Law Council
OF AUSTRALIA

Business Law Section

Capital Gains Tax and Negative Gearing—Tranche 2 Legislation

The Treasury

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Executive summary

1. The Tax Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to comment on Treasury's consultation on Capital Gains Tax and Negative Gearing—Tranche 2 Legislation. The Committee's submission addresses critical aspects of the Tranche 2 package, including the application of the reinstated CGT indexation regime to Attribution Managed Investment Trusts (**AMITs**), valuation of deemed sale and reacquisition, minimum tax treatment of deceased estates and testamentary trusts, deferred gains, foreign and temporary residents, and related consequential and implementation matters.

2. The consultation concerns the next stage of draft legislation implementing the 2026–27 Budget reforms to negative gearing and capital gains tax, following the first-stage legislation. The exposure draft is the Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 (**Exposure Draft**) and related materials.

3. The consultation addresses continuity of negative gearing or new-build status on inheritance and relationship breakdown, the application of the CGT changes to AMITs, exemptions for genuine testamentary trusts, deceased estates and special disability trusts, part-year Australian residents, deferred gains and certain CGT events, the definition of new residential dwelling, exempt housing categories, and valuation rules for real property and assets without a readily ascertainable market value.

4. Treasury's draft identifies four cases in which a dwelling may be a new residential dwelling for an entity: construction or installation on land without a dwelling, addition of dwellings to land, conversion of a non-residential building, and acquisition from another entity no more than 24 months after the first certificate of occupancy. The common requirements are directed to dwellings in Australia that are legally occupiable and capable of being acquired by another entity. Treasury proposes to place the final definitions and exemptions in primary legislation, while later tranches will address CGT roll-overs and similar concessions, remaining foreign, mixed, and temporary resident issues, and special cases including consolidated groups.

5. The Committee recognises the policy objective of directing negative gearing towards additional housing supply and replacing the existing CGT discount for most gains with cost base indexation and a minimum 30 per cent tax rate on relevant capital gains from 1 July 2027. It considers, however, that the Tranche 2 rules must operate coherently for individuals, co-owners, trusts, AMITs, deceased estates and housing providers, and must be capable of being administered from ordinary commercial records. Without that coherence, the regime risks imposing disproportionate compliance costs and producing unintended inequities.

6. The principal recommendations are to keep substantive eligibility rules in primary legislation, provide objective new-dwelling and continuity rules, offer alternative valuation safe harbours, expand the minimum-tax exemptions, adopt a workable AMIT attribution model, provide transitional relief and elevated de minimis thresholds, and publish a Law Companion Ruling with worked examples by 31 March 2027.

7. The Committee's principal concerns include the operational burden of applying member-specific AMIT gross-ups, uncertainty about the treatment of losses and multiple gains under proposed subsection 276-85(4B), uncertainty about the section 110-36A choice, and the interaction with unders and overs and CGT event E10. The Committee is also concerned about systems, data, and transitional costs. It supports the objective of investment neutrality but considers that these issues require targeted amendment and clear administrative guidance before the regime commences. In the Committee's view, commencement without resolution of these matters would be premature and would expose investors to avoidable systemic risk.

Recommendations

8. The Committee's recommendations are directed to making the reforms clear, administrable, and capable of being implemented by 1 July 2027 without disproportionate compliance costs.

Recommendation 1: Keep substantive eligibility rules in primary legislation

Core definitions and rules that determine whether a taxpayer can negatively gear a property or access a CGT concession should be stated in the primary legislation. Legislative instruments should be confined to technical requirements, evidence, valuation, and administrative detail.

- Retain objective criteria for new residential dwellings and clear reliance rules for certificates of occupancy.
- Provide transitional protection where a taxpayer has acted on a certificate or other prescribed evidence in good faith.

Recommendation 2: Clarify new residential dwelling and exempt housing categories

The legislation should identify how the 24-month certificate of occupancy test, substantial renovations, replacement dwellings, off-the-plan acquisitions, mixed-use property, and staged developments operate. It should also confirm the interaction with build-to-rent, affordable housing, social housing, National Disability Insurance Scheme (**NDIS**) housing, and public housing.

Recommendation 3: Preserve continuity on death, inheritance, and relationship breakdown

Carry forward new-build status and relevant acquisition history where economic ownership is continued or involuntarily altered through death, inheritance, or a genuine relationship breakdown. State separately whether, and in what circumstances, quarantined amounts transfer with an ownership interest.

Recommendation 4: Provide valuation safe harbours and alternative methodologies

Provide taxpayers with a range of alternative valuation methodologies under section 112-185 of the *Income Tax Assessment Act 1997* (**ITAA 1997**), including benchmark methodologies based on movements in the Consumer Price Index, broad market indices, industry-specific indices, property market indices and other Treasury-approved statistical measures. The legislation should not be confined to a single prescribed algorithm. Develop comparable safe harbour methodologies for specific asset classes, including shares in unlisted entities, private companies, units in trusts, partnership interests, and other non-market assets. A taxpayer that follows a prescribed method should receive protection from penalties.

Recommendation 5: Expand and clarify exemptions for estates and trusts

Clarify that the beneficiary-level exemption for qualifying testamentary trusts, deceased estates, and special disability trusts applies to capital gains attributed under the trust and AMIT provisions, including gains whose amount reflects cost base indexation. For deceased estates and testamentary trusts, extend the exclusion to assets representing the continuation of estate-derived capital, rather than limiting it to the identical asset held at death. The anti-avoidance provision, if it is to be retained, should be supported by very clear objective criteria that provide a meaningful degree of certainty for ordinary estate planning and administration. Provide clear tracing rules and examples for replacement assets, mixed funds, and later distributions.

Recommendation 6: Clarify deferred gains and interaction with other CGT provisions

Confirm the remaining interactions between deferred gains, Subdivision 118-B, the small business CGT concessions, CGT event K6, and other CGT events. The legislation and explanatory material should identify the events excluded from the definition of deferral realisation event and explain how the specified deferral exemptions prevent double taxation.

Recommendation 7: Adopt a workable AMIT attribution model

Adopt the preferred universal gross-up model that preserves standardised trust-level reporting. Remove the member eligibility condition for section 110-36A and permit a fund-level election applying to all of the fund's dealings that indexation will not be available to any investor. The law should address the loss-ordering disadvantage affecting complying superannuation funds investing through MITs and AMITs and ensure that those funds achieve materially equivalent after-tax outcomes whether investing directly or through a MIT or AMIT. If the current model is retained, permit class-based elections and targeted loss-ordering amendments, and consider a reallocation adjustment mechanism, with appropriate integrity protections. Identify a practicable interim solution and a longer-term solution, including a preferred one-year transition for MITs, AMITs, CCIVs, IDPS arrangements and associated institutionally administered structures and an unders-and-overs-style reconciliation as a fallback where workable.

Recommendation 8: Specify elections, reporting and unders and overs

The preferred solution is to remove the member eligibility condition in subsection 110-36A(2) and permit a fund-level election applying to all of the fund's dealings that indexation will not be available to any investor.

If that solution is not adopted, specify the section 110-36A election's verification standard, form, timing, scope, revocability and consequences of non-satisfaction, including a register-based or reasonable-inquiry safe harbour for unplanned CGT events, and clarify the operation of the gross-up for multiple gains, unders and overs, CGT event E10, and Subdivision 276-H. The rules should also specify the investor information to be recorded and the content of AMMA statements.

Recommendation 9: Provide transitional relief and elevated de minimis thresholds

Provide transitional relief for MITs, AMITs, CCIVs, IDPS arrangements, and associated institutionally administered structures, including a preferred one-year transition during which existing CGT methodology may be used for disposals during the 2027–28 income year, with the revised indexation rules applying prospectively from 1 July 2028.

If that approach is not adopted, allow affected managed funds to use existing calculations provisionally during 2027–28 and reconcile the difference under the revised rules through a legislated unders-and-overs-style mechanism where technically workable; this should not be treated as a workable option for IDPS arrangements. The relief should include safe harbours, reasonable-care protection, elevated de minimis thresholds, and a formal transitional period covering genuine compliance efforts, unintentional errors, and information that did not previously have to be collected.

Recommendation 10: Publish ATO guidance before commencement

Publish a Law Companion Ruling by 31 March 2027, together with approved forms, data specifications, and worked examples covering the gross-up, application of losses, multiple gains, interposed trusts, unders and overs, cost base adjustments, foreign and temporary residents, deferred gains, estates, and valuation.

Recommendation 11: Make drafting and tranche sequencing transparent

Publish a consolidated roadmap showing how the Tranche 2 provisions interact with later amendments, rollovers, foreign and mixed resident rules, and consolidated groups. The final materials should identify deferred matters and confirm that the current provisions operate independently of, and will not be adversely affected by, future amendments.

