was entitled to a carer allowance to care for that person;
    - a person who is certified permanently blind;
    - a person who is disabled and likely to suffer from that disability permanently or for an extended period;
    - a person who is unable to work full time because of a permanent disability and received little or no financial support from relatives; and
    - a person with a double orphan pension.

22. There is merit in Treasury considering the position for 'excepted persons' who are already recognised under existing tax law as being outside usual income-splitting avenues that the minimum tax proposal seeks to address, and whether it is fair, and within the policy's intent, for an excepted person to be caught by the proposed minimum tax simply because they receive income from a trust.

23. The LIV recognises that carving out an exception under this proposal for 'excepted persons' risks potential tax arbitrage by enabling an excepted person to create an overall lower tax threshold than otherwise payable. However, the LIV considers this risk is very low considering the individuals who fall within the 'excepted person' definition. This risk may also be narrowed by creating the following exclusions:

    - exclude excepted persons only where the distribution is not part of a reimbursement agreement or circular arrangement.
    - apply the exclusion only where the beneficiary receives and controls the benefit of the income.

Corporate beneficiaries

24. The LIV suggests the Consultation Paper's proposed corporate beneficiary treatment could be refined to avoid double-taxation. The Consultation Paper proposes that corporate beneficiaries will not receive a minimum tax offset for tax paid at the *trust level* because allowing such an unrestricted offset could enable the corporate beneficiary to convert that offset into refundable franking credits (that are then paid out to corporate shareholders, who may also be beneficiaries under the trust arrangement). That policy concern is understandable, but providing no offset mechanism at the *trust level* still creates economic double taxation which must be avoided.

25. To use the example on Page 7 of the Consultation Paper:

    - Trust A generates $100,000 income, and the trustee distributes that income to Company A.
    - Trust A must pay the 30 per cent tax on the $100,000 trust income ($30,000).
    - Company A must also pay 25 per cent company tax on the $100,000 of assessable trust income ($25,000).
    - At this point, the ATO has collected $55,000 of tax on the same $100,000 income.
    - The only tax refund available is via franking credits available on the $25,000 company tax paid by Company A.
    - Franking credits are highly dependent on the assessable income of the individual or entity that claims the franking credit and is only used to offset their own assessable income. For example, if the person claiming the franking credit has a tax rate that matches the company, it is only assessed as not having to pay any additional tax on that income (or if their tax rate is higher, they must only pay the difference between the two tax rates).
    - In brief, the franking credits solve the issue of double taxation between company and shareholders, but it does not solve the issue of double taxation between the trust and the corporate beneficiary.

26. The LIV considers that a more balanced model would allow corporate beneficiaries to receive a tax credit for trustee-level minimum tax paid. The credit could reduce the company's income tax payable on the relevant trust distribution, but it would not be refundable and would not permit the company to frank subsequent distributions attributable to that income. Such an approach would address Treasury's integrity concerns whilst ensuring that the same economic income is not taxed twice merely because it is distributed to a company.

27. In the above example, Company A would be left with a non-refundable $5,000 tax credit for that tax year, which may not be carried forward to future years. Company A would also not be allowed to use that tax paid by the trustee to generate franking credits, making any dividends unfranked.

Q4—Are the proposed rollover relief arrangements appropriate?

28. The LIV notes the Consultation Paper advises that rollover relief will be available to assist taxpayers who wish to transition out of a discretionary trust and into other arrangements. The LIV welcomes this proposal. However, the proposed three-year transition period may be insufficient.

29. Large family groups, trading entities and property structures often require considerable time to obtain valuations, refinance borrowings, negotiate lender approvals, amend leases, address minority interests and navigate duty, GST and other commercial consequences.

30. The LIV considers that:

- the rollover period should be extended to at least five years, or alternatively be capable of extension by the Commissioner where a genuine restructure is underway;
- access to rollover relief should not be subject to a separate genuine restructuring test;
- Treasury should work with States and Territories to encourage consistent duty relief;
- restructures should be permitted on an asset-by-asset or business-by-business basis;
- existing economic interests should be capable of being preserved where post-restructure rights are fixed and commercially supportable; and
- integrity rules should focus on whether discretionary economic outcomes have been retained rather than on simplistic requirements such as a single class of shares.

