Law Council
OF AUSTRALIA

5 November 2026

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Senate Standing Committees on Economics
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Dear Economics Legislation Committee

Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 and Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026

1. The Law Council of Australia welcomes the opportunity to respond to the Senate Economics Legislation Committee's inquiry into the Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 and the Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026 (**Bill package**).

2. This submission follows the Law Council's submission to the Treasury dated 22 September 2026 on the exposure draft legislation (**Earlier Submission**). In light of the disappointingly short (two week) period for submissions to be lodged with the Committee, we refer back to our Earlier Submission through this document as appropriate.

3. The Law Council acknowledges the contribution of the Law Institute of Victoria (**LIV**) to this submission. It also encloses detailed submissions from our National Elder Law and Succession Law Committee (**Elder Law Committee**) at Attachment 1, and the Taxation Committee of our Business Law Section (**Tax Committee**) at Attachment 2. This covering letter draws together key concerns and recommendations arising from the contributions.

4. Both the Elder Law Committee and Tax Committee have provided detailed analysis of the proposed measures and include recommendations within each committee's area of expertise. Given the limited consultation period, the committee submissions are provided in full and should be attributed to the respective committees.

5. The Law Council acknowledges the improvements made to the Bill package following Treasury's exposure draft consultation. These include additional exclusions from the minimum tax regime, clarification of aspects of the treatment of testamentary trusts and charitable beneficiaries, and a limited discretion for the Commissioner of Taxation in relation to specified excluded election trust (**EET**) failures. These changes respond constructively to concerns raised during consultation. However, several principal concerns identified in our Earlier Submission remain unresolved or have been addressed only in part.

6. An overarching concern for the Law Council is that taxpayers may be required to make significant and potentially irreversible restructuring and election decisions before the legislative framework is complete. The Explanatory Memorandum (**EM**) expressly contemplates further legislation concerning important aspects of the regime, including its administration and interaction with other taxation provisions. Important matters remain subject to future legislative instruments, including conditions for charitable and exempt-entity exclusions, aspects of the material discretionary elements tests and rollover continuity requirements for trusts without a family trust election. ATO guidance on the application of the amended fixed trust definition is also to follow passage of the legislation. This limits the ability of taxpayers and their advisers to assess the available options and their long-term consequences with reasonable certainty.

7. The Law Council has a longstanding interest in the quality, certainty and integrity of taxation legislation and its consistency with rule of law principles.[1] Core criteria determining liability, eligibility for exclusions and access to restructuring relief should be ascertainable from the primary legislation. Explanatory materials and administrative guidance have an important supporting role, however these are not substitutes for clear statutory rules on matters that determine whether a tax liability arises.

8. The Law Council considers that further refinement is required to ensure that the regime addresses the integrity concerns at which the reforms are directed, without imposing unintended or disproportionate consequences on ordinary commercial, family and succession arrangements. The principal matters requiring attention are set out below.

Certainty about the scope of the regime and its exclusions

Material discretionary elements

9. The concept of "material discretionary elements" remains central to several critical aspects of the regime and continues to be inherently fact-sensitive, especially in relation to the proposed definition of a fixed trust.[2] Consistent with the Earlier Submission,[3] the Law Council reiterates the recommendation for clearer statutory boundaries, distinguishing substantive powers to reallocate economic benefits from ordinary governance, financing, protective and succession powers.

10. Clear statutory criteria, supported by additional practical examples, should ensure that ordinary arrangements that do not facilitate discretionary reallocation of economic benefits do not inadvertently cause a trust or company to fail the relevant eligibility requirements. The practical examples may include classes of shares, dividend rights, redemption and conversion rights, management equity, capital raisings and succession arrangements.

Legal profession trust accounts

11. The Law Council acknowledges the statement in the EM that bare trusts, including solicitor and accountant trust accounts, are expected to satisfy the amended fixed trust

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1 Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011), 2 (see, in particular, Principle 1).
2 Treasury Laws Amendment (Tax Reform No. 3) Bill 2026, section 272-65.
3 Law Council of Australia, Minimum tax on discretionary trusts—exposure draft legislation (22 September 2026), 3-4 [10]-[12].

definition and therefore fall outside the minimum tax regime.[4] In our view, legal practitioners should not be required to rely on statements in the EM to establish that these accounts fall outside the regime. The Law Council therefore recommends that trust accounts and controlled money accounts maintained under the Legal Profession Uniform Law or equivalent State or Territory legislation be expressly excluded from the minimum tax regime in the primary legislation.

Charitable, testamentary and exempt entity arrangements

12. Consistent with the above points, the substantive conditions governing exclusions for income appointed to registered charities, deductible gift recipients and other income tax exempt entities should be set out in the primary legislation.

13. At a minimum, the governing principles for any cap on the amount of income excluded for exempt entities that are neither registered nor deductible gift recipients should also be prescribed in the primary legislation.

Protection of genuine estate and succession planning

14. The Law Council recommends that the testamentary trust provisions expressly preserve the exclusion for qualifying income from accumulated income, reinvested proceeds and replacement assets to the extent that the relevant income remains attributable to deceased estate property. Ordinary estate administration, investment changes and genuine succession planning should not, of themselves, cause the exclusion to be lost. The legislation should provide for proportionate treatment where assets are acquired using both estate and non-estate funds. Integrity provisions should not deny the exclusion merely because taxation consequences are considered as part of genuine estate or succession planning.

15. The legislation should also expressly resolve the treatment of testamentary trusts established on or after 1 July 2028 whose instruments include a company or a trustee of a trust other than a special disability trust as a potential beneficiary. In particular, the legislation should make clear whether the presence of such a beneficiary affects the exclusion for otherwise qualifying income, even where no entitlement, distribution or other benefit is provided to that beneficiary.

16. Both the Elder Law Committee and Tax Committee recommend that the beneficiary restriction operate by reference to actual entitlements, distributions and benefits provided to non-qualifying beneficiaries. The mere inclusion of such a potential beneficiary in the trust instrument should not disqualify otherwise qualifying income from the exclusion.

Flexibility and proportionate consequences under the EET regime

17. The Law Council welcomes the introduction of a limited discretion for the Commissioner to address inadvertent breaches of the EET requirements. However, the restrictions on varying EET nominations remain insufficiently flexible to accommodate genuine changes in family circumstances over the life of a trust. Consistent with our Earlier Submission, the Law Council reiterates the recommendation for a controlled mechanism permitting prospective variations following significant and objectively

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4 Explanatory Memorandum, 14 [1.26].

verifiable changes in family circumstances, including birth, adoption and incapacity, subject to appropriate integrity safeguards. Trustees should also be able to respond to beneficiaries' changing circumstances in the proper discharge of their fiduciary duties without exposing the trust to disproportionate taxation consequences.

18. The consequences of revoking an EET election should distinguish between deliberate non-compliance, inadvertent failures and a voluntary decision to leave the regime. The Law Council recommends provision for the correction of inadvertent failures and an overly prospective exit, with the ordinary minimum tax framework applying thereafter, rather than automatic taxation at the top marginal rate in the revocation year where no avoidance or deliberate non-compliance has occurred.

Practical access to rollover relief

19. Consistent with our Earlier Submission, the Law Council reiterates its recommendation that the rollover permit transfers to multiple eligible transferees and partial restructures of distinct businesses or undertakings, subject to appropriate continuity and integrity requirements.[5] Requiring business assets, real property and passive investments to be transferred to a single entity may produce commercially inappropriate outcomes and impede genuine succession arrangements. The governing continuity requirements, including a pathway for trusts without a family trust election, should be set out in the primary legislation rather than depend on a future legislative instrument.

20. The practical availability of the rollover must also be addressed having regard to State and Territory duty liabilities and other implementation costs. Commonwealth income tax relief alone may not provide a viable restructuring option, particularly for trusts holding land. The Law Council encourages the Commonwealth to engage with the States and Territories to secure complementary duty relief for qualifying restructures, with the position settled sufficiently early to inform trustees' decisions.[6]

Coordination with existing taxation provisions

21. The Law Council reiterates that the interaction between the minimum tax regime and existing private group integrity provisions, including Division 7A, Subdivision EA and section 100A of the *Income Tax Assessment Act 1936* (Cth), should be resolved before taxpayers are required to make long-term restructuring or election decisions.[7] Clear coordination rules are needed so that trustees and beneficiaries can determine the consequences of distributions to corporate beneficiaries, unpaid present entitlements and benefits subsequently provided to shareholders or their associates.

Further consultation and commencement

22. The Law Council recommends further targeted technical consultation on a complete legislative package, including all material legislative instruments and administrative provisions. Matters determining liability and eligibility should be resolved in the primary legislation. Practical guidance and worked examples should be available sufficiently

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5 Law Council of Australia, Minimum tax on discretionary trusts—exposure draft legislation (22 September 2026), 4-5 [16]-[18].

6 This builds on the concerns raised in the Law Council's previous submission. See ibid, 5 [20].

7 Ibid, 6-7 [27]-[29].

early to assist taxpayers and advisers to understand and apply the completed framework.

23. All material rules should be enacted sufficiently in advance of commencement and the applicable election and restructuring deadlines to provide a meaningful implementation period. If this cannot be achieved, commencement and the associated decision timeframes should be deferred. Taxpayers should not be required to make enduring decisions on the basis of an incomplete framework.

Contact

24. The Law Council appreciates the Senate Committee's consideration of the points raised in this letter, in addition to the attached submissions by the Elder Law Committee and Tax Committee, which raise important matters in their own right. We would welcome further engagement as the legislation continues to develop.

25. If you have any questions or if you would like to make arrangements for a Parliamentary hearing, please contact Janina Richert, Senior Policy Lawyer, [redacted] in the first instance.

Yours sincerely



Elizabeth Shearer
President-elect

Attachment 1: Submission by the Law Council of Australia's National Elder Law and Succession Law Committee

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

Introduction

1. The National Elder Law and Succession Law Committee of the Law Council of Australia (**Elder Law Committee**) welcomes the opportunity to provide input to the Senate Economics Legislation Committee's inquiry into the *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (**Principal Bill**) and the *Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026* (together **the Bills**).