Recommendation 12: Protect AMIT implementation

Confirm that trust deed amendments and any prescribed organisational restructuring made solely to comply with the new AMIT reporting and attribution obligations will not constitute a significant event for Australian Securities and Investments Commission (**ASIC**) reporting purposes, affect AMIT status or fixed trust deeming, or trigger CGT events for existing unitholders. ASIC should provide a class order or equivalent relief to facilitate the amendment process and any prescribed fund reorganisations. The amendments should be capable of being made during a reasonable transition period without adverse tax or regulatory consequences.

Preliminary observations and tranche sequencing

9. The first-stage legislation established the principal settings for the reforms. From 1 July 2027, the CGT framework will use cost base indexation for eligible individuals and trusts, while Division 119 of the ITAA 1997 introduces a minimum 30 per cent rate on relevant capital gains.

10. The Committee supports a staged legislative approach only if the stages are designed as one coherent regime. Taxpayers, trustees, fund administrators, and advisers will need to model the combined effect of the provisions before 1 July 2027, including provisions that are not yet in final form. A piecemeal approach that leaves material questions unresolved between tranches will undermine the certainty on which compliance depends.

11. The Committee's principal drafting concern is the boundary between primary legislation and delegated instruments. A rule that determines whether a taxpayer may negatively gear a property, retain new-build status, or access a CGT concession affects a substantive tax outcome and *must* be expressed in the Act. The delegation of such rules to legislative instruments would compromise transparency, parliamentary scrutiny, and taxpayer certainty.

12. The Committee recommends that the final package include a consolidated roadmap of the tranches, commencement provisions, saving rules, and cross-references. The roadmap should identify which questions are settled in Tranche 2 and which are deliberately reserved for later legislation.

Legislative architecture and sequencing

13. The first-stage provisions in sections 26-155 and 26-160 of the ITAA 1997 establish the framework for quarantining excess residential dwelling deductions and distinguishing residential dwellings from new residential dwellings. The provisions should be read with the method statement in subsection 102-5(1), sections 110-36 and 114-1 to 114-30, Subdivision 112-E, sections 115-102 and 115-125, Subdivisions 115-C and 115-CA, and Division 119.

14. The Committee considers that the Explanatory Memorandum to the Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 (**Explanatory Memorandum**) should explain the interaction between these provisions by reference to ordinary taxpayer scenarios, not only by provision. Worked examples should show the result for an individual, a co-owner, a trust, an AMIT, a deceased estate, and a property used for more than one purpose.

Negative gearing and new residential dwelling rules

15. From the 2027–28 income year, section 26-155 quarantines excess deductions attributable to established residential dwellings acquired after 7.30 pm AEST on 12 May 2026. Those amounts are generally available only against assessable income from residential dwellings or capital gains from residential dwellings. Dwellings acquired before that time remain outside the quarantining rule, and a dwelling that is a new residential dwelling for the entity is also exempt.

16. Section 26-155 should make clear how quarantined amounts interact with later capital gains, changes in use, co-ownership, trust distributions, death, and relationship breakdown. The rules should avoid a result in which a taxpayer loses the benefit of a quarantined amount because an asset changes hands in circumstances that do not reflect a tax-driven disposal.

Objective new dwelling criteria

17. Section 26-160 presently contemplates that requirements for a new residential dwelling will be determined by legislative instrument. The consultation materials propose to place the substantive requirements and housing exemptions in the *Income Tax Assessment Act* 1997 and remove the ministerial powers. The Committee supports that approach and considers that any delegated instrument should deal only with evidence and technical administration.

18. The draft instrument defines a certificate of occupancy and measures the 24-month period from the time the certificate was first issued. The final primary legislation should retain those objective elements and clarify how the rule applies where more than one certificate is issued for a staged development, a building, or individual dwellings, or where a certificate is amended or replaced.

19. A purchaser should be able to rely on a certificate of occupancy and prescribed vendor information unless the purchaser knew, or was reckless as to whether, the information was materially incorrect. The purchaser should not be required to reconstruct the development history or investigate matters that are properly within the developer's control.

20. The explanatory material states that reissue of a certificate after substantial renovations is irrelevant and the draft materials address conversions of non-residential buildings, demolition and rebuilding of derelict structures, and acquisitions within 24 months after the first certificate of occupancy. The final primary legislation should state expressly whether substantial renovations, demolition and replacement, off-the-plan acquisitions and staged developments qualify, and whether the 24-month period applies by dwelling, legal interest, title, or development.

Mixed-use and development structures

21. The legislation should explain how the new-build test applies where a property contains residential and non-residential areas, where the ownership interest is held through a partnership or trust, and where a staged development contains dwellings completed at different times. The rules should apportion by reference to the

objective characteristics of the relevant dwelling or interest and should not assume that an entire development has a single status.

22. The draft instrument exempts specified specialist disability accommodation, eligible community housing, public housing, and active build-to-rent developments from the quarantining rule. The final primary legislation should preserve clear boundaries for those categories and explain their interaction with affordable housing and other existing housing concessions.

Exempt housing categories and relationship breakdown or inheritance continuity

23. The legislation should attach the relevant status to the economic ownership and history of the asset and should not treat every legal transfer as a new investment. This is particularly important where death, inheritance, a court order, or a genuine relationship breakdown causes the transfer.

24. Existing CGT provisions in Division 128 deal with assets passing through a deceased estate and surviving joint tenants, while Subdivision 126-A provides roll-over relief for qualifying marriage and relationship breakdown transfers. Subdivision 118-B contains related main residence rules. The new continuity provisions should operate consistently with those regimes.

Relationship breakdown

25. Proposed section 26-158 preserves pre-Budget acquisition status or new residential dwelling status for an ownership interest transferred under an order, agreement or award covered by paragraphs 126-5(1)(a) to (f), including a transfer from a spouse, company or trustee. Proposed section 26-159 extends the new-dwelling treatment for the CGT choice in section 115-102. The draft does not transfer quarantined amounts and the deemings are confined to the specified provisions. The final law should state the intended treatment of quarantined amounts and make the limited scope of each deeming clear.

26. The legislation should distinguish genuine relationship-breakdown transfers from ordinary commercial transactions but should not impose evidentiary requirements that are more onerous than those already used for the relevant CGT rollover. A transferee acting in accordance with a court order should receive clear protection.

Death and inheritance

27. Proposed sections 26-156 and 26-157 preserve pre-Budget acquisition status or new residential dwelling status for a surviving spouse and, subject to additional conditions, a surviving co-owner. They disregard the acquisition timing rules in subsections 128-15(2) and 128-50(2) for those limited purposes. The draft does not transfer quarantined amounts. The final law should state whether those amounts remain with the deceased taxpayer, are available to the estate or pass with the ownership interest.

28. The draft does not provide a general continuity rule for a dwelling held by a legal personal representative during administration, transferred to a testamentary trust, or passing to a beneficiary who was not the deceased's spouse or co-owner. Treasury should confirm the intended treatment of those cases and whether any continuity deeming applies only for sections 26-155 and 115-102 or for other provisions as well.

CGT apportionment and valuation methodology

29. The first-stage provisions use a combination of indexation, time-based apportionment, and deemed sales or reacquisitions. The method statement in subsection 102-5(1), as amended by the first-stage Act, works out a net capital gain using the indexed cost base where it is available, and section 110-36 and Division 114 govern when indexation may be included in a cost base, including residency and asset requirements. The framework is technically coherent in broad outline, but it will require detailed rules for assets with more than one use or value driver.

30. Subdivision 112-E contains separate deemed sale, reacquisition and deferral rules for assets held by individuals in sections 112-155 and 112-160, assets held by trusts in sections 112-165 and 112-170, and pre-CGT assets in sections 112-175 and 112-180. Section 112-185 permits a legislative instrument to determine an apportioning method. The Tranche 2 draft adds rules in proposed subsections 112-160(7) to (10) and 112-170(7) to (10) for specified deferral exemptions.

Apportionment method

31. The proposed *Income Tax Assessment (Method for Apportioning Capital Gains and Capital Losses)* Determination *2026* (draft Determination) provides an apportioning method as an alternative to obtaining a market valuation. It uses the actual proceeds from the later realisation event, the first element of the asset's cost base and an assumed constant compound daily growth rate over the entire holding period to derive the proceeds for the deemed sale at 30 June 2027. The method may reduce valuation costs, but it does not independently estimate market value at the reset date and may not produce an economically representative split in all cases.

32. The Committee welcomes the introduction of a valuation methodology that does not require a formal valuation, which is a useful step.

33. The practical utility of the proposed methodology is nevertheless limited. The approach is likely to assist only where the taxpayer is indifferent as to whether the resulting value accurately reflects the market value of the asset as at 1 July 2027. That may be appropriate for assets of relatively modest value where the potential tax consequences are not material, but it offers little assurance for the substantial majority of affected taxpayers.

34. For more significant assets, the methodology provides little comfort. It does not adequately address the broader and more pressing concern arising from the requirement to establish a value for all CGT assets as at 1 July 2027. The compliance burden and valuation uncertainty associated with that exercise remain substantial, and the draft offers no proportionate response to that challenge.