31. The rollover should also operate consistently with the GST going concern provisions. Treasury should ensure that the conditions for rollover relief do not conflict with the practical requirements for transferring an enterprise as a GST-free supply of a going concern.

Q9—Having regard to tax system integrity, compliance costs and administrative simplicity, should excess franking credits be refundable to the trustee?

32. The Consultation Paper identifies that trustees who receive franking credits will be required to use their credits to offset their taxation liabilities. This is consistent with current arrangements. However, the Consultation Paper seeks stakeholder guidance on what to do with excess franking credits—that is where the trustee franking credits exceed the total tax liability it is required to pay. The Consultation Paper puts forward two options:

    - refund excess franking credits to the trustee; or
    - allow excess franking credits to be carried forward to reduce future tax liability.

33. The LIV agrees that excess franking credits should be recognised at trustee level and would support either option presented.

34. Franking credits represent company tax that has already been paid. The minimum tax should operate as a tax floor rather than as a mechanism for denying recognition of tax previously paid on the same income. Refunding excess franking credits, or providing an equivalent trustee-level credit, would better align with the policy intent of a minimum tax and reduce the risk of over-taxation.

Q12—What additional safeguards, administrative modifications, or beneficiary notification requirements should be considered to support the effective operation and collection of the minimum tax, particularly for arrangements involving corporate trustees?

35. The Consultation Paper identifies that as the proposed tax is on the trust, and must be paid by the trustee, there must be accompanying collection mechanisms. The Consultation Paper suggests that the proposal could adopt early collection mechanisms at the trustee level, such as Pay As You Go (**PAYG**) instalments.

36. The LIV does not support a collection mechanism that requires trustees to predict income allocations, franking credits, exclusions and beneficiary entitlements before trust accounts and tax calculations have been finalised. If PAYG instalments are adopted, the regime should include practical safe harbours, protection from penalties where estimates are reasonably based on available information, and alignment with existing trust return lodgement processes.

37. The LIV also considers that a practical safe harbour should apply where all trust income is distributed to beneficiaries who are already taxed at effective rates of 30 per cent or more. In such cases, the policy objective of the regime has already been achieved, and additional compliance obligations would serve little purpose.

Q17—Are there any other issues or complications as a result of the High Court's decision in *Bendel* that should be considered as part of the design and implementation of the revised 2018–19 Budget measure?

38. As noted in the Consultation Paper, the High Court in *Bendel* ruled that a corporate beneficiary's unpaid present entitlement to trust income was not a 'loan' for the purposes of the Division 7A of the ITAA36. Division 7A treats certain payments, loans or other benefits by a private company to its shareholder or associates as unfranked (deemed) dividends, unless the amount is repaid or placed on a complying loan agreement. The decision was contrary to the ATO's longstanding administrative position.

39. In effect, the *Bendel* decision confirmed that existing tax laws already contain targeted integrity measures to address inappropriate trust arrangements. Even where Division 7A does not apply, other provisions such as section 100A remain available to address tax-driven reimbursement arrangements. In light of these existing safeguards, the proposed minimum tax should be carefully targeted to genuine avoidance concerns, should operate prospectively and should not use the minimum tax regime as an indirect substitute for Division 7A.[2]

40. In particular, the LIV considers that any response should include:

- no retrospective treatment of existing unpaid present entitlements;
- appropriate transitional arrangements;
- clear ordering rules governing the interaction of trustee minimum tax, corporate tax, franking credits, Subdivision EA,[3] section 100A and Division 7A;[4] and
- safeguards ensuring that the same economic income is not taxed more than once under overlapping integrity regimes.

---

2 Australian Taxation Office, "Decision Impact Statement: *Commissioner of Taxation v Bendel* [2026] HCA 18", 26 June 2026.
3 Subdivision EA and Division 7A of Part III of the ITAA 1936.
4 Section 100A, ITAA 1936.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Ms Jennifer Ball, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.