2. This submission focuses on matters within the Elder Law Committee's expertise, including testamentary trusts, deceased estates, other post-death fiduciary arrangements, the effect of the excluded election trust (**EET**) regime on trustees and beneficiaries, succession consequences of restructuring and the practical impact upon existing estate plans. The Elder Law Committee does not address the unrelated measures contained in the Principal Bill except where they interact with the minimum tax reforms considered in this submission.

3. The Law Council's submission of 22 September 2026 on the exposure draft legislation (**Earlier Submission**) attached a detailed submission prepared by the Elder Law Committee. The Earlier Submission concluded that the exposure draft package was not sufficiently certain or complete and made specific recommendations directed to succession law and estate administration. The introduced legislative package addresses some matters, but many central recommendations have not been adopted or have been addressed only in part.[8]

4. The Elder Law Committee acknowledges the improvements made since the exposure drafts. These include additional entity-level exclusions from the definition of Minimum Tax Trust (**MTT**), a Budget-night transitional limb for certain property already transferred to testamentary trusts, express rollover exceptions for particular retained assets, a limited discretion for the Commissioner of Taxation (**Commissioner**) in relation to specified EET failures, and more complete provisions dealing with minimum tax offsets and overlapping rebates. Those changes are useful. They do not resolve the principal concerns set out below.

Executive Summary

5. The Elder Law Committee's principal concern is that the legislative package remains broader, more complex and less certain than is appropriate for a reform of this significance. It affects existing discretionary trusts, testamentary trusts, deceased

[8] Law Council of Australia, Minimum tax on discretionary trusts—exposure draft legislation (Submission, 22 September 2026), Attachment 2.

estates, trustees, beneficiaries and succession arrangements. Although the introduced Bills address some concerns raised during consultation, significant issues remain concerning the scope of the minimum tax regime, the treatment of existing estate plans, the testamentary trust exclusion, the rigidity of the EET regime, the practical availability of transitional rollover relief and the reliance upon delegated legislation and unresolved administrative rules. The practical consequences will be borne by families, trustees and businesses.

6. The Principal Bill continues to define MTTs by excluding listed entities and trusts satisfying the proposed fixed trust definition. Trusts that are neither expressly excluded nor fixed may therefore fall within the regime even where they do not possess the family-directed income allocation characteristics at which the policy is directed. Every affected existing discretionary trust will require legal, tax and accounting advice about whether to remain within the minimum tax regime, undertake a rollover restructure or make an EET election. Remaining within the regime may result in additional trustee-level tax. Restructuring may involve substantial professional costs, valuation requirements and State and Territory duty. An EET election may restrict future distributions and expose the trust to serious consequences if its requirements are not satisfied.

7. The testamentary trust provisions also require substantial amendment. Testamentary discretionary trusts have not been carved out of the minimum tax regime. The exclusion is narrow and conditional. It applies only to qualifying income and depends upon conditions concerning the trust, its beneficiaries and its funding. Existing Wills are not grandfathered, “established” remains undefined and a testamentary trust established on or after 1 July 2028 may lose the exclusion because its instrument includes a company or other trust as a potential beneficiary, even where that provision is never used.

8. Unless those provisions are amended, every existing Will containing a discretionary testamentary trust may require review and, in many cases, amendment or replacement, at significant cost to ordinary Australians. Some Will-makers will have lost testamentary capacity and will be unable to alter their estate planning. Others may die before obtaining advice or may be unable to afford it. The consequences are not confined to wealthy families. Testamentary trusts are used to protect minor children, adults unable to manage money, beneficiaries affected by disability, family violence, addiction, coercion, insolvency or relationship breakdown, and families seeking to preserve a home or death benefits. A special disability trust is not an adequate substitute in every case.

9. The EET regime requires enduring nominations and fixed percentages, with significant consequences for failure, while leaving unresolved legal, equitable, succession and duty issues. Transitional rollover relief remains constrained by eligibility, timing, single-transferee and asset-transfer requirements and may attract State or Territory duty. The trustee-level tax, offset and coordination rules are complex, and important legislative instruments, forms and administrative processes remain incomplete. Trustees are therefore being required to make decisions that may be difficult or impossible to reverse before the complete rules are available. These are not marginal compliance effects. The Explanatory Memorandum to the Principal Bill (**Explanatory Memorandum**) estimates average regulatory costs for Schedules 1 to 3 of $141.5 million per year over ten years.

Principal recommendations

10. The Elder Law Committee recommends that the legislative package be amended before enactment. At a minimum, it should:

- replace the exclusion-based definition of MTT with a positive test directed to a substantive power to allocate income or capital among alternative beneficiaries or in differing proportions, supported by statutory safe harbours for ordinary governance, protective and succession powers;
- grandfather testamentary trust arrangements contained in Wills executed before 1 July 2028, including later codicils or replacement Wills that do not materially alter the relevant provisions;
- define when a testamentary trust is established;
- test actual distributions, entitlements and benefits instead of disqualifying a trust because its instrument contains an unused company or trust beneficiary;
- include objective source and function criteria for genuine testamentary arrangements and confine the integrity rules to arrangements entered into for a principal or dominant purpose of obtaining the exclusion;
- provide statutory rules for replacement assets, successive reinvestment, mixed funding, borrowings, refinancing, improvements and reasonable tracing or apportionment;
- extend equivalent treatment to genuine post-death trusts funded by superannuation, insurance, employment death benefits and comparable death-related property;
- expressly protect trusts established and administered principally to support people with disability or other vulnerable beneficiaries where a special disability trust is unavailable or unsuitable;
- redesign the EET regime so it preserves genuine trustee discretion, permits proportionate correction and variation and does not expose a trust to retrospective and penal consequences for minor or inadvertent failures;
- clarify the legal, equitable, succession, family law, insolvency, creditor, asset-protection, social security and duty consequences of an EET election and nomination;
- permit rollover restructures involving more than one transferee, enact the continuity principles and objective safe harbours in primary legislation, and provide deferred relief for an asset properly retained to meet liabilities or because of a genuine impediment;
- secure consistent State and Territory duty relief, or provide equivalent Commonwealth relief, together with appropriate GST and implementation-cost relief for qualifying restructures and EET events;
- provide a non-refundable offset for corporate beneficiaries so that trust income is not taxed at 30 per cent in the trustee's hands and again at 30 per cent in the company's hands; and
- complete and expose the legislative instruments, approved forms, coordination rules and remaining administrative provisions before trustees and Will-makers are required to make enduring decisions.

Assessment of the legislative package

Scope of MTTs and fixed trusts

11. The Principal Bill now expressly excludes special disability trusts, deceased estates, complying superannuation entities, certain special purpose entities, employee share trusts and approved worker entitlement funds. It also permits further kinds of trusts to be excluded by legislative instrument. These additions respond to part of the concern that the exposure drafts captured trusts beyond ordinary discretionary family trusts.[9]

12. The more fundamental recommendation has not been adopted. The Principal Bill continues to define scope by excluding listed entities and trusts that satisfy the proposed fixed trust definition. A trust that is neither expressly excluded nor fixed may be a MTT even if it lacks the family-directed income allocation characteristics at which the policy is directed.

13. The expanded fixed trust definition continues to rely upon "material discretionary elements" capable of significantly affecting beneficiaries' entitlements or rights. The Principal Bill gives indicative criteria and retains broad legislative instrument powers. Ordinary amendment, governance, protective, succession and appointment powers may therefore remain relevant to classification, even where they are not used to divert income among lower-rate beneficiaries.

14. The Elder Law Committee maintains its recommendation that the legislation adopt a positive, purpose-built test directed to a substantive power to allocate income or capital among alternative beneficiaries or in differing proportions. Ordinary governance, protection and succession powers should be protected by clear statutory safe harbours.

15. Although special disability trusts are expressly excluded, they are not available or suitable for every person with disability or other vulnerable beneficiary. Protective discretionary trusts may be established principally to provide accommodation, meet care and living expenses, respond to changes in support funding and protect a beneficiary from exploitation or financial abuse. The Elder Law Committee recommends an express exclusion or safe harbour for trusts established and administered principally to provide support, care, accommodation or protection for a person with disability or another vulnerable beneficiary, subject to appropriate integrity conditions.

Testamentary trusts

No grandfathering for existing Wills

16. The Earlier Submission recommended grandfathering testamentary trust arrangements contained in Wills executed before 1 July 2028. The Principal Bill does

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[9] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 1 item 9, proposed s 101AB of the *Income Tax Assessment Act 1936* (Cth), and sch 1 item 10, proposed s 272-65 of sch 2F to the *Income Tax Assessment Act 1936* (Cth).

not adopt that recommendation. It distinguishes trusts established before and after 1 July 2028, not Wills executed before that date.[10]

17. The Explanatory Memorandum states that existing trust, succession and property law concepts govern establishment and that a testamentary trust will generally be established when property transfers to the trustee. This provides an indication of the intended approach but does not define a single statutory event. Depending upon the Will and the administration of the estate, potentially relevant events include death, a grant of representation, vesting in the legal personal representative, assent, appropriation, transfer to a separate trustee and completion of administration.

18. A person who executed a Will years ago may die after 1 July 2028. A person may also lose testamentary capacity before the change is understood or before advice can be obtained. An application for a statutory Will is not a practical or certain substitute for grandfathering. Other Will-makers may be bound by mutual Will arrangements or may be unable to bear the cost of reviewing and replacing a complex estate plan.

19. The distinction based upon establishment therefore places the cost and risk of legislative change upon Will-makers and their families. It also creates an arbitrary difference between substantially identical Wills according to the timing of death, estate administration or the transfer of property.

20. The cost to Will-makers of reviewing and replacing existing Wills has not been quantified. There is no national register or reliable estimate of the number of Wills containing discretionary testamentary trusts because those trusts generally have no separate existence or regulatory visibility until the Will-maker dies. Available evidence nevertheless indicates that the number of Wills requiring professional review could run into the millions. University of Queensland research found that 60 per cent of Australian adults had a valid Will and that 15 per cent of Wills had been prepared by a solicitor specialising in wills and estate planning. On an indicative extrapolation to Australia's adult population of approximately 22.2 million at March 2026,[11] those findings suggest that almost two million Wills were prepared by specialist practitioners alone. Wills prepared by general solicitors accounted for a further 58 per cent, equating to 7.7 million Wills on the same basis.[12] There is no reliable national data identifying how many of those Wills contain discretionary testamentary trusts. However, testamentary trust provisions have been used widely by specialist and general practitioners over several decades. Publicly advertised fees indicate that replacing a Will incorporating a discretionary testamentary trust may cost thousands of dollars for an individual and materially more for a couple or a complex estate

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[10] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 1 item 9, proposed s 101AD(1)(c) of the *Income Tax Assessment Act 1936* (Cth); *Explanatory Memorandum, Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth) [1.36]–[1.39].