35. The method may distort the allocation of a gain or loss where substantial capital expenditure is incurred after acquisition, development occurs in stages, the asset changes use, or the sources of value change materially during the holding period. It is available for real property and for another CGT asset without a readily ascertainable market value whose cost base is not otherwise worked out by reference to market value. The explanatory material should address these limitations and identify circumstances in which another method or a formal valuation is preferable.

Alternative methodologies and safe harbours

36. Section 112-185 permits the Minister to determine an apportioning method. The Committee strongly recommends that taxpayers be provided with a range of alternative valuation methodologies capable of producing a deemed value without requiring a formal valuation. The legislation should not be confined to a single prescribed algorithm. Taxpayers should instead be permitted to select from several recognised methodologies, with eligibility conditions that match the nature of the relevant asset and the available records. One possible approach would be a benchmark methodology based on movements in the Consumer Price Index over the period during which the asset has been held. Other objective economic benchmarks should also be available, with the objective of enabling taxpayers to determine an acceptable indexed value through a prescribed methodology rather than requiring a formal valuation exercise in every case. The alternative benchmarks could include:

    - movements in the Consumer Price Index;
    - broad market indices;
    - industry-specific indices;
    - property market indices for real property; and
    - other Treasury-approved statistical measures capable of reflecting changes in asset value over time.

37. Providing taxpayers with a choice of approved methodologies would significantly reduce compliance costs while providing greater certainty. It would allow taxpayers to select the adjustment mechanism that most appropriately reflects the characteristics of the relevant asset without the need to obtain an independent valuation, provided the prescribed method produces a reasonable allocation of the overall gain or loss.

38. Further guidance should also be developed for specific asset classes where valuation difficulties commonly arise. Consideration should be given to approaches similar to those currently used for employee share scheme concessions, where prescribed valuation methodologies and benchmark-based assessments can be used for shares in unlisted entities. Comparable safe harbour methodologies could be developed for private companies, units in trusts, partnership interests, and other non-market assets. Such an approach would substantially improve the workability of the regime while maintaining an appropriate balance between administrative simplicity and valuation integrity. A taxpayer that follows a prescribed method should receive protection from penalties and later challenge, except in cases of fraud, deliberate non-compliance, or material error.

Deceased estates and testamentary trusts

39. Division 119 imposes the minimum tax on individuals. Proposed section 119-20 therefore does not exempt a deceased estate or trust as an entity. It excludes a qualifying capital gain made by an individual as a beneficiary of a testamentary trust, deceased estate, or special disability trust from the individual's minimum tax capital gain.

40. The exclusion of deceased estates and testamentary trusts from the proposed 30 per cent minimum tax is a welcome development. It recognises that traditional estate planning arrangements should not be subject to the same policy concerns that underpin the broader minimum tax regime.

41. The testamentary trust and deceased estate tests draw on paragraph 102AG(2)(a) and subsection 102AG(2AA) of the *Income Tax Assessment Act* 1936. Those provisions are not confined to the identical asset held at death. They extend to property representing estate property and to accumulations of income or capital derived from it. The explanatory material also recognises debts collected and assets realised or reinvested during administration. The remaining need is for practical guidance on tracing replacement assets, mixed funds, and later additions of non-estate property.

42. Notwithstanding those tracing concepts, the scope of the exclusion is concerningly narrow. In particular, the concession is limited to assets held by the deceased at the time of death. This approach fails to recognise the broader pool of estate-derived capital held and administered thereafter, and in doing so penalises prudent estate administration without any discernible policy justification.

43. This fails to account for the practical realities of deceased estate and testamentary trust administration. Assets held within an estate or testamentary trust frequently change over time as a consequence of prudent trustee decision-making, portfolio rebalancing, corporate actions, compulsory acquisitions, mergers, demergers, rollovers and other transactions that may occur wholly outside the control of the legal personal representative or trustee. To deny the exclusion merely because an asset has been replaced in the ordinary course of administration would be arbitrary and inequitable.

44. Under the current approach, there is a real and unacceptable risk that assets representing the continuation of estate wealth may cease to qualify merely because the form of the asset has altered. The focus should instead be directed towards preserving the integrity of the estate-derived capital, rather than requiring the ongoing retention of the identical asset held by the deceased on the date of death. Any other approach would produce outcomes inconsistent with the policy intent and would punish prudent trusteeship.

45. Proposed subsection 119-5(3) confirms that a gain made because of section 115-215 or section 276-80 can qualify if section 119-20 otherwise applies. The final materials should explain how the exemption operates where the attributed gain reflects cost base indexation, including the extended application of Subdivision 115-C under section 115-255, and how it applies to revised AMMA statements and unders and overs.

46. Proposed paragraph 119-5(2)(d) excludes a gain to which section 119-20 applies before the individual's minimum tax capital gain is calculated. The draft does not use a post-calculation credit. The explanatory material should nevertheless include examples showing the ordering where the individual has other minimum tax gains, losses, offsets, and attributed trust gains.

Genuine testamentary trusts

47. The draft appropriately uses the existing concepts in paragraph 102AG(2)(a) and subsection 102AG(2AA) rather than creating a separate definition of genuine testamentary trust. The final materials should explain how those provisions apply to ordinary investment, refinancing, replacement of assets and distributions, and should identify the records needed to trace estate-derived property.

48. Proposed subsections 119-20(5) and (6) deny the exclusion for specified schemes where a purpose of securing access to the concession exists, while subsection 119-20(7) provides that a merely incidental purpose is to be disregarded.

49. Even with that qualification, the anti-avoidance provisions are deeply problematic. The threshold at which the exclusion may be denied is exceptionally low and creates substantial, and in the Committee's view unacceptable, uncertainty. In particular, a test that can be triggered by one purpose of an arrangement—with the taxpayer required to establish that any purpose of obtaining access to the concession is no more than merely incidental—does not provide taxpayers or advisers with a meaningful degree of certainty.

50. In practice, the provision creates an effective veto power over the concession while providing little guidance as to when the exclusion will remain available. A concession intended to support long-established testamentary trust arrangements should be supported by clear, objective criteria capable of practical application. The current drafting fails to provide an appropriate level of certainty for taxpayers undertaking ordinary estate planning and administration activities, and risks rendering the concession illusory in all but the most straightforward cases.

Special disability trusts

51. Proposed subsection 119-20(4) applies where an individual makes the capital gain as a beneficiary of a trust that is a special disability trust at the end of the income year. Unlike the testamentary trust and deceased estate rules, it does not require the gain to be traced to estate property, and the two specific integrity rules do not apply.

52. The exemption applies to a gain made as beneficiary of the special disability trust. It does not, without a separate rule, exempt a later gain made by a beneficiary from disposing of an asset after it leaves the trust. Treasury should provide examples covering CGT events E5 and E7, administration after the principal beneficiary's death and the interaction with the main residence rules in sections 118-215 to 118-230.

AMIT and Division 276 issues

53. Division 276 operates on a standardised trust attribution architecture. The new CGT categories, indexation rules, minimum tax, deferred gains, and related CGT events must be communicated through that architecture, and the provisions must operate coherently for AMIT trustees, fund administrators, and members.

54. The Exposure Draft appears to use proposed subsections 276-85(4A) and 276-85(4B), proposed subsections 276-105(9) and 276-105(10), proposed subsection 276-345(6), proposed subsections 276-415(5) and 276-415(6), proposed subsection 276-810(3), proposed subsections 12A-110(11) and 12A-110(12) of Schedule 1 to the *Taxation Administration Act 1953* (**TAA**), and proposed section 110-36A of the ITAA 1997 to implement the AMIT mechanics.

Two-tier architecture and standardised attribution

55. Division 276 operates on a two-tier architecture. At Tier 1, the trustee calculates the trust's net capital gain by applying the method statement in subsection 102-5(1) on the assumption that the AMIT's trustee was liable to pay tax and was an Australian resident. At Tier 2, the trustee attributes the determined trust components to members on a fair and reasonable basis under Subdivision 276-D. The architecture was designed so that the Tier 1 calculation would be performed once, on a standardised basis, with investor-specific tax consequences determined by each member in their own assessment.

56. The standardised attribution principle requires the trustee to perform a single set of calculations and attribute amounts uniformly, without needing to know the tax profile of individual members. This was a deliberate policy choice reflecting the impracticability of investor-specific calculations for widely held trusts with continuous dealing.

57. Division 6 trusts operate differently in a material respect. Those trusts flow gains through to beneficiaries under Subdivision 115-C, and the beneficiary's individual circumstances, including any entitlement to indexation, are determined at beneficiary level. The beneficiary's tax profile does not alter the trustee's calculation.

58. Paragraph 1.19 of the Explanatory Memorandum describes the proposed approach as similar to subsection 115-225(5) for Division 6 trusts. While the broad policy intent may be similar, that analogy obscures the structural difference because the Division 6 trustee's calculation is not altered by the beneficiary's tax profile, whereas the proposed Division 276 mechanism would require trust-level use of member tax characteristics.

59. Division 276 was enacted in 2016 after extensive consultation and was deliberately designed to reduce compliance costs for widely held managed investment trusts by eliminating the need for trustees to obtain or act upon investor-specific information. The proposed amendments reverse that foundational design choice for indexation without fully addressing, or even acknowledging, the resulting systemic consequences. This is a matter of serious concern.

Gross-up and loss ordering

60. The proposed gross-up mechanism in subsections 276-85(4A) and (4B) requires the trustee to increase the amount attributed to a member who would not have been entitled to indexation, so that the member is assessed as if the gain had been worked out without the indexation benefit. The objective is to preserve investment neutrality, but the mechanism requires a trust-level calculation by reference to member tax characteristics and therefore departs from the standardised attribution on which Division 276 was built.

61. The proposed mechanism requires the trustee to identify which members are entitled to indexation, maintain parallel calculation pathways, apply the expressed "hold harmless" constraint and report different amounts to different classes of members. These requirements depart from the design principles on which Division 276 is based.

62. Where an AMIT realises a capital gain on an asset acquired before 1 July 2027 and the indexed cost base produces a smaller gain, the trustee attributes the indexed gain to members on a fair and reasonable basis. For members who would not be entitled to indexation, primarily complying superannuation funds taxed at 15 per cent and companies taxed at 30 per cent, the attributed amount is then grossed up to reflect the gain that would have arisen without indexation.

63. Example 1.1 in the Explanatory Memorandum illustrates the mechanics with an $800,000 pre-indexation gain and a $200,000 indexation benefit, producing an indexed gain of $600,000. A member entitled to a pro rata share of the $600,000 but not entitled to indexation receives a grossed-up amount reflecting that member's share of the $800,000 pre-indexation gain.

64. Example 1.1 is confined to a case in which the AMIT has no capital losses, and that limitation is significant in practice. The example demonstrates the mechanical operation of the gross-up where no losses are present, but it does not indicate the outcome where capital losses, previously unapplied net capital losses or quarantined amounts exist. Most AMITs will hold capital losses at some point during their existence.

65. The existing discount gross-up in subsections 276-85(3) and (4) is a simple arithmetic doubling determined after losses are applied. By contrast, the indexation gross-up in subsection 276-85(4B) operates before losses because it adjusts the cost base and therefore changes the quantum of the gain against which losses are applied. The discount analogy cannot resolve the interpretive questions arising from the indexation gross-up.

66. The method statement is intended to apply once, with each step depending on the outcome of the preceding step. Subsection 276-85(4B) instead requires the trustee to change the cost base while holding the Tier 1 loss application constant. The expressed "hold harmless" constraint therefore requires a counterfactual calculation that is inconsistent with the sequential logic of the method statement.

67. The phrase “capital gain remaining” in subsection 276-85(4B) is ambiguous. It could refer to the capital gain remaining after losses have been applied, being the net capital gain; the capital gain remaining after the cost base adjustment but before losses are applied, being the gross pre-loss non-indexed gain; or an intermediate figure produced by the simultaneous operation of both assumptions.

68. Paragraphs (a) and (b) of subsection 276-85(4B) create a further difficulty. Paragraph (a) changes the cost base, while paragraph (b) requires no changes to the application of capital losses, previously unapplied net capital losses, or quarantined amounts, including how much of each was applied. It is unclear whether the parenthetical wording freezes the precise allocation between current year losses, prior year net capital losses and quarantined amounts, or only the total quantum applied.

69. A related question arises where an AMIT has multiple capital gains in the same income year, some calculated using indexed cost bases and others using non-indexed cost bases. Losses are applied at Tier 1 under the method statement, which allows the trustee to choose the order in which capital gains are reduced. It is therefore unclear whether the Tier 1 loss allocation to the particular gain must be held constant, or whether the total loss allocation across all gains must be held constant. The Explanatory Memorandum is silent on this issue.

70. These interpretive difficulties will confront every AMIT trustee realising capital gains in post-commencement income years where the AMIT also holds capital losses. Without clear legislative guidance or binding ATO interpretation, different trustees and administrators will inevitably adopt different approaches, producing inconsistent outcomes for investors in economically identical positions. That result is directly inconsistent with the standardisation objective of Division 276 and would undermine confidence in the regime.

71. The bifurcation between indexed and non-indexed components must also be reconciled with Subdivision 276-D, which requires amounts to be attributed on a fair and reasonable basis. That concept operates by reference to member entitlements and does not take account of member tax characteristics. Tension therefore arises where the trustee reports different tax outcomes to members with otherwise equivalent entitlements.

72. The Exposure Draft also contains parallel gross-up provisions in subsections 276-105(9) and (10), subsections 276-415(5) and (6), subsection 276-810(3), and subsections 12A-110(11) and (12) of Schedule 1 to the TAA. The number of these provisions raises a concern about interpretive consistency. The Explanatory Memorandum should expressly confirm that these provisions are intended to operate identically in substance, with only such variations as their respective contexts require.

73. The most significant technical issue is a structural asymmetry in the ordering of losses between Tier 1 and Tier 2. At Tier 1, the trustee calculates the trust’s net capital gain using the indexed cost base, producing a smaller gain against which current year and prior year capital losses are applied. At Tier 2, for a member not entitled to indexation, the attributed amount is grossed up to the pre-indexation quantum, while the “hold harmless” constraint requires the trustee to assume that no

changes were made to how losses, previously unapplied net capital losses or quarantined amounts were applied. Losses applied at Tier 1 against the smaller indexed gain therefore cannot be reapplied at Tier 2 against the grossed-up amount.

74. The following example illustrates the effect. Consider an AMIT holding commercial real property disposed of approximately eight years after acquisition, with a pre-indexation capital gain of $1,500,000, an indexation benefit of $450,000 reflecting approximately 30 per cent CPI growth, an indexed capital gain of $1,050,000, available current year capital losses of $1,200,000 and a single member that is a complying superannuation fund holding 100 per cent of the units.

Tier 1 calculation, trust level:

Step	Amount
Capital gain (indexed cost base)	$1,050,000
Less: capital losses applied	($1,050,000)
Net capital gain at Tier 1	$0
Remaining unapplied losses	$150,000

75. At Tier 1, the $1,200,000 of capital losses fully extinguishes the $1,050,000 indexed gain. Only $1,050,000 of the available losses is utilised, leaving $150,000 unapplied.

Tier 2 calculation, member level, gross-up for non-indexed member:

Step	Amount
Capital gain (non-indexed cost base)	$1,500,000
Less: losses applied, held constant from Tier 1	($1,050,000)
Grossed-up amount attributed to member	$450,000

76. Under subsection 276-85(4B), the cost base is recalculated without the indexation benefit, but the losses remain applied at $1,050,000. The grossed-up amount attributed to the complying superannuation fund is therefore $450,000.

77. Had the member held the asset directly, it would have applied all $1,200,000 of losses against the $1,500,000 gain and produced a net capital gain of $300,000. Under the AMIT structure, the member receives an attributed amount of $450,000, which exceeds the direct ownership outcome by $150,000. The $150,000 of unapplied losses at Tier 1 are not available to the member at Tier 2.

78. The difference is not necessarily eliminated by carrying the losses forward. The unapplied losses remain in the trust's loss pool and may be applied against future gains, but the member cannot carry them forward for its own benefit. The trustee has nevertheless attributed $450,000 of assessable capital gain to the member, whereas direct ownership would have produced $300,000.

79. The practical consequence falls most heavily on complying superannuation funds. The reforms proceed on the basis that superannuation funds are excluded from the new CGT regime. However, the loss-ordering asymmetry identified above means that a complying superannuation fund investing through a MIT or AMIT may bear a higher effective tax burden than a fund holding identical assets directly.

80. Under direct ownership, the one-third CGT discount leaves two-thirds of an eligible gain in the taxable calculation; applying the concessional 15 per cent rate to that amount produces an effective burden of approximately 10 per cent. Where discount-eligible and non-discount gains coexist, the fund can ordinarily apply losses first against the latter and preserve the discounted treatment for the former. Within a MIT or AMIT, however, gains and losses are determined before attribution. The attribution consequently carries the consequences of that trust-level allocation, and the member has no mechanism under Division 276 to reopen it in its own assessment.

81. The immediate consequence is that a greater portion of the fund's attributed gain is exposed to the full 15 per cent rate rather than the discounted rate, reducing the capital left within the fund for members. In the worked example, the AMIT route produces an attributed amount of $450,000, compared with a $300,000 net capital gain under direct ownership; the $150,000 difference represents $22,500 of tax exposure at 15 per cent. That is not merely a difference in reporting character: it reduces the capital available to compound for members' retirement benefits even though the underlying assets, gains and losses are identical.