[11] Australian Bureau of Statistics*, National, state and territory population, March 2026* (released 17 September 2026), estimating total population at 27,921,150, corresponding to an adult population (aged 18 and over) of approximately 22.2 million.

[12] Cheryl Tilse et al, *Families and generational asset transfers: Making and challenging wills in contemporary Australia: Outcomes from a national prevalence survey of will making* (The University of Queensland, March 2013) 13, 24. See also Cheryl Tilse et al, 'Making and Changing Wills: Prevalence, Predictors, and Triggers' (2016) 6 *SAGE Open* 1.

plan.[13] Even if only a fraction of those Wills is affected, the aggregate cost to Australian families may be substantial. That cost cannot confidently be treated as captured by the regulatory-cost estimate.

21. The Elder Law Committee recommends that a trust contemplated by a Will executed before 1 July 2028 receive the treatment that applies to trusts established before that date, even if the Will-maker dies or the trust is funded after that date. The protection should extend to a later codicil or replacement Will that does not materially alter the relevant testamentary trust provisions.

Beneficiary classes

22. For a trust established on or after 1 July 2028, proposed paragraph 101AD(1)(c) of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) requires that, under the instrument establishing the trust, the relevant beneficiary can only be an individual, an exempt entity or a trustee of a special disability trust (**qualifying beneficiaries**). The Explanatory Memorandum states that if the testamentary trust has corporate entities or other trusts as beneficiaries (**non-qualifying beneficiaries**), its net income will be subject to minimum tax.[14]

23. That explanation resolves the ambiguity identified in the Earlier Submission in favour of a trust-instrument test. It does not address the Elder Law Committee's substantive recommendation. The provision still disqualifies income because non-qualifying beneficiaries are capable of benefiting, regardless of whether they actually receive an entitlement, distribution or other benefit.

24. Broad beneficiary provisions are a conventional feature of modern testamentary trust drafting. They commonly name related companies, related entities, successor trusts and default and remote beneficiaries. In jurisdictions where it is permitted, they may also confer powers to add or remove beneficiaries. Those provisions preserve flexibility over the potentially long period between execution of the Will, death, administration of the estate and the eventual vesting of the trust. Crucially, they also accommodate vulnerable beneficiaries who cannot manage funds directly. A testamentary trust will frequently direct distributions to a separate protective trust managed by a responsible person rather than paying money into the hands of an adult with an addiction, an intellectual disability falling outside strict statutory criteria, or someone experiencing financial coercion. Such arrangements are designed for personal protection, not tax avoidance.

25. The rule will also require a review of existing Wills on a scale not justified by the identified mischief. The concern could be addressed more directly by testing whether income, capital or another benefit is actually provided to non-qualifying beneficiaries. If a trust-level restriction is retained, the legislation should permit a prospective curative amendment removing or irrevocably excluding a non-qualifying beneficiary without engaging the integrity rules or disturbing the trust's establishment date.

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[13] See, for example, Legal Essentials, 'Prices' (prices valid from 1 July 2026), listing $2,200 for an individual Will incorporating a discretionary trust and $4,400 for a couple's discretionary testamentary trust Wills and estate plans; Rosewood Succession, 'How much does a testamentary trust cost?' (2026), estimating additional drafting costs of $1,000 to $2,500 and $2,500 to $5,000 for complex structures.

[14] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 1 item 9, proposed s 101AD(1)(c) of the *Income Tax Assessment Act 1936* (Cth); Explanatory Memorandum, [1.38].

26. An actual-benefit test would preserve the integrity objective. Minimum tax could apply to the amount actually appointed or provided to non-qualifying beneficiaries, without disqualifying otherwise qualifying income applied for the benefit of individuals, exempt entities or special disability trusts. The offset rules should preserve the 30 per cent floor without subjecting the same income to cumulative trustee and corporate taxation.

Meaning of established and later changes

27. The Principal Bill does not define "established". The Explanatory Memorandum's general-law explanation does not provide sufficient certainty for optional testamentary trusts, trusts funded in stages, trusts administered by the executor and later transferred to a separate trustee, or arrangements altered by a court order or estate compromise.

28. The legislative package also does not comprehensively state whether an amendment, court-ordered variation, family provision settlement, deed of family arrangement or construction order affects the date or character of establishment. These questions matter because a later establishment date may engage the post-1 July 2028 beneficiary restriction.

29. The Elder Law Committee recommends a statutory establishment rule and express protection for bona fide amendments, court orders and estate compromises that preserve the testamentary source and succession function of the arrangement.

Genuine testamentary purposes and integrity rules

30. The Explanatory Memorandum continues to describe the exclusion as applying to trusts established and administered for genuine testamentary purposes. The operative provision does not define that expression. It instead combines source requirements with scheme-based integrity rules in proposed subsections 101AD(2) and (3) of the ITAA 1936, subject to the direction in subsection 101AD(4) of the ITAA 1936 to disregard a merely incidental purpose.[15]

31. The Explanatory Memorandum usefully recognises that genuine estate or succession planning is not caught merely because choices are informed by taxation consequences, where obtaining the exclusion is only incidental to the substantive purpose. This clarification responds in part to the earlier concern. It is not an objective statutory safe harbour.

32. Ordinary planning and administration commonly involve a scheme in the broad statutory sense. They may include making or amending a Will, transferring property to a legal personal representative, appropriating or transferring property to a trustee, investing, refinancing, compromising an estate dispute and making distributions. The purpose threshold remains lower and less certain than the principal or dominant purpose test recommended in the Earlier Submission.

33. The Elder Law Committee maintains that the law should state objective source and function criteria and protect ordinary estate planning, administration, investment,

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[15] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 1 item 9, proposed ss 101AD(2)–(4) of the *Income Tax Assessment Act 1936* (Cth); Explanatory Memorandum, ch 1, "Integrity rules".

reinvestment, refinancing, family provision settlements, construction orders and genuine succession or protective arrangements. The integrity provisions should target contrived arrangements entered into for a principal or dominant purpose of obtaining the exclusion.

Estate-derived property and tracing

34. The Explanatory Memorandum confirms that qualifying property can include accumulated income or capital and a replacement asset acquired in an ordinary arm's-length transaction. This is a helpful response to part of the Earlier Submission.[16]

35. The operative provisions still do not provide a comprehensive substitution, tracing or apportionment regime for successive reinvestment, mixed estate and non-estate funding, borrowings, refinancing, improvements funded from several sources, partial disposals, mixed accounts or authorised transfers between testamentary trusts.

36. A testamentary trust may continue for decades and may replace investments many times. Reliance on an undefined connection with estate-derived property, supplemented by explanatory text addressing only an ordinary arm's-length replacement, will impose substantial record-keeping obligations and leave uncertain how mixed property is treated.

37. The Elder Law Committee recommends statutory rules preserving the character of substituted and reinvested estate-derived property and providing proportionate treatment for mixed funding. A reasonable apportionment method should be available where direct tracing is not practicable.

Other genuine post-death trusts

38. The recommendation to extend equivalent treatment to genuine post-death trusts has not been adopted. Proposed section 101AD of the ITAA 1936 remains principally confined to a trust established as a result of a Will, codicil, intestacy or qualifying court order.

39. Under the proposed provisions, an identical death benefit may be protected when held for a child under 18 but subject to minimum tax when held for a surviving spouse, adult dependant or adult child with disability. That distinction depends upon the beneficiary's age and the payment pathway, rather than the protective purpose of the arrangement.[17]

40. Superannuation death benefits, life insurance proceeds and employment death benefits may pass through the deceased estate and then fund a testamentary trust. They may instead be paid directly to a trustee or held under a separate protective trust. Economically and functionally equivalent death-related property may therefore

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[16] Explanatory Memorandum, ch 1, "Income from testamentary trusts"; *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 1 item 9, proposed s 101AD of the *Income Tax Assessment Act 1936* (Cth).

[17] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 1 item 9, proposed s 101AE(1)(c) of the *Income Tax Assessment Act 1936* (Cth), and sch 4 item 83, proposed s 119-20(5) of the *Income Tax Assessment Act 1997* (Cth), operating by reference to s 102AG(2)(c) of the *Income Tax Assessment Act 1936* (Cth).

receive materially different treatment because of the administrative pathway by which it is paid.

41. The exclusions for specified income relating to minors do not solve the broader problem. They do not provide equivalent protection for a surviving spouse, an adult with disability who does not satisfy the special disability trust requirements, another dependent adult or a trust serving a family group after death. The Law Council has separately provided feedback on proposed measures to prevent perpetrators of family and domestic violence from accessing victims' superannuation death benefits.[18] Taxing a protective proceeds trust at 30 per cent may cut across that objective by reducing the funds preserved for vulnerable dependants.

42. The Elder Law Committee maintains its recommendation for an objective exclusion covering genuine post-death fiduciary arrangements funded directly or indirectly from superannuation, insurance, employment death benefits and comparable death-related property, with the same tracing, substitution, reinvestment and mixed-funding rules as qualifying testamentary trusts.

Excluded election trust regime

Improvements and matters partly addressed

43. The introduced EET provisions include two improvements relevant to the Earlier Submission. First, a nomination may include an eligible class comprising deductible gift recipients (**DGRs**) or registered charities. Secondly, proposed section 102UYH of the ITAA 1936 gives the Commissioner a discretion to disregard specified automatic revocation events where revocation would be unreasonable, having regard to matters including inadvertence, quantum, control and remedial action.[19]

44. Those changes are welcome but limited. The permitted-class concept applies only to registered charities and DGRs. It does not implement the Elder Law Committee's recommendation for a permitted-beneficiary-class model that preserves discretion among family beneficiaries. The Commissioner's discretion is confined to the entitlement, charity-payment and capital-correspondence failures in proposed paragraphs 102UYG(2)(b) to (d). It does not apply to every automatic revocation event or provide a general correction period.