82. These tax effects would also engage the trustee's regulatory obligations and the structure of the superannuation market. A trustee subject to the best financial interests duty under paragraph 52(2)(c) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) would need to consider whether retaining a pooled exposure that bears this additional burden remains in members' best financial interests, particularly where a direct mandate over the same assets would produce a better net result. The resulting tax-driven performance differential could also influence comparisons under the Your Future, Your Super performance-testing framework, even though it would arise from the investment vehicle rather than underlying performance. If trustees respond by moving toward direct mandates, segregated portfolios or superannuation-only vehicles, the consequences would extend to members: shared custody, administration and investment costs could be lost, duplication could increase, and net retirement outcomes could deteriorate.

83. Because a substantial share of Australia's retirement savings is invested through pooled vehicles, the issue is not a marginal anomaly. Division 276 was enacted in 2016 as a standardised regime reflecting a deliberate legislative choice that indirect investment should not be tax-disadvantaged relative to direct ownership. The Committee submits that a loss-ordering outcome that imposes a higher burden on a complying superannuation fund solely because it invests through a MIT or AMIT is fundamentally inconsistent with that design principle and must be corrected before commencement.

84. The Committee prefers a universal gross-up model. Under that model, the trustee would attribute the pre-indexation gain uniformly to all members and separately identify the indexation component. Members entitled to indexation would apply the benefit in their own assessment. This has direct precedent in the existing treatment of the CGT discount under subsections 276-85(3) and (4), under which a grossed-up discount capital gain is attributed uniformly, and the member claims the discount if entitled. Consequential amendments to CGT event E10 would be required so that the grossed-up attribution does not produce inappropriate cost base adjustments for members who separately claim indexation relief.

85. If the current model is retained, the loss ordering asymmetry should be addressed by one of two approaches. The section 110-36A election could be permitted at unit class level, allowing segregated classes whose members are not entitled to indexation to elect out of indexation. Alternatively, subsection 276-85(4B) could permit losses to be reapplied against the grossed-up amount to the extent that losses remain unapplied at Tier 1. The class-based approach is the more practicable interim solution.

86. For class segregation to be workable, the legislation should clarify that the election may be exercised class by class; transfers of assets between classes to establish segregation do not trigger CGT events; reclassification of units does not trigger CGT events for investors; and necessary restructuring can occur without adverse taxation consequences during a reasonable transition period.

87. Loss reapplication at Tier 2 would create an integrity concern because it could permit the same losses to be used twice. Treasury could design appropriate safeguards, such as limiting reapplication to the losses that would have been applied had the gain been calculated on a non-indexed basis from the outset. Treasury should give further consideration to this option as a longer-term solution and confirm whether the loss-ordering disadvantage is intended to be a permanent feature of the regime. If the disadvantage is unintended, Treasury should amend the provisions before commencement.

Section 110-36A election

88. The proposed section 110-36A election should specify who makes the election, whether it is made by the trustee or by class, the approved form, the time for making it, whether it is irrevocable and what happens if a condition is later found not to have been satisfied. Subsection 110-36A(2) requires the condition to be satisfied just before the CGT event, creating a temporal verification difficulty. For a listed AMIT with continuous on-market dealing, the register changes on a daily or intra-day basis, and the trustee cannot verify with certainty the identity and characteristics of all members at the moment of a particular disposal.

89. Section 110-36A permits the trustee of a trust, including an AMIT, to elect for indexation not to apply where each member is either not entitled to indexation or is the trustee of another trust that would itself satisfy the condition. The election's practical value is limited by the requirement that every member satisfy that test.

90. The "all beneficiaries" requirement makes the election unavailable to an AMIT with any member who is an individual entitled to indexation. It therefore excludes most widely held AMITs, which typically have a mixture of individual, superannuation fund, company, and trust members. The election is available only to AMITs with homogeneous membership, such as a wholesale fund invested exclusively by superannuation funds, which is arguably the class least in need of the relief.

91. Subsection 110-36A(2) also creates a recursive look-through test where a member is the trustee of another trust. In multi-layered fund-of-fund structures this may produce an extended chain of verification obligations. Subsection 110-36A(3) provides an assumption for the look-through but does not address how a trustee at the top of a

chain verifies investors at the bottom where interposed trusts are managed by different responsible entities.

92. The absence of a prescribed form also creates uncertainty about the evidentiary standard, revocability, the consequences if a condition is later found not to have been satisfied, whether the election may be made asset by asset or must apply to all CGT events in an income year and the interaction with the trustee's fair and reasonable attribution obligations. The interaction with the residential dwelling and affordable housing provisions is also unaddressed where an AMIT holds a mixture of asset types attracting different indexation treatment.

93. The Committee recommends a register-based verification standard. The condition in subsection 110-36A(2) should be taken to be satisfied if, at the close of the register on the day the CGT event happens, no member shown on the register is a natural person, other than a natural person acting as trustee of a trust that would itself satisfy the condition. This is an objective and verifiable test and aligns with existing precedents such as the widely held requirements in section 12-401 of Schedule 1 to the TAA. A "reasonable inquiry" standard, permitting reliance on information reasonably available when the election is made, is an alternative.

94. For unplanned CGT events, such as compulsory acquisitions and corporate actions, the trustee should be permitted to rely on the register composition at the most recent practicable date before the event, provided the trustee had no reason to believe that the composition had materially changed. The legislation should also introduce a prescribed form, or at minimum specify the information the trustee must record and retain. Reflecting the choice in the tax return without formal documentation is insufficient for a choice with significant economic consequences for a large number of members.

95. The difficulties identified above point to a fundamental design problem with the eligibility condition itself, rather than a series of implementation issues capable of incremental resolution. The condition in subsection 110-36A(2) should be removed. In its place, a fund should be permitted to elect, for all of its dealings, that indexation will not be available to any of its investors. Locating the election at fund level would detach its operation from the tax status of individual holders, provide a stable and administrable rule for the trustee, and eliminate the impracticable verification obligations that the current drafting imposes.

96. The condition proceeds on an assumption that forgoing indexation is a benefit requiring protection against misuse. That assumption is misconceived. An election to forgo indexation requires the fund's members to surrender access to a concession that might otherwise be available; it does not confer a further tax benefit on the fund or its members. The appropriate regulatory safeguard is a transparent fund-level choice, not a requirement to demonstrate that every holder is incapable of using indexation. A member for whom indexation is valuable can take that feature into account when assessing the product, while a member unable to use it may prefer the simpler methodology. There is no policy rationale for preventing the latter from obtaining that benefit.

97. The condition is also capable of producing disproportionate results. A fund may have a predominantly institutional membership, with a small retail exposure held through a platform; that limited holding could prevent the election from being made for the fund as a whole, even though most of the capital could not benefit from indexation. The result would be a fund-wide obligation to maintain the more elaborate calculation and reporting process for little practical gain. In that circumstance, the administrative response is determined by the least representative feature of the membership rather than by the economic substance of the fund.

98. A trustee subject to the best financial interests duty under section 52(2)(c) of the SIS Act would face a difficult compliance position if access to the election depended on the continuing status of every member. It would need to monitor changes in the register, test whether each change affected the statutory condition, and decide whether the risk of losing the election justified retaining a less efficient tax methodology. That burden would consume trustee resources while creating uncertainty about whether the election remained available at each relevant CGT event. The condition could therefore make it harder, not easier, for the trustee to demonstrate that its chosen investment structure serves members' best financial interests.

99. The commercial dynamics of fund selection already discipline the use of the election. A product that gives up indexation will be less attractive to a member who can use that concession unless other features justify the trade-off, whereas the same product may be appropriate for a membership unable to obtain the benefit. That choice is reflected in product design, disclosure, and member flows; it does not require a statutory veto whenever the fund contains a holder with a different tax profile. Preventing members who cannot use indexation from adopting the simpler regime would make their treatment depend on the circumstances of others without providing additional protection to those who can use the concession.

100. The remedial design should operate at fund level, applying uniformly to all gains and dealings rather than being revisited for each asset or disposal. A single fund-level rule would stabilise the legal position for trustees and members, eliminate repeated testing of member eligibility and transaction-level records, and remain workable as the register changes. It would also preserve the commercial consequences of choosing to forgo indexation while avoiding a regime in which administrative feasibility turns on the tax profile of each individual holding.

Unders and overs, CGT event E10 and Subdivision 276-H

101. Subdivision 276-F permits the trustee to correct attribution errors discovered in later income years without amending prior year assessments. Proposed subsection 276-345(6) provides that, where an under or over relates to a base year in which the indexation provisions applied, the under or over is to be worked out under the law applying for that base year. The interaction between that rule and the indexation gross-up is not clear.

102. First, it is unclear whether subsection 276-345(6) requires the trustee to re-perform the entire Tier 1 and Tier 2 calculation, including the gross-up, or whether the under or over may be calculated by reference to the quantum of the attribution error alone.

103. Secondly, the Explanatory Memorandum confirms at paragraph 1.27 that discount capital gain unders and overs may continue to arise after 30 June 2027 but does not address the interaction between a discount capital gain under or over and the indexation gross-up. If an AMIT discovers that it under-attributed a discount capital gain in a post-commencement year, it is unclear whether the gross-up applies to the correction amount.

104. Thirdly, where an under or over is discovered in a later year relating to a base year, membership composition may have changed. The legislation should clarify whether the gross-up is applied by reference to the characteristics of the member at the time of the original attribution or at the time of the correction.

105. Fourthly, subsection 276-810(3) addresses unders and overs for trusts that cease to be AMITs, adjusted for the indexation gross-up. It does not address the situation where a trust ceases to be an AMIT before discovering an under or over relating to a period when it was an AMIT and the indexation provisions applied. The transitional operation of the mechanism in that situation is unclear.

106. A related transitional boundary arises where an attribution error is discovered in a post-commencement year but relates to a gain realised in the income year that includes 1 July 2027, being the first year of application. A safe harbour should apply to unders and overs discovered within the first two income years of operation where the error relates to the indexation gross-up and the trustee has made genuine compliance efforts.

107. CGT event E10 in section 104-107A of the ITAA 1997 happens where a member's AMIT cost base reduction amount for an income year exceeds the total of the member's AMIT cost base increase amount and the cost base of the member's units. The event may also interact with the related AMIT cost base adjustment rules in sections 104-107B to 104-107H. The interaction between the gross-up mechanism and those adjustments requires express clarification.

108. There are three specific concerns. First, if the grossed-up amount is used in the AMIT cost base adjustment rules, the resulting adjustment may not reflect the economic gain actually realised by the trust. Secondly, if the Tier 1 indexed amount is used instead, there is a mismatch between the amount assessed to the member and the amount used to adjust the unit's cost base. Thirdly, the legislation should make clear whether reversing the indexation benefit in the member's attributed gain also affects the unit's cost base, and how any resulting interaction is prevented from producing a double adjustment.

109. The legislation should specify whether the AMIT cost base adjustment rules in sections 104-107B to 104-107H are determined by reference to the Tier 1 indexed amount or the Tier 2 grossed-up amount, whether the trigger amount for CGT event E10 includes or excludes the gross-up component, and how double counting is addressed through a priority rule or offsetting adjustment.

110. The deemed sale and reacquisition under section 112-165 must also be reconciled for AMITs. The interaction between that reset and the AMIT cost base adjustment rules in sections 104-107B to 104-107H and CGT event E10 is not fully addressed, creating a risk of double-counting or unintended cost base mismatches.

Reporting and systems

111. The AMIT regime's compliance architecture relies on the AMIT member annual statement (**AMMA statement**), a standardised annual reporting document that reports attributed amounts on a uniform basis without differentiation by reference to member tax characteristics. The member or tax adviser then applies the member's own circumstances. The proposed gross-up mechanism would convert the AMMA statement into an investor-specific tax computation document, with substantial implications for the compliance infrastructure of the managed funds industry.

112. To perform the gross-up calculation, the trustee would need to collect and maintain information about each member's tax profile, including whether the member is an individual, company, complying superannuation fund or trustee of another trust; where the member is a trustee, whether that trust's beneficiaries are entitled to indexation; whether the member's circumstances change during the income year, such as a transition from accumulation phase to pension phase; and whether units are held through nominee or custodian arrangements requiring look-through to the beneficial holder.

113. AMIT trustees do not currently collect this information as a matter of course. Trustees typically hold basic registration information such as name, address and TFN or ABN, but do not ordinarily maintain records of each member's entity type or tax circumstances for trust-level calculations. The amendments would impose a new data collection obligation with no express legislative basis and no guidance on the standard of verification required.

114. A further systemic consequence arises in relation to the ATO's automated reporting infrastructure. If a trustee assigns an incorrect tax classification to a member, that error may be transmitted through Annual Investment Income Report (AIIR) channels and incorporated into pre-filling, presenting a return based on figures that do not correspond to the member's circumstances. The problem is particularly acute for platform, nominee and custodian holdings, where one registered holding may represent beneficiaries or members with different tax profiles; a single record for that holding may therefore be incapable of generating accurate pre-filling for each underlying taxpayer.

115. Implementing the gross-up would require substantial changes to systems architecture. Fund administrators would need parallel calculation engines producing indexed and non-indexed outcomes from the same underlying data, investor classification databases linked to the attribution engine, modified AMMA statement generation processes, reconciliation processes ensuring that member-level grossed-up amounts remain consistent with trust-level calculations, and audit trail and documentation systems supporting verification of member eligibility.

116. The majority of AMITs outsource fund administration, including tax calculation and AMMA statement production, to third-party service providers. Those administrators service multiple AMITs and must implement the changes across their entire client base. The new obligations would need to be reflected in service agreements, systems specifications, and operational procedures across the industry.

117. The reporting framework should distinguish information that must be included in the AMMA statement from information that may be supplied electronically to custodians, registries, or tax agents. It should not require members to reconstruct the trustee's calculation. Approved forms, data specifications, and record-keeping expectations should be published well before the first affected income year and should support differentiated reporting while allowing the trustee to reconcile member-level amounts to the trust-level calculation.

Trust deeds, de minimis thresholds and timing

118. AMIT trust deeds are constitutional documents drafted on the assumption of standardised calculation and uniform attribution. The proposed amendments may require changes to authorise collection and maintenance of investor tax profile information, permit differentiated attribution, authorise the trustee to make the section 110-36A choice and address the interaction between differentiated attribution and the fair and reasonable attribution requirement in Division 276. Amendments to the constitution of a registered managed investment scheme are governed by section 601GC in Part 5C.3 of the *Corporations Act 2001* (**Corporations Act**). They may require member approval by special resolution or may be made by the responsible entity if it reasonably considers that the change will not adversely affect members' rights. A copy of the modification or new constitution must be lodged with ASIC, and the change cannot take effect until lodgement. These steps may be costly and time-consuming for affected schemes.

119. The Exposure Draft does not address these constitutional implications, and the Explanatory Memorandum does not acknowledge the resulting costs and approval requirements. This is a significant omission. Legislative reform should not impose material constitutional amendment costs and regulatory burdens on regulated entities without express acknowledgment and adequate transitional accommodation.

120. The Committee considers that legislative protection should extend beyond constitutional amendments to any prescribed organisational restructuring that trustees may need to undertake to implement the Tranche 2 reforms. This could include creating segregated classes, transferring assets between classes or reclassifying units. Without that protection, those steps could give rise to adverse tax consequences for existing unitholders, an argument that the trust has been resettled, or claims that members' rights have been prejudiced. ASIC should be requested to provide class order or equivalent relief covering member approval requirements, disclosure obligations, and related regulatory processes. Legislative precedent exists in the form of transitional arrangements adopted for the original AMIT elective regime.

121. Statutory amendments should not impose collateral constitutional amendment costs on regulated entities unless Treasury has clearly articulated the policy necessity and affected entities have adequate time to make the necessary changes. Amendments made solely to comply with the new reporting and attribution obligations should not constitute a significant event for ASIC reporting purposes, affect the trust's status as an AMIT or its eligibility for the fixed trust deeming provisions and should be capable of being made during a reasonable transition period without adverse consequences.

122. The de minimis thresholds in section 276-345 should be elevated for the first two income years of operation, or such longer period as is necessary to achieve industry-wide implementation. Attribution errors relating to the indexation gross-up are likely to be more frequent while trustees, administrators and systems adapt to the new requirements. Thresholds should be tested at the appropriate AMIT or class level and should not create penalty exposure where the difference is immaterial, and the administrator has acted reasonably.

123. Given the number of systems affected, Treasury should provide the final rules, approved forms, data specifications, and administrative guidance with sufficient lead time for implementation. A Law Companion Ruling should include examples that reconcile the AMIT calculation to the member's return and address the gross-up, loss ordering, multiple gains, unders and overs, interposed trusts, and cost base adjustments.

Deferred gains and CGT events

124. The first-stage legislation uses deemed sales and reacquisitions to divide pre-1 July 2027 and post-1 July 2027 economic growth. The Tranche 2 provisions defer some gains and losses until a later realisation event, including for assets held through trusts.

125. The deferred gain should retain its intended character, acquisition history, and eligibility for relevant concessions until the realisation event. The rules should identify which entity is treated as making the deferred gain, how the amount is carried through Subdivision 115-C or Subdivision 115-CA and how capital losses and prior quarantined amounts are applied. The treatment should be capable of being followed through trust and AMIT attribution without requiring beneficiaries to reconstruct the trustee's calculation from first principles.

126. Proposed section 112-152 defines a deferral realisation event by excluding specified CGT events that do not represent a substantial realisation of the asset and defines limited deferral exemptions. Proposed subsections 112-160(7) to (10) and 112-170(7) to (10) then address how those exemptions apply to the combined economic gain or loss. The final materials should explain the remaining cases involving roll-overs, inheritance or conversion and identify when a later event first becomes a deferral realisation event.

Main residence, small business concessions and CGT event K6

127. The draft already addresses part of the main residence interaction. The definitions of the pre- and post-July 2027 ownership periods exclude days for which the gain can reasonably be expected to be disregarded under Subdivision 118-B, and the proposed exemption rules treat the deferred and later gains together for specified purposes. Worked examples should confirm the result for partial main residence periods, first use to produce income, and trust-held dwellings.