Fixed nominations and trustee discretion

45. The EET regime still requires specified beneficiaries and nominated percentages of income and non-income earnings that total 100 per cent. The trustee must act consistently with the nomination if the election is to remain in force. Capital entitlements, if conferred, must correspond with the nominated income and non-income earnings percentages.[20]

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[18] Law Council of Australia, *Submission to Treasury: Consultation paper: Preventing perpetrators from accessing victims' superannuation death benefits* (1 June 2026).

[19] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 3 item 1, proposed ss 102UYA, 102UYC(2), 102UYE(4)–(7) and 102UYH of the *Income Tax Assessment Act 1936* (Cth).

[20] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 3 item 1, proposed ss 102UYC(2) and 102UYE(2)–(7) of the *Income Tax Assessment Act 1936* (Cth).

46. The Principal Bill's replacement of the exposure draft requirement for annual present entitlement to trust capital with rules concerning non-income earnings and capital appointments is an improvement. However, proposed paragraph 102UYE(1)(b) of the ITAA 1936 continues to apply section 95A of the ITAA 1936 to trust capital. The legislation should confirm that this operates only as a taxation deeming rule, does not create or alter any legal, equitable or proprietary interest and does not require annual entitlement to the corpus. It should also address the treatment of accumulations, capital gains, non-income receipts, reclassifications and later corpus appointments.[21]

47. The Explanatory Memorandum states that the nomination does not restrict the trustee's discretion under the deed because the trustee may depart from it and accept the tax consequences. That explanation does not resolve the trust-law question. The trustee chooses in advance to adopt an enduring allocation and later faces automatic revocation and section 99A of the ITAA 1936 consequences if it departs. That is highly likely to create a practical conflict between preserving the election and responding to the circumstances of beneficiaries after real and genuine consideration.

48. The concern is heightened by paragraph 3.94 of the Explanatory Memorandum, which indicates that the Commissioner's discretion is not intended to apply where the trustee changes nominated shares because of a change in a beneficiary's personal circumstances. Those may be precisely the circumstances the trustee is required to consider when exercising its discretion and giving real and genuine consideration to beneficiaries. An enduring fixed-percentage allocation may therefore increase the risk of challenge by a beneficiary who is excluded or disadvantaged as circumstances change.[22]

49. The Principal Bill should not require a trustee to choose between compliance with fiduciary duties and preservation of the election. A permitted-class model would better resemble the tax boundary created by a family trust election while preserving genuine discretionary administration. If fixed percentages are retained, the legislation should allow prospective variation or departure for genuine family, vulnerability, succession, fiduciary and commercial reasons.

Legal character and consequences of the nomination

50. The Explanatory Memorandum states that making or revoking an EET election does not itself give rise to capital gains tax (**CGT**) because the election does not create an asset or interest for CGT purposes. That statement is helpful but does not comprehensively resolve the legal character of the nominated beneficiary's position.[23]

51. The Principal Bill does not expressly state whether a nomination creates, alters or recognises a legal, equitable or proprietary interest for trust, succession, family law, social security, insolvency, creditor, asset-protection and State and Territory duty purposes, when any interest arises, whether it forms part of a beneficiary's estate, or

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[21] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 3 item 1, proposed s 102UYE(1)(b) of the *Income Tax Assessment Act 1936* (Cth).

[22] Explanatory Memorandum, [3.94]. See also *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142.

[23] Explanatory Memorandum, ch 3, "Consequences of revocation", including the statement that an EET election does not operate to create an asset or interest for CGT purposes.

whether the nomination creates a new trust or gives rise to a resettlement. A fixed nominated percentage may be relied upon in family law, bankruptcy and creditor contexts as supporting an argument that the beneficiary has a vested or otherwise proprietary interest in the nominated proportion of income or non-income earnings and, where corresponding capital entitlements are conferred, in capital. It may also affect how the trust and its distributions are treated for social security purposes. These questions are especially important when a nominated beneficiary dies and the percentage is reallocated.

52. The Elder Law Committee recommends an express statutory statement addressing the legal effect of the nomination and consequential rules for CGT, succession and social security. The Commonwealth should also obtain and publish the position of each State and Territory revenue authority, and secure consistent relief for duty arising solely because a trustee makes or maintains an EET election.

Variation and revocation

53. The variation grounds remain confined to the death of a nominated beneficiary and a qualifying relationship breakdown involving two nominated individuals. They do not accommodate birth or adoption, disability, incapacity, family violence, bankruptcy, hardship, changes in a family business, changes in tax or trust law, or other genuine family and succession events identified in the Earlier Submission.

54. The death mechanism still confines replacement individuals by reference to the deceased nominee's estate and the capacity of those individuals to benefit under the trust. It may therefore allow the nominee's Will or the intestacy rules to determine the available replacements, rather than allowing the trustee to respond to the needs of the trust's wider family group.

55. The relationship-breakdown mechanism does not allow all consequential changes that may be required to implement a settlement, maintain consistency with a family trust election or respond to the changed family structure.

56. Automatic revocation remains severe. Except where the trust vests or winds up, revocation may cause beneficiaries to be treated as never presently or specifically entitled in the revocation year, expose the whole net income to section 99A of the ITAA 1936 without the ordinary unreasonableness discretion and return the trust to MTT status for later years. The election also cannot be remade after revocation. A charity or DGR payment failure can operate retrospectively from the start of the year in which the entitlement arose.[24]

57. The Elder Law Committee recommends prospective variation on reasonable notice for genuine changes, a correction period for inadvertent failures, a Commissioner's discretion covering all revocation triggers, prospective operation of revocation except in cases of deliberate avoidance, the ability to make a prospective election in a later eligible year and the ability to remake an election after remediation.

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[24] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 3 item 1, proposed ss 102UYG–102UYJ of the *Income Tax Assessment Act 1936* (Cth); Explanatory Memorandum, ch 3, "Revocation of an EET election", "Commissioner's discretion" and "Consequences of revocation".

Transitional rollover relief

Improvements since the exposure draft

58. The introduced rollover contains useful additions. Assets excluded from the transfer-all-assets requirement now include assets not capable of transfer, qualifying primary production assets, assets reasonably required to discharge trust liabilities, assets needed for winding-up costs, specified low-value assets and membership interests in the transferee. These amendments respond in part to the earlier concerns about assets that cannot be transferred or must be retained to meet liabilities.[25]

59. The exclusion of a retained asset from the transfer-all-assets requirement protects the rollover for the assets that are transferred. However, it does not provide rollover relief if the retained asset is later transferred after 30 June 2030, and it does not exclude income and gains derived from the asset while it remains in the MTT. Deferred relief for an asset properly retained to discharge a liability has not been provided.

60. The legislation should also address how bank debt, related-party loans and unpaid present entitlements are allocated or transferred, whether associated liabilities may be transferred with the assets, and how income and gains from retained assets are treated while the original trust is wound down.

Single transferee and completion

61. The rollover continues to require the transferor's choice to specify one transferee and generally requires all relevant assets to be transferred to that entity. The recommendation to permit more than one eligible transferee and appropriate partial restructures has not been adopted.

62. A single trust may hold an active business, land, passive investments and assets with different risks or financing arrangements. Requiring all transferable assets to move to one entity may be inappropriate for commercial or succession reasons. It may also prevent separation of business and investment risks that the restructure should facilitate.

63. The Principal Bill does not provide a general Commissioner's discretion to extend the completion period where a genuine legal, financing, regulatory or third-party impediment prevents completion. Earlier transfers may therefore lose relief retrospectively if an asset that is capable of transfer, and so is not excluded by the retained-asset exceptions, cannot practically be transferred by 30 June 2030.

64. The Elder Law Committee recommends permitting multiple eligible transferees and partial restructures where continuity is preserved, together with a confined extension power and deferred relief for identified assets necessarily retained to meet liabilities or overcome genuine impediments.

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[25] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 2 item 1, proposed s 126-905(3)–(4) of the *Income Tax (Transitional Provisions) Act 1997* (Cth).

Continuity and post-restructure integrity

65. Continuity requirements for non-family trusts, and alternative requirements for a family trust that does not satisfy the statutory test, remain capable of being prescribed by legislative instrument. The post-restructure test also continues to rely upon material discretionary elements and may look through interposed entities for four income years.

66. The substantive conditions of an effectively irreversible restructure should be known before it begins. Ordinary changes in governance, capital management, succession or commercial ownership should not retrospectively deny relief unless they recreate the discretionary outcomes at which the regime is directed.

67. The Elder Law Committee maintains its recommendation that the governing continuity principles and objective safe harbours be enacted in primary legislation, supported by a confined Commissioner's discretion where substantial continuity of economic ownership is demonstrated.

Duty and implementation costs

68. The rollover provides Commonwealth income tax relief only. It does not relieve State and Territory transfer duty, landholder duty or other transaction taxes. The earlier recommendation for coordinated duty relief has not been addressed in the legislative package.

69. Duty, GST, refinancing, lender consent, valuation and implementation costs may make a qualifying restructure impracticable. This is not a peripheral issue. It determines whether the rollover is a real transition option for a trust holding land, a family business or secured assets.

70. The Commonwealth should seek consistent State and Territory relief for qualifying restructures. If that cannot be secured, equivalent Commonwealth assistance should be considered. The position of each jurisdiction should be published before trustees are required to choose a pathway.

Offsets and interaction with existing tax law

71. The introduced package contains fuller rules for the trustee-level top-up, beneficiary offsets, refundable franking credits and the reduction of overlapping rebates and refunds. These changes address several matters that were incomplete in the exposure drafts.[26]

72. The non-refundable offset remains unavailable to a corporate beneficiary. As Example 1.5 of the Explanatory Memorandum illustrates, the same trust income may be subject to trustee-level minimum tax at 30 per cent and then company tax at 30 per cent without a corresponding corporate credit, producing an effective tax rate of 60 per cent on the same income. That result cannot be reconciled with a policy

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[26] *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 1 items 3–9 and 12-16, including proposed ss 101AG–101AH of the *Income Tax Assessment Act 1936* (Cth); *Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026* (Cth), sch 1 item 2, proposed s 12AB of the *Income Tax Rates Act 1986* (Cth).

directed at ensuring that income bears tax of at least 30 per cent, rather than imposing twice that rate on the same income. The Law Council's recommendation for a non-refundable corporate offset, designed to preserve a 30 per cent floor while preventing effective double taxation outside the policy concern, has not been adopted.[27]

73. The package also does not comprehensively coordinate the new tax with Division 6, Division 6AA, section 100A and Division 7A of the ITAA 1936, unpaid present entitlements, trust losses, family trust and interposed entity elections, capital gain and franked distribution streaming and non-resident beneficiary rules.