128. The definition of deferral exemption includes Subdivision 152-B, but not every concession or roll-over in Division 152. CGT event K6 is expressly excluded from the definition of deferral realisation event. Treasury should explain the treatment of the remaining small business concessions, replacement-asset rules, and CGT events J2,

J5 and J6, including whether any of those events should trigger or preserve a deferred gain.

129. Trust attribution can separate the entity that realised the asset from the beneficiary or member assessed on the gain. The distinction between the trust's capital gain and the gain attributed to a beneficiary is illustrated by *Peter Greensill Family Co Pty Ltd (Trustee) v Commissioner of Taxation* [2021] FCAFC 99. The Explanatory Memorandum and ATO guidance should therefore trace a deferred gain through Subdivision 115-C, Subdivision 115-CA, and Division 276 without requiring the investor to reconstruct the trustee's calculation from first principles.

Other events and integrity

130. The draft reduces premature recognition by excluding specified CGT events from the definition of deferral realisation event and by applying specified exemptions to the deferred and later gains together. The final materials should nevertheless explain the ordering where CGT events E5 and E7 occur, and how CGT event E10, which is not a realisation event under section 977-5, interacts with the deferred-gain provisions. They should include examples demonstrating that the same economic gain is not counted twice.

131. The Committee supports clear integrity rules for arrangements designed to avoid the minimum tax or to recharacterise established housing as new housing. Those rules should be targeted and should not disturb genuine inheritance, relationship-breakdown, rollover, or estate-administration transactions.

Foreign and temporary residents

132. Sections 114-25 and 114-30, together with sections 115-105 to 115-120, govern aspects of indexation and discount treatment for foreign and temporary residents. Tranche 2 removes the general residency restriction on post-1 July 2027 indexation, introduces an apportioned indexation factor in proposed subsections 960-275(1D) and (1E), and extends the deemed sale and reacquisition rules to certain mixed-residency cases involving taxable Australian property. The Explanatory Memorandum states that further consideration is being given to indirect gains through trusts. The final law should explain those boundaries and the interaction with AMIT attribution.

133. The proposed day-counting rules provide a transparent basis for direct gains by reference to periods of Australian residence when the individual is not a temporary resident. Equivalent information and rules are still required for attributed trust and AMIT gains and deferred gains. The law should avoid a cliff effect where a short change in status alters the treatment of growth outside the relevant period.

134. The residency provisions should also state how status is carried through an inheritance, a relationship-breakdown transfer, a rollover and a trust or AMIT attribution. A beneficiary should not lose access to an otherwise available concession merely because the trustee or an earlier owner had a different status on a day before the relevant testing period.

Part-year residence and interposed trusts

135. For trusts and AMITs, the reporting should identify the relevant ownership and residency periods at the level needed by the investor. The trustee should not be required to supply a bespoke calculation for every investor where a standardised tax profile can achieve the same result.

136. The Committee recommends transitional protection for taxpayers who change status during the 2026–27 or 2027–28 income year and who cannot obtain complete historical information from an earlier trustee, fund administrator, or vendor. A reasonable estimate supported by available records should be accepted subject to later correction where material.

Transitional and implementation issues

137. The amendments commence on the first 1 January, 1 April, 1 July, or 1 October after Royal Assent, while the application provision applies them for assessments for the income year that includes 1 July 2027 and later income years. If Royal Assent occurs after 1 July 2027, the amendments may therefore have retrospective effect from the start of the 2027–28 income year. That raises practical concerns for trustees, administrators and taxpayers who must perform calculations and make choices before knowing the final form of the law.

138. The first material AMIT reporting obligations are likely to arise for the 2027–28 or 2028–29 income years, depending on Royal Assent and the timing of affected gains. Section 276-455 requires AMMA statements no later than three months after the end of the income year, which is 30 September for a standard income year. Trustees and administrators must therefore have calculation, registry and reporting systems operating during the first affected income year, not merely by the statement due date.

139. Given the systems, contractual and regulatory steps required before affected vehicles can operate under the new rules, the Committee considers that a phased commencement is warranted. MITs, AMITs, CCIVs, IDPS arrangements and associated institutionally administered structures should continue using the existing CGT methodology for disposals during the 2027–28 income year, with the revised indexation rules applying to those arrangements prospectively from 1 July 2028. Individuals investing outside those structures could apply the revised rules from 1 July 2027. The distinction is especially important for IDPS arrangements, whose regulatory framework requires tax calculations and reporting to be maintained separately for each account.

140. A second approach, less satisfactory in the Committee's assessment, would preserve the nominal 1 July 2027 start date while allowing affected vehicles to operate their existing systems during 2027–28 and reconcile any difference through a legislated true-up. It is not workable for IDPS arrangements. The SIS Act and Corporations Act framework governing those products requires account-level records, disclosures and tax reporting to remain coherent for each holder; a retrospective reconciliation would therefore have to be allocated and restated across each affected account, followed by corresponding corrections to investor statements and, where relevant, individual tax returns. The burden would fall on providers and account holders, and

the necessary sequence of recalculation, restatement and disclosure would defeat the purpose of a transition mechanism.

141. Transitional rules should cover off-the-plan contracts, construction contracts entered into before commencement, delayed settlement, delayed occupancy certificates, staged developments, and replacement dwellings. The relevant status should not be lost because an approval or certificate is issued after the taxpayer has entered into an irrevocable commercial commitment.

142. The legislation should state what records are sufficient to establish acquisition time, occupancy, supply addition, use of a dwelling, residency status, valuation, and trust attribution. Where the new rules require information that was not previously needed, the Commissioner should have power to accept reasonable substitute evidence.

Compliance relief and de minimis thresholds

143. The Committee supports transitional compliance relief for MITs, AMITs, CCIVs, IDPS arrangements and other institutionally administered structures. The relief should include safe harbours for trustees that make genuine efforts to comply but encounter systems errors, appropriate remission of shortfall penalties for unintentional errors during the first two income years, and a documented period in which the ATO would not ordinarily devote compliance resources to gross-up calculations where reasonable care has been taken. Its operation should be tailored to the point at which the relevant arrangement undertakes its calculations and reporting. Safe harbours and reasonable-care protection should also apply when trustees use prescribed methods or certificates, or make reasonable estimates supported by records.

144. For AMITs, de minimis thresholds should be applied at the trust or class level where that is the level at which the relevant calculation is made. A threshold that is too low, or tested separately for every investor, would convert immaterial fund-accounting differences into repeated statement corrections and amended returns.

Systems readiness and implementation timeline

145. Division 276 was enacted in 2016 with a commencement date providing approximately 18 months for implementation. Industry participants observed at the time that the period allowed limited scope for implementation, even for a regime operating on standardised principles. The present implementation task is at least as demanding as the original AMIT implementation, because the proposed rules require investor-specific calculations.

146. Published estimates from industry bodies suggest that the direct cost to custody and administration providers will exceed $30 million. That is only part of the picture. The broader cost to the managed funds industry—including expenditure by responsible entities, platform operators, registries and technology vendors on parallel running, data conversion, testing, remediation, and ongoing maintenance—is likely to be materially higher.

Tranche sequencing and commencement

147. Trustees and administrators must complete the following steps before the first reporting cycle:

- Systems development and testing for parallel calculation engines.
- Development of investor classification databases and data collection processes.
- Amendment of service agreements with third-party administrators.
- Review and, where necessary, amendment of AMIT trust deed constitutions.
- Staff training and process documentation.
- Development of modified AMMA statement templates and distribution processes.
- Reconciliation and audit processes to ensure the accuracy of differentiated reporting.

148. The deferred matters include CGT rollovers, foreign and mixed resident investors, and consolidated group interactions. Where an AMIT participates in a CGT rollover, the rollover cost base may include an indexation component, but the interaction between the rollover provisions and the gross-up mechanism is not addressed. The full treatment of foreign residents is also deferred, creating a potential gap where a foreign resident member's entitlement to indexation is not clearly determined. Where an AMIT is a member of a consolidated group or holds units in another AMIT that is part of a consolidated group, the interaction between the single entity rule and the gross-up mechanism is uncertain. The Explanatory Memorandum or Second Reading Speech should identify these matters and confirm that the current provisions are intended to operate independently of, and will not be adversely affected by, future amendments.

149. The final materials should distinguish matters that are intentionally deferred from matters that remain unresolved. A consolidated set of commencement, saving and review provisions would reduce the risk that taxpayers and administrators apply different assumptions during the transition period. A safe harbour should apply to unders and overs discovered within the first two income years of operation where the error relates to the indexation gross-up and the trustee has made genuine compliance efforts.

ATO guidance

150. The Committee requests that Treasury and the ATO publish administrative guidance well before 1 July 2027. A Law Companion Ruling (**LCR**) is an appropriate vehicle because it is a type of public ruling that sets out the Commissioner's view on how recently enacted law applies. Taxpayers may rely on an LCR under the public ruling regime, including the protection available where they rely on it in good faith. It can address the interpretive questions raised by the gross-up, application of losses, choices, reporting, and cost base provisions. Guidance published after 31 March 2027 may not provide sufficient lead time for implementation.