74. The interaction with the separate minimum tax on capital gains in Schedule 4 to the Principal Bill remains material for testamentary trusts and deceased estates. Definitions and tracing rules should operate coherently across the two regimes, and integrated examples should address disposal and reinvestment of estate property, accumulation, later distribution and mixed funding.[28]

Delegated legislation and incomplete administration

75. The introduced Bills provide a more complete framework than the exposure drafts. Important matters affecting liability and eligibility nevertheless remain subject to legislative instruments, approved forms, administrative processes or later amendments.

76. These matters include further entity-level exclusions, conditions for charity and exempt-entity income, aspects of the fixed trust definition, continuity rules for certain rollover restructures, the material-discretionary-elements tests for transferees and nominated companies, notifications, collection and other administration. The Explanatory Memorandum also anticipates further amendments concerning particular rollover and CGT interactions.[29]

77. A trustee should not be required to make an effectively irreversible election or restructure while substantive eligibility criteria may later be supplemented or altered. Nor should a Will-maker be required to redesign an estate plan without complete rules and authoritative examples.

78. The financial consequences are potentially substantial. The Explanatory Memorandum estimates that Schedules 1 to 3 will increase average regulatory costs by $141.5 million per year over ten years, equivalent to $1.415 billion over that period.[30] [31] CPA Australia separately estimates that approximately 850,000 discretionary trusts may require professional advice and that the cost of determining

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27 Explanatory Memorandum, Example 1.5.

28 *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), sch 4 item 83, proposed ss 119-20 and 119-25 of the *Income Tax Assessment Act 1997* (Cth); Explanatory Memorandum, ch 4, "Testamentary trusts", "Deceased estates" and "Integrity rules for testamentary trusts and deceased estates".

29 *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth), proposed ss 101AB(2), 101AE(2)–(3), 272-65(5), 126-925(4), 126-935(4) and 102UYD(4); Explanatory Memorandum, ch 2, "Future amendments".

30 Explanatory Memorandum, Treasury Laws Amendment (Tax Reform No. 3) Bill 2026, 'Compliance cost impact' and Attachment 1: Impact Analysis.

31 Explanatory Memorandum, General outline and financial impact, "Compliance cost impact" for Schedules 1, 2 and 3.

whether to remain within the regime, restructure or make an EET election may be between $2.0 billion and $2.8 billion.[32] That cost would be incurred before any trust is restructured and excludes restructuring expenditure, State and Territory duty and implementation costs.

Consultation and commencement

79. The Earlier Submission urged a further reasonable period of consultation on a complete package. The introduced provisions contain substantive changes, including new EET class rules, a Commissioner's discretion, additional rollover exceptions and more complete offset provisions. Stakeholders have again been given a compressed period in which to analyse their combined tax, trust, succession, property and duty consequences.

80. The Elder Law Committee remains concerned that the proposed commencement framework will require advice and decisions before all legislative instruments, approved forms, administrative processes and further amendments are available. Decisions about Wills, EET elections and restructures may have enduring consequences and may be difficult or impossible to reverse.

81. The Elder Law Committee recommends that the legislation not be enacted in its present form. The outstanding matters should be addressed in primary legislation where they affect liability or eligibility. Revised provisions and all material subordinate legislation should be exposed for targeted technical consultation involving taxation, trust, succession, estate administration and State and Territory duty specialists.

Conclusion

82. The legislative package contains constructive changes, but it does not address the central succession-law recommendations previously made by the Law Council in the Earlier Submission. In particular, it does not grandfather existing Wills, define establishment, regulate actual benefits rather than unused beneficiary classes, provide comprehensive tracing rules, protect equivalent post-death trusts, resolve the legal and duty effects of an EET nomination or make the rollover practically available in a sufficient range of cases.

83. The succession issues are central to the operation of the measure. Testamentary and other post-death trusts are used to protect families and manage property after death, often for people who cannot later alter the arrangements. The law should not require widespread rewriting of Wills or impose minimum tax because an orthodox beneficiary provision was included but never used.

84. The Elder Law Committee would welcome the opportunity to appear before the Senate Economics Legislation Committee to assist its inquiry and address the succession law, estate administration and fiduciary implications of the Bills.

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[32] CPA Australia, Minimum tax on discretionary trusts—exposure draft legislation (Submission to Treasury, September 2026) 1, 5, 27 and 34–35.

Attachment 2: Submission by the Taxation Law Committee of the Law Council of Australia's Business Law Section

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

1. The Tax Committee of the Law Council's Business Law Section (**Tax Committee**) welcomes the opportunity to make a submission to the Senate Economics Legislation Committee on its inquiry into the Treasury Laws Amendment (Tax Reform No. 3) Bill 2026 (**Main Bill**) and the Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026 (**Imposition Bill**), together with the Explanatory Memorandum (**EM**).

2. This submission follows the Law Council's submission to the Treasury dated 22 September 2026 on the exposure draft legislation (**Earlier Submission**).[33] It deals principally with the new minimum tax on discretionary trusts in Schedules 1 to 3 of the Main Bill and the Imposition Bill (trust minimum tax), and also with aspects of the separate and unrelated capital gains tax changes in Schedule 4 of the Main Bill (**Tranche 2 CGT changes**).

3. The numbering of provisions in the Treasury exposure draft differed from the numbering in the Main Bill. For example, the exposure draft eligible company provision was 102UYC and is now section 102UYD; the exposure draft revocation provisions were 102UYF(2) and 102UYG and are now sections 102UYG and 102UYI; and the exposure draft roll-over provisions were 126-430 and 126-440 and are now sections 126-905 and 126-925. Exposure draft provisions are referred to only as they were described in the Earlier Submission.

Key messages

4. The Tax Committee acknowledges the Government's policy of measures targeted at the mischief it has identified. Its concerns are with the design and timing of the Bills, in eight respects.

   - **The trust minimum tax should be targeted at the mischief.** Defining a minimum tax trust by exclusion puts ordinary family, commercial, charitable, farming and legal profession arrangements at risk, and relies on carve-outs and hedged statements in the EM to rescue them. In significant areas, the trust minimum tax will cause harm that has nothing to do with the integrity concern it is meant to address.

   - **Certainty is needed now.** Taxpayers, particularly trustees considering irrevocable elections or restructuring, need to understand the scope and nature of the regime to plan for it. Instead, key issues are left to future legislation, ministerial instruments or later Australian Taxation Office guidance. The complete package,

[33] Law Council of Australia, Minimum tax on discretionary trusts—exposure draft legislation (22 September 2026).

including administration, collection and all draft instruments, should be settled before enactment, with sufficient time after enactment for taxpayers to respond.

- **The restructuring options do not solve the problem.** The roll-over and the so-called fixed trust election are narrow, rigid and costly. They do not address the disruption the trust minimum tax will cause to the many discretionary trusts that present no integrity risk.

- **Ordinary estate planning and vulnerable beneficiaries should be protected.** The testamentary trust rules in both the trust minimum tax and the Tranche 2 CGT changes do not cater for ordinary wills, wills made before the trust minimum tax was announced, ordinary changes to estate assets over time or trusts that arise on death outside a will.

  The intended grandfathering of assets held at Budget night does not appear to be properly reflected in the drafting. It is completely inappropriate for people who cannot change their wills to be caught simply because the testamentary trust has been, or may be, created after 1 July 2028. The nature and scope of the assets that qualify are explained inconsistently in the EM and the provisions, and duplicated layers of anti-avoidance rules create unnecessary uncertainty.

- **The treatment of corporate beneficiaries is disproportionate.** Trust minimum tax paid on a distribution to a company receives no recognition at the company level, producing an effective rate of 60 per cent on the same income at the company level, and up to approximately 77 per cent once dividends reach individuals taxed at the top marginal rate. That is a penalty, not an integrity measure. Trustees who properly discharge their fiduciary duties may also lose the electable regime and be taxed at the top marginal rate.

- **Superannuation savings should not be disadvantaged by investing through pooled funds.** The Bill's response to the CGT loss-ordering problem, a choice of loss ordering and an additional capital loss for superannuation funds, is welcome but incomplete. The amount of the additional loss is left to a future ministerial instrument, and the loss-ordering choice is available to a trust only if no investor could use indexation. That class of trusts is unnecessarily narrow and will significantly and adversely affect superannuation funds holding interests through other managed funds.

- **Fund managers need certainty now.** The Tranche 2 CGT changes apply from the income year that includes 1 July 2027, yet managed funds still lack settled rules on valuation, losses, the election out of indexation, reporting and transitional relief. A phased start with safe harbours is needed. The gateway for electing out of indexation, which depends on the tax profile of every investor, is unworkable and unnecessary; a simple fund-level election carries no integrity risk.

- **The ordinary commercial use of trusts should not be penalised.** Formal valuations of unlisted units, the narrow election out of indexation, the uncertain fixed trust test with a 30 per cent liability at stake and deferred rules on roll-overs will together discourage the use of unit trusts for property syndicates, joint

ventures, unlisted funds and infrastructure projects, including in the property sector on which housing supply depends.

5. The Tax Committee welcomes the changes made since the exposure draft. Most, however, give effect to the Law Council's Earlier Submission only in part, several appear only in the EM and some introduce new uncertainty.

Part A: Introduction

Scope of this submission

6. This submission addresses Schedules 1 to 3 of the Main Bill, the Imposition Bill and Chapters 1 to 3 of the EM. It also addresses aspects of Schedule 4 of the Main Bill, being the exemption from the CGT minimum tax for deceased estates, testamentary trusts and special disability trusts, and the Tranche 2 CGT changes for AMITs and managed funds, drawing on the Tax Committee's submission of 26 August 2026 on Capital Gains Tax and Negative Gearing (**CGT Submission**).[34] The submission does not address the remaining Schedules of the Main Bill, or Chapter 4 of the EM other than as described above.

7. The following abbreviations are used: **ITAA 1936** (*Income Tax Assessment Act 1936*); **ITAA 1997** (*Income Tax Assessment Act 1997*); **TAA** (*Taxation Administration Act 1953*); **ITTP Act** (*Income Tax (Transitional Provisions) Act 1997*); **FBTAA** (*Fringe Benefits Tax Assessment Act 1986*); **AMIT** (attribution managed investment trust); **CCIV** (corporate collective investment vehicle); **DGR** (deductible gift recipient); **EET** (electable eligible trust, being a trust for which an election under Division 6F is in force); **MDE** (material discretionary elements); and **MIT** (managed investment trust).

Caveat on the comparison undertaken

8. The Tax Committee has not had access to a marked-up comparison between the exposure draft and the introduced Bills. The comments are based on comparing the introduced Bills and the EM with the exposure draft provisions as described in the Earlier Submission. Where the Tax Committee cannot confirm that a feature is new, we have the feature as giving effect to a recommendation, without asserting that it is a change.

Certainty as a matter of urgency

9. The Tax Committee's most pressing concern is the lack of certainty. The trust minimum tax applies to income years starting on or after 1 July 2028. Before then, trustees must decide whether to restructure under the roll-over, for which the choices under subsections 126-910(2) and (6) of the ITTP Act cannot be revoked and the deadline in paragraph 126-905(1)(b) is 30 June 2030, or whether to make an election under Division 6F. That election may be made once only (subsection 102UYC(7)), and only during the period starting on 1 July 2028 and ending on the last day of the trust's first income year commencing on or after 1 July 2028 (paragraph 102UYC(5)(c)). At present, those decisions must be made on the basis of incomplete law.

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[34] Law Council of Australia (Business Law Section), Capital Gains Tax and Negative Gearing: Tranche 2 Legislation (26 August 2026).

10. A consistent theme of the Bills is that important issues are left to be resolved later, by one of three means:

    - **future legislation**: notification, collection and administration (EM paragraphs 1.17, 1.64, 1.99 and 1.100); the interactions with CGT, international tax and integrity, and further anti-streaming rules (EM paragraphs 1.100 and 1.101); and further amendments to the roll-over and the electable regime (EM paragraphs 2.109 to 2.111, 3.103 and 3.104);

    - **ministerial legislative instruments**: the trusts that are excluded (subsection 101AB(2)), the conditions and any cap for exempt entities (section 101AE), the matters that indicate material discretionary elements (section 272-65 of Schedule 2F to the ITAA 1936), continuity for roll-over transferees that are not family trusts (section 126-925 of the ITTP Act) and the eligibility of companies under the electable regime (section 102UYD); and

    - **guidance from the Australian Taxation Office**: the operation of the fixed trust definition, on which guidance is to be provided after passage, with taxpayers otherwise left to seek private rulings (EM paragraph 1.85).

11. Each deferral shifts risk to taxpayers. Administrative guidance does not bind a court. An instrument may be made, varied or replaced after a taxpayer has acted. The content of future legislation is unknown. The trust minimum tax affects many thousands of family trusts, testamentary trusts, charities, farming families and businesses, and the EM estimates the compliance cost at $141.5 million per year, with a one-off cost of $939 million recorded in the Impact Analysis. Uncertainty on that scale has real costs, including the cost of advice given on assumptions that may later prove wrong.

12. The same pattern is evident in the Tranche 2 CGT changes. In the CGT Submission, the Law Council identified the boundary between primary legislation and delegated instruments as its principal drafting concern and requested that a Law Companion Ruling be published by 31 March 2027, noting that later guidance may not provide sufficient lead time for implementation.

13. The Tax Committee urges the Committee to treat certainty as a matter of urgency. The detail of the regime should be settled before enactment: core rules should be in the primary law, and the administrative and integrity tranche and all draft instruments should be released before the Bills pass. There should then be a sufficient period between enactment and commencement to allow taxpayers to understand the law, obtain advice and restructure or elect, with Australian Taxation Office guidance published well before they must act. The timetable for irrevocable decisions should not begin until the law is complete.

Part B: Changes made since the exposure draft and remaining deficiencies

14. The Tax Committee acknowledges the Government for the changes made since the exposure draft. Two of them, the express exclusion of employee share trusts and approved worker entitlement funds and the retention of refundability of excess

franking credits, give full effect to the Earlier Submission. The others give effect to a recommendation only in part.

15. This Part focuses on the deficiencies that remain in those changes. Four themes recur.

- **Changes made in the EM only.**
  Several responses appear only in the EM and not in the Bills: the legal character of a nomination (EM paragraphs 3.4, 3.23 and 3.101), the time of establishment of a testamentary trust (EM paragraph 1.36), the protection of accumulations and replacement assets (EM paragraph 1.36), the position of legal profession trust accounts (EM paragraph 1.26) and trust-to-trust distributions (EM paragraphs 1.67 and 3.30). An explanatory statement does not bind a court or a State or Territory revenue authority, and several of the statements are hedged.

- **Exclusions that depend on a future instrument.**
  The exclusion of widely held and collective investment trusts depends on a determination under paragraph 101AB(2)(d) that has not been made. Until it is made, those trusts have no exclusion. Continuity for roll-over transferees that are not family trusts depends on a determination under section 126-925, and subsection 126-925(5) means that no pathway exists at all in its absence, although EM paragraph 2.50 describes the power as ‘wholly beneficial’.

- **Relief narrower than the problem.**
  The Commissioner’s discretion in section 102UYH applies only to the events in paragraphs 102UYG(2)(b) to (d) and only on an application made by the notification date. The eligible class of beneficiary is confined to DGRs and registered charities. A special disability trust is now a permitted recipient of a testamentary trust, but legal personal representatives, estates and sister testamentary trusts are not. Assets retained to meet liabilities under paragraph 126-905(4)(c) receive no deferred roll-over, and the electable regime still requires equal shares and full annual allocation.

- **New uncertainty.**
  Some changes enlarge the area of uncertainty. The fixed trust definition in section 272-65 now applies across the whole of the tax law (EM paragraph 1.7), so that its imprecision affects provisions well beyond the trust minimum tax. The EM describes AMITs in terms inconsistent with section 276-55 of the ITAA 1997 (EM paragraphs 1.11 and 1.26) and still describes the electable regime as an election to be treated as a non-discretionary trust (EM paragraph 1.8). The low “purpose includes” integrity threshold has been carried into the CGT minimum tax (subsections 119-25(1) to (3) of the ITAA 1997).

16. These are not matters of presentation. Each determines whether a taxpayer can know its position before acting. The Tax Committee renews the relevant recommendations in Part C.

Part C: Renewed submissions

17. This Part re-makes, in full, each recommendation in the Earlier Submission that has not been accepted, or that has been accepted only in part. It then explains, by

reference to the relevant sections of the Bills and paragraphs of the EM, the extent to which the recommendation has not been addressed. It then sets out the Tax Committee's position and reasons and concludes with a numbered recommendation.

C1. Core liability and eligibility rules should be in the primary legislation

The recommendation in the Earlier Submission

18. The Law Council has previously submitted that the core criteria for liability and eligibility should appear in the primary law, and that delegated powers should be constrained.[35]

The extent to which the Bills and the EM do not address the recommendation

19. The Bills retain extensive instrument-making powers over core questions of liability. They allow the Minister to determine which trusts are excluded (subsection 101AB(2)), the conditions and any cap for the exempt entity exclusions (section 101AE), the matters that indicate MDE for fixed trust status across the whole of the tax law (section 272-65 of Schedule 2F to the ITAA 1936), continuity for roll-over transferees that are not family trusts (section 126-925 of the ITTP Act) and the eligibility of companies under the electable regime (section 102UYD). Under subsection 126-925(5), no continuity pathway exists at all unless a determination is in force.

20. The EM justifies these powers by reference to disallowance and sunsetting, and states that the power will be exercised 'sparingly' (EM paragraph 1.91).

21. None of these provisions prevents a later determination, for example under paragraph 272-65(5)(b), paragraph 126-935(4)(b) or paragraph 102UYD(4)(b), from operating on an election already made or a restructure already completed. A later determination that an eligible company has MDE could trigger automatic revocation under subparagraph 102UYG(2)(e)(iv).

The Tax Committee's position and reasons

22. The criteria that determine whether a tax liability arises should be settled by the Parliament. Delegated legislation attracts a lower level of parliamentary scrutiny than primary legislation. Where the delegated power governs the incidence of a 30 per cent liability, the case for parliamentary determination is strong.

23. Taxpayers must also be able to determine their position before making irrevocable choices. A choice under subsection 126-910(2) or (6) of the ITTP Act cannot be revoked. An election under Division 6F may be made once only (subsection 102UYC(7)). A trustee asked to make such a choice cannot sensibly do so while the content of the law remains to be settled by instrument.

24. Disallowance is not an adequate substitute for enactment. Disallowance operates after an instrument has been made and, in practice, is rarely exercised. Sunsetting does not assist a taxpayer who has acted on the law as it stood.

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[35] See, Law Council of Australia, Minimum tax on discretionary trusts—exposure draft legislation (22 September 2026), 2-3, 13-14 and 53.

25. Instrument-making powers should be confined to matters of administration and verification. If a determination adverse to taxpayers is to be made, it should operate prospectively only. It should not affect a restructure already completed or an election already made.

26. Drafts of all proposed instruments should be released for consultation before the Bills pass. That includes the continuity determination contemplated by subsection 126-925(4) of the ITTP Act and any cap contemplated by paragraph 101AE(2)(b).

Recommendation 1

- **The Tax Committee recommends that the Bills be amended to:**
  - **move the core criteria for liability and eligibility into the primary law, including the categories of excluded trust, the conditions and any cap for exempt entity exclusions, and the content of material discretionary elements;**
  - **confine the instrument-making powers in paragraph 101AB(1)(h), subsections 101AB(2), 101AE(2) and (3), 272-65(2) to (5), 126-925(2) to (5), 126-935(2) to (4) and 102UYD(2) to (4) to beneficial or administrative matters; and**
  - **insert a statutory rule that a determination which is adverse to taxpayers applies prospectively only, and does not affect a roll-over completed, or an election made under Division 6F before the determination commenced.**
- **The Tax Committee further recommends that draft instruments, including the continuity determination under subsection 126-925(4) of the ITTP Act and any cap under paragraph 101AE(2)(b), be released for consultation before the Bills pass.**

C2. A purpose-built definition of a discretionary trust

The recommendation in the Earlier Submission

27. The Earlier Submission recommended a purpose-built, positive definition of a discretionary trust.[36]

The extent to which the Bills and the EM do not address the recommendation

28. Subsection 101AB(1) continues to define a minimum tax trust by exclusion. A trust is a minimum tax trust if it is not a fixed trust and does not fall within one of the listed categories. EM paragraphs 1.18 to 1.20 explain that structure.