151. Guidance should contain worked examples for an individual owner, co-owners, a company, a discretionary trust, a unit trust, an AMIT, a deceased estate, a testamentary trust, a special disability trust, a relationship-breakdown transfer, a staged development and a mixed-use property. It should also cover foreign and temporary residents, part-year residence, deferred gains, CGT event K6, CGT event E10, unders and overs and valuation methods.

Law Companion Ruling

152. The LCR should explain the relationship between sections 26-155 and 26-160, the first-stage provisions in the *Treasury Laws Amendment (Tax Reform No. 1) Act 2026*, the indexation rules in sections 110-36 and 114-1 to 114-30, the deemed-event rules in Subdivision 112-E, the trust rules in Subdivisions 115-C and 115-CA, Division 119 and the proposed Division 276 amendments. At a minimum, it should address the following matters:

- The meaning of “capital gain remaining” in subsection 276-85(4B), including whether it refers to a post-loss or pre-loss amount.
- The operation of the “no changes to how losses were applied” constraint where multiple categories of loss have been applied at Tier 1.
- The application of subsection 276-85(4B) where the AMIT has multiple capital gains in the same income year, some indexed and some not.
- The standard of verification required for the “would not have been entitled to indexation” test in subsection 276-85(4A), including nominee and custodian arrangements.
- The evidentiary requirements for the section 110-36A choice, including the Commissioner’s expectations regarding documentation and record retention.
- Worked examples illustrating the application of losses, multiple gains, interposed trust structures, and the interaction between the gross-up and unders and overs.
- The interaction between the gross-up mechanism and the AMIT cost base adjustment rules in sections 104-107A to 104-107H, including CGT event E10.

153. The ATO should publish the relevant approved forms, data specifications, and record-keeping expectations at the same time. The guidance should confirm when a taxpayer may rely on a vendor certificate, valuation, or trustee statement, how a trustee evidences member eligibility and how a trustee corrects an earlier statement that is later found to be materially wrong.

Recommended amendments

154. The Committee suggests that Treasury consider the following amendments and implementation directions when refining the Exposure Draft and associated materials:

- Keep central definitions and core eligibility rules in primary legislation, with delegated instruments limited to technical evidence, valuation, and administrative matters.
- Set objective requirements for new residential dwellings, including the first certificate of occupancy, and state expressly the treatment of substantial renovations, replacement dwellings, off-the-plan acquisitions, mixed-use property, and staged developments, with purchaser reliance protection.
- Confirm how exempt housing categories interact with build-to-rent, affordable housing, social housing, NDIS housing, specialist disability accommodation, and public housing.
- Provide continuity rules for death, inheritance and relationship breakdown that preserve the relevant acquisition and new-dwelling status where the policy intends continuity, and state separately whether quarantined amounts transfer.
- Allow taxpayers to select from alternative benchmark and safe-harbour valuation methodologies under section 112-185, including movements in the Consumer Price Index, broad market indices, industry-specific indices, property market indices, and other Treasury-approved measures. Consider comparable prescribed methodologies for shares in unlisted entities, private companies, units in trusts, partnership interests, and other non-market assets.
- Acknowledge the events and exemptions already addressed in proposed section 112-152 and subsections 112-160(7) to (10) and 112-170(7) to (10) and clarify the remaining treatment of deferred gains under Subdivision 118-B, Division 152 and other CGT provisions. Include ordering rules and examples that prevent the same economic gain from being counted twice.
- Clarify the beneficiary-level exemption in section 119-20 and its application to gains attributed under sections 115-215 and 276-80. Explain the tracing rules drawn from paragraph 102AG(2)(a) and subsection 102AG(2AA), the treatment of replacement assets and mixed funds, the exclusion of gains made outside the trust or estate, and the more than incidental purpose tests.
- Test a universal gross-up model as a policy alternative, recognising that it would require new member-level indexation and cost base rules. If the proposed model is retained, explain its relationship with subsection 115-225(5), the application and allocation of losses, multiple gains, and nil trust components, and consider class-based choices where legally and operationally feasible.
- Specify the section 110-36A verification standard, scope, revocability, and consequences of non-satisfaction, supplementing section 103-25, and provide a register-based or reasonable-inquiry safe harbour for unplanned CGT events. Clarify unders and overs, the AMIT cost base adjustment rules in sections 104-107A to 104-107H, CGT event E10, parallel gross-up provisions, investor data, and differentiated AMMA statement reporting.

- Permit a class-by-class section 110-36A choice only through express legislation that addresses section 276-20, asset and gain allocation, interclass transfers, unit reclassification and integrity. Provide appropriate roll-over or transitional relief where restructuring is reasonably required to implement the final rules.
- Explain the intended relationship among the parallel gross-up provisions in Division 276 and Schedule 1 to the TAA, and identify any differences required by their distinct assessment and withholding contexts.
- Provide transitional compliance relief, safe harbours, and a targeted materiality threshold for the first two income years or longer, if necessary, together with adequate time to update systems, documents, forms and procedures. The ATO should publish a documented transitional compliance approach that protects genuine compliance efforts and unintentional immaterial errors.
- Provide transitional relief where a trustee reasonably concludes that amendments to a scheme constitution, disclosure document, registry arrangement, or administration agreement are necessary to implement the new rules. Confirm that an otherwise valid implementation change will not of itself affect AMIT status or fixed trust treatment, and coordinate with ASIC on any approval, disclosure, or notification issues.
- Publish an LCR and worked examples by 31 March 2027, supported by final forms, data specifications, and record-keeping requirements before the first affected reporting cycle. The LCR should address “capital gain remaining”, multiple loss categories, multiple gains, member verification, choice evidence, nominee and custodian arrangements, interposed trusts, unders and overs and the AMIT cost base adjustment rules in sections 104-107A to 104-107H.

Concluding observations

155. The Committee recognises and supports the policy objective of investment neutrality, namely that reinstated CGT indexation should operate equitably irrespective of whether an investor holds CGT assets directly or through an AMIT. The Committee acknowledges the difficulty of extending investor-specific tax attributes through a standardised trust attribution regime. That difficulty, however, does not justify commencement of a regime whose critical mechanics remain unresolved.

156. The Committee's concerns relate to legislative design and implementation. The Committee does not suggest that AMITs should be excluded from the indexation reforms or that the gross-up mechanism is conceptually flawed. The issues identified concern unresolved interpretation, systems burden, data verification, and interaction with existing AMIT rules. They should be addressed before commencement.

157. The interaction between proposed subsection 276-85(4B), the loss choices in section 102-5 and multiple categories of gain warrants early clarification. The simple single-gain calculation appears capable of reproducing the non-indexed outcome, but the draft does not adequately explain cases involving multiple gains, a gain reduced to nil or quarantined amounts. Treasury should resolve those cases before commencement.

158. The absence of clear ATO guidance also creates a systemic risk of inconsistent implementation across the industry. The AMIT regime depends on standardisation, under which participants apply the same rules and produce consistent and auditable outcomes. Introducing investor-specific calculations without clear administrative guidance will, not merely may, result in fragmented and inconsistent implementation, exposing investors to arbitrary differences in tax treatment determined solely by the approach their fund manager happens to adopt.

159. The Tax Committee would be pleased to discuss these matters further with Treasury. The contact person for this submission is Neil Brydges on 03 9611 0176 or nbrydges@sladen.com.au.

160. The Committee is willing to engage further with Treasury and the Australian Taxation Office. Its members include practitioners with direct experience in the design, implementation, and ongoing operation of AMITs, and the Committee is well placed to provide technical assistance in developing amendments, explanatory materials, and administrative guidance. The Committee respectfully but firmly urges Treasury to address the issues identified in this submission before finalising the Bill and introducing it into Parliament. The systemic implications for the superannuation and managed funds sectors, and critically, for the retirement savings of millions of Australians invested through those structures, demand no less.

About the Business Law Section

The Business Law Section of the Law Council of Australia provides a forum through which lawyers and others interested in business law can discuss current issues, contribute to law reform in Australia and enhance their professional skills. The Tax Committee has prepared this submission on behalf of the Section.

The Section:

- prepares almost half of the Law Council's submissions each year, putting the views of the business community and the legal profession directly to the Federal Government and its agencies and Federal Parliamentary Committees;
- provides a forum for debate of current issues, and assists lawyers to develop and maintain their professional skills and knowledge, through a schedule of regular conferences, workshops, and seminars;
- represents the Law Council on a number of bodies, for example, the National Taxation Liaison Group and its sub-committees, the Customs and Border Protection National Consultative Committee and its sub-committees and the ASX Corporate Governance Council; and
- gives its members the opportunity to develop a network of professional contacts in their fields of practice.

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's Secretariat is based in Canberra. Its website is www.lawcouncil.au. Contact for this submission: Neil Brydges.