29. The positive test proposed in the Earlier Submission has not been adopted. The Bills contain no safe harbour for ordinary amendment powers, appointor powers, trustee-replacement powers or protective and succession powers of the kind described in the Law Council's Earlier Submission.

[36] Ibid, 11-12 and 35.

The Tax Committee's position and reasons

30. A definition by exclusion casts the net widely and then relies on carve-outs to retrieve the trusts that were never the target. That approach places the burden on every trust in Australia to establish that it falls outside the charge. It produces uncertainty for ordinary commercial and family arrangements that involve no allocation discretion at all.

31. A positive test would be shorter, clearer and more closely aligned with the policy. The relevant feature of a discretionary trust is a present, substantive power to decide who receives income or capital, or in what proportions. Powers that concern governance, trustee succession, investment or the protection of beneficiaries do not have that character.

Recommendation 2

- **The Tax Committee recommends that subsection 101AB(1) be replaced with a positive statutory test, under which a trust is a minimum tax trust only if the trustee, or another person, holds a present substantive power to allocate income or capital among alternative beneficiaries, or in differing proportions.**
- **The Tax Committee further recommends that the test include a safe harbour for ordinary governance, protective and succession powers, including amendment powers, appointor powers, and powers to remove and replace a trustee.**

C3. The fixed trust definition: precision, safe harbour, and examples

The recommendation in the Earlier Submission

32. The Law Council's Earlier Submission sought a precise fixed trust definition, supported by a safe harbour and by worked examples.[37]

The extent to which the Bills and the EM do not address the recommendation

33. Paragraphs 272-65(5)(a) and (b), read with subsection 272-65(2), permit the Minister to determine matters that conclusively mean that there are, or are not, MDE. The Tax Committee supports that power in principle, but it does not resolve the underlying uncertainty.

34. Paragraph 272-65(1)(b) still turns on whether there are 'material discretionary elements capable of significantly affecting' the entitlements or rights of the trust's beneficiaries to its income or capital. The matters listed in subsection 272-65(3) only 'suggest' the absence of MDE. EM paragraph 1.85 confirms that the list is not exhaustive, that the presence or absence of a listed matter is 'not necessarily determinative', that guidance is to be provided by the Australian Taxation Office after passage, and that taxpayers may seek private rulings. EM paragraph 1.88 explains the word 'significantly' only in relation to the addition of new units. There is a single worked example, Example 1.7, which concerns a MIT.

[37] Ibid, 3-4, 12-14 and 35.

35. There are no examples for unit trusts, hybrid trusts or trusts with broad amendment or appointor provisions. The definition now applies across the whole of the tax law (EM paragraph 1.7; Schedule 1, item 19 of the Main Bill, amending subsection 995-1(1) of the ITAA 1997). That extension increases the consequences of uncertainty.

The Tax Committee's position and reasons

36. Administrative guidance cannot cure uncertainty in a liability rule. Guidance binds the Commissioner, not a court, and is not available at the time a trustee must act. Private rulings are costly and slow and cannot be obtained at scale by the many thousands of trusts affected.

37. A safe harbour would resolve the difficulty for most trusts without weakening the integrity of the trust minimum tax. If a trust satisfies the matters listed in subsection 272-65(3), the law should say that there are no MDE. The remaining cases can then be dealt with by the general test.

38. The statutory language should also distinguish allocation discretions from governance, financing, investor-protection and remote powers. A power that could be exercised only in a remote contingency, or only with the consent of all members, does not reflect the mischief.

Recommendation 3

- **The Tax Committee recommends that section 272-65 of Schedule 2F to the ITAA 1936 be amended to:**
  - **convert the matters listed in subsection 272-65(3) into a statutory safe harbour, so that satisfaction of those matters conclusively means that there are no material discretionary elements; and**
  - **give statutory content to the expressions 'material discretionary elements' and 'significantly', distinguishing allocation discretions from governance, financing, investor-protection and remote powers.**
- **The Tax Committee further recommends that the Explanatory Memorandum include worked examples for unit trusts, hybrid trusts, and trusts with amendment, appointor, and succession powers.**

C4. Managed funds, widely held trusts and the hedged statements in the Explanatory Memorandum

The recommendation in the Earlier Submission

39. The Tax Committee has previously recommended an express statutory exclusion for registered managed investment schemes, MITs and widely held commercial trusts, independent of the fixed trust definition.[38]

[38] Ibid, 14-18.

The extent to which the Bills and the EM do not address the recommendation

40. The recommendation has been addressed in part, however the difficulty remains.

41. EM paragraph 1.11 states that the tax will not apply to fixed trusts, 'including most widely held trusts, MITs and AMITs'. EM paragraph 1.26 states that MITs and AMITs 'would be expected to meet' the fixed trust definition, and that CCIVs 'are intended to be excluded'.

42. Those statements understate the legal position for AMITs. An AMIT is already deemed to be a fixed trust by section 276-55 of the ITAA 1997. The note in Schedule 1, item 19 of the Main Bill states that 'AMITs are treated as fixed trusts (see section 276-55)'. EM paragraph 4.11 itself says that an AMIT is treated as a fixed trust. EM paragraphs 1.11 and 1.26 are inconsistent with those statements. That inconsistency is recorded in Annexure A, item 31.

43. The exclusion for other widely held trusts depends on a future determination under paragraph 101AB(2)(d). Until that determination is made, those trusts have no exclusion.

The Tax Committee's position and reasons

44. The consequence of failure to qualify is a liability at 30 per cent, potentially for multiple years. For a widely held fund, that liability falls on the fund and is borne by its members, many of whom are superannuation funds and retail investors.

45. The Tax Committee also notes the effect on MIT withholding settings and on the confidence of foreign investors. Those settings depend on the characterisation of the trust. Leaving the characterisation to a future instrument is inconsistent with the certainty that the withholding regime assumes.

Recommendation 4

- **The Tax Committee recommends that subsection 101AB(1) be amended to insert an express statutory exclusion for registered managed investment schemes, managed investment trusts, attribution managed investment trusts, corporate collective investment vehicles and their sub-funds, and widely held trusts offered on a commercial basis.**

- **The Tax Committee further recommends that paragraphs 1.11 and 1.26 of the Explanatory Memorandum be corrected to state the legal position for attribution managed investment trusts accurately, consistently with section 276-55 of the ITAA 1997.**

C5. Legal profession trust accounts and regulated custodial arrangements

The recommendation in the Earlier Submission

46. The Law Council's Earlier Submission sought an express statutory exclusion for legal profession trust accounts or, failing that, unqualified confirmation in the EM with examples.[39]

The extent to which the Bills and the EM do not address the recommendation

47. The EM at paragraph 1.26 (fourth bullet) states that bare trusts such as solicitor and accountant trust accounts "are expected would meet" the new fixed trust definition. The statement is hedged. It does not mention controlled money accounts or comparable regulated arrangements. It is not accompanied by examples addressing unidentified, contingent or disputed entitlements.

The Tax Committee's position and reasons

48. A law practice trust account holds money for clients under a statutory regime. The practitioner has no beneficial interest in the money and no discretion as to its application. The account is subject to external examination and to the supervision of regulatory authorities.

49. Nevertheless, entitlements in such an account may be unidentified, contingent, or disputed at a given time. Money may be held pending the resolution of a dispute, or pending the identification of the person entitled. On a literal reading, that may be said to prevent the account from satisfying the fixed trust definition. The hedged statement in EM paragraph 1.26 leaves law practices exposed to that argument.

50. The consequences would be serious and plainly unintended. A law practice could face a liability at 30 per cent on interest or other income referable to client money. The administrative burden of establishing the position for each account would be substantial.

Recommendation 5

- **The Tax Committee recommends that subsection 101AB(1) be amended to insert an express exclusion for trust accounts and controlled money accounts maintained under the *Legal Profession Uniform Law* or equivalent State or Territory legislation, and for comparable regulated custodial arrangements.**
- **If that recommendation is not adopted, the Tax Committee recommends that paragraph 1.26 of the Explanatory Memorandum be amended to confirm the position without qualification, and that examples be included addressing unidentified, contingent and disputed entitlements.**

[39] Ibid, 7.

C6. Testamentary trusts

51. The Earlier Submission made a series of recommendations about testamentary trusts. The Bills address those recommendations only in part. The Tax Committee renews them below.

C6(a). Mixed beneficiary classes and the operative test in paragraph 101AD(1)(c)

52. The Tax Committee has previously noted that the testamentary trust exclusion is too narrow and should be broadened to cover the full range of trusts created under a will.[40]

53. Paragraph 101AD(1)(c) still refers to the beneficiary referred to in paragraph 101AD(1)(b), and to what that beneficiary "can only be" under the instrument. EM paragraph 1.38 still states that, if a testamentary trust has beneficiaries that are corporate entities or other trusts, its net income will be subject to the trust minimum tax. The discrepancy remains unresolved. It is recorded in Annexure A, item 2.

54. The practical effect is that a testamentary trust is denied the exclusion because of the composition of the class of potential beneficiaries, rather than because of who actually benefits. Many wills include corporate beneficiaries for asset protection reasons, and many wills include broad classes and gift-overs that are never used. There is also no mechanism by which a trustee may make a curative amendment.

55. The test should attend to actual benefit. A trust whose income is in fact applied for individuals should not lose the exclusion because the will permits, but does not require, a distribution to a company that never receives anything.

C6(b). Replacement and derived property on the face of the statute

56. The Tax Committee has previously argued that the legislation should make clear on its face that the exclusion asks whether property is held in connection with the deceased estate or will trust, so that substituted property, replacement assets, reinvested estate property, proceeds of sale and assets acquired in the course of administration are all covered, regardless of whether the precise original asset survives.[41]

57. The protection for accumulations and replacement assets appears in EM paragraph 1.36 only. There are no statutory tracing or apportionment rules. The EM does not address mixed funding, borrowings, improvements to estate assets, or transfers from one trust to another.

58. A testamentary trust may hold an estate asset for decades. It may sell that asset, reinvest the proceeds, borrow against the replacement and improve it. Whether the resulting income is protected should be determined by a statutory rule, not by an explanatory statement. Where an asset is funded in part from estate property and in part from other sources, an apportionment rule is required.

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[40] Ibid, 19-21.
[41] Ibid, 20.

59. There also needs to be much greater clarity as to the nature and scope of the assets that can benefit from being held within a testamentary trust. At present the explanation is inconsistent, both within the EM and as between the EM and the operative provisions.

60. EM paragraph 1.36 refers to assets from the deceased person's estate transferred to the trust, together with accumulations and assets sold and replaced in a normal arm's length transaction. Paragraph 101AD(1)(b) instead refers to income of a kind covered by subsection 102AG(2AA), or income from property transferred to the trustee before 7.30 pm (ACT legal time) on 12 May 2026. EM paragraph 4.143, in the context of the CGT minimum tax, refers to assets of the deceased estate including superannuation death benefits paid to the estate, while EM paragraph 4.144 refers to assets that do not originate with the deceased estate.

61. These formulations are not the same, and it is unclear whether, for example, superannuation death benefits, life insurance proceeds, assets received by the estate after death or property appointed under a power exercisable on death are within scope for the purposes of section 101AD.

62. These matters are significant. Trustees, executors and testators require a single, consistent statutory description of the qualifying assets, applied identically for the trust minimum tax and the CGT minimum tax, so that they can determine with confidence which income and gains of a testamentary trust are protected.

C6(c). Grandfathering of wills

63. The Tax Committee has previously recommended that the restrictions on corporate beneficiaries in post-1 July 2028 testamentary trusts should be reconsidered. Testamentary trusts created by wills executed before Budget night should be grandfathered even if the testamentary trust does not come into existence until later.[42]

64. The recommendation has not been addressed. Paragraph 101AD(1)(c) applies to any trust established on or after 1 July 2028. EM paragraph 1.36 states that establishment is generally when property transfers to the trustee. The consequence is that wills made long before the trust minimum tax was announced will be caught. Subparagraph 101AD(1)(b)(ii) protects only property transferred to the trustee before 7.30 pm (ACT legal time) on 12 May 2026.

65. A testator who has lost capacity cannot make a new will. The alternative is an application for a statutory will, which is expensive and uncertain. A testator who has died cannot act at all. The trust minimum tax therefore alters the tax consequences of dispositions that cannot now be changed.

66. The grandfathering that the Bills do provide is too limited. Subparagraph 101AD(1)(b)(ii) protects only property actually transferred to the trustee before Budget night, and EM paragraph 1.37 treats property injected after that time as subject to the trust minimum tax. Paragraph 101AD(1)(c) then imposes the beneficiary restriction on any testamentary trust established on or after 1 July 2028. Because establishment will generally occur only when property transfers to the

[42] Ibid, 21.

trustee after death, the restriction will apply to almost every testamentary trust created under a will that is already in existence, regardless of when the will was made. The drafting therefore does not provide appropriate comfort for family members who are relying on existing estate plans.

67. The grandfathering of assets held at Budget night is itself drafted too narrowly. Subparagraph 101AD(1)(b)(ii) protects only income derived from property transferred to the trustee before 7.30 pm (ACT legal time) on 12 May 2026. Unlike subparagraph 101AD(1)(b)(i), which picks up the accumulation and reinvestment concepts in subsection 102AG(2AA), it does not extend to accumulations of income from that property, to income derived from those accumulations or to other assets that derive from the grandfathered property, such as replacement assets acquired on a sale, reinvested proceeds, bonus or rights issues and assets received on a corporate restructure.

68. On the present drafting, protection will be lost as soon as a grandfathered asset is sold and replaced, or its income is reinvested, even though the wealth plainly continues to derive from property held before Budget night.

69. The Tax Committee considers that this is a drafting defect rather than a policy issue. Nothing in the EM suggests that the Government intended grandfathered property to lose its protection in this way, and EM paragraph 1.36 itself contemplates that accumulations and replacement assets remain covered. Subparagraph 101AD(1)(b)(ii) should be amended to extend expressly to income and accumulations derived from grandfathered property, and to property that derives from it.

70. It is completely inappropriate for people who cannot change their wills, because they have died or lost capacity, to be caught by adverse elements of the regime simply because the relevant testamentary trust has been, or may be, created after 1 July 2028. The timing of establishment is a matter outside the testator's control and depends on the date of death and the pace of estate administration. Grandfathering should attach to the will, not to the date property happens to reach the trustee.

C6(d). The integrity threshold and "genuine testamentary purposes"

71. The Law Council's Earlier Submission recommended that the legislation should express the testamentary trust exclusion through objective source and function criteria and confine the integrity rules to contrived arrangements entered into for a principal or dominant purpose of obtaining the exclusion.[43]

72. The Bills do not address this recommendation. Subsections 101AD(2) to (4) still apply where a purpose 'includes' obtaining the exclusion, and disregard only purposes that are merely incidental (subsection 101AD(4)). Note 2 to subsection 101AD(1) refers to 'genuine testamentary purposes', which is not defined. There are no statutory safe harbours.

73. The protective statement about increasing the value of an estate now appears only in EM paragraph 4.156, which concerns the CGT minimum tax. EM paragraph 4.154 states that genuine estate planning is not affected. Neither statement appears in Chapter 1 of the EM or in the operative provisions of section 101AD. EM paragraph

[43] Ibid, 32 and 37.

1.39 describes the test as a purpose of 'avoiding the minimum tax', which differs from the statutory text (see Annexure A, item 33). We note the corresponding threshold in subsections 119-25(1) to (3).

74. A 'purpose includes' threshold is too low for a provision of this kind. Ordinary estate planning involves tax considerations. A testator who establishes a testamentary trust will often do so partly for tax reasons. On the present drafting, that is enough to engage the integrity rule. The threshold should be a principal or dominant purpose, supported by statutory safe harbours.

75. The testamentary trust exclusion is also subject to duplicated levels of anti-avoidance provisions. Income must first fall within subsection 102AG(2AA), which is itself an integrity rule confining concessional treatment to income from estate property. Property transferred after Budget night is separately excluded by subparagraph 101AD(1)(b)(ii). The beneficiary restriction in paragraph 101AD(1)(c) is described in EM paragraph 1.38 as a further integrity provision. Subsections 101AD(2) to (4) then add a purpose-based rule and a Commissioner's determination (EM paragraph 1.39). Parallel rules apply for the CGT minimum tax in section 119-25 of the ITAA 1997, and Part IVA and section 100A of the ITAA 1936 continue to apply in any event.

76. This layering creates unnecessary uncertainty for taxpayers, who cannot readily determine which test is decisive or how the tests interact. The Tax Committee submits that the integrity rules be consolidated into a single, objective rule.

C6(e). Post-establishment amendments, court orders and settlements

77. The Law Council's Earlier Submission noted that testamentary trusts may require amendment or court-ordered variation to correct an error, respond to changed law, protect a beneficiary or implement an estate settlement. We asserted that the legislation should confirm the treatment of amendments under an express power and variations under applicable State or Territory trustee legislation.[44]

78. A testamentary trust may be varied by the court, including on a family provision application or an application to approve a compromise. Its terms may be altered by a deed of family arrangement. The Bills do not say whether such a variation affects the trust's status under section 101AD, or whether it constitutes the establishment of a new trust. Trustees and beneficiaries require certainty before participating in a court-approved compromise.

C6(f). Other post-death trusts

79. The Law Council's Earlier Submission asserted that the legislation should extend equivalent treatment to genuine post-death trusts funded by superannuation death benefits, life insurance proceeds, employment death benefits and comparable death-related property.[45]

80. Paragraph 101AE(1)(c) covers only the income of minors of a kind described in paragraph 102AG(2)(c). Superannuation proceeds trusts, life insurance proceeds

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[44] Ibid, 39-40.
[45] Ibid, 34-35 and 40-41.

trusts and employment death benefit trusts are not covered. EM paragraphs 1.41 and 1.42 do not address them.

81. These trusts arise from death and serve the same function as a testamentary trust. In many cases they are used to protect vulnerable beneficiaries, including survivors of family and domestic violence, where a will-based structure is unsuitable because the fund does not form part of the estate. The exclusion should be extended by reference to objective criteria concerning the source of the funds and the function of the trust, with proportionate apportionment where a trust holds mixed funds.

Recommendation 6

- **The Tax Committee recommends that section 101AD and the related provisions be amended to:**

  - **resolve the discrepancy between paragraph 101AD(1)(c) and paragraph 1.38 of the Explanatory Memorandum by adopting a test based on actual benefit, and to permit legal personal representatives, estates and other qualifying testamentary trusts under the same will to be recipients, and to permit prospective curative amendments;**
  - **enact statutory tracing, substitution and apportionment rules for replacement assets, reinvested proceeds, borrowings, improvements and derived property, and adopt a single consistent statutory description of the assets that qualify, applying equally under section 101AD and sections 119-20 and 119-25 of the ITAA 1997;**
  - **grandfather testamentary trust provisions in wills executed before 1 July 2028 or, at a minimum, in wills executed before 7.30 pm (ACT legal time) on 12 May 2026, whenever the trust is established, and in any event ensure that a testator who has died or lost capacity is not exposed to paragraph 101AD(1)(c) merely because the trust is established on or after 1 July 2028; or specify a single statutory establishment event with transitional protection;**
  - **raise the integrity threshold in subsections 101AD(2) and (3) to a principal or dominant purpose, consolidate the overlapping integrity rules into a single objective rule, define "genuine testamentary purposes" and provide statutory safe harbours;**
  - **address the effect of post-establishment amendments, court orders and compromises on the status of a testamentary trust; and**
  - **extend the exclusion to superannuation proceeds trusts, life insurance proceeds trusts and employment death benefit trusts, by reference to objective source and function criteria, with proportionate apportionment for mixed funds.**

C7. Corporate beneficiaries and the non-refundable offset

The recommendation in the Earlier Submission

82. The Tax Committee has previously submitted that corporate beneficiaries should not be denied all recognition of the trust minimum tax paid by the trustee.[46]

The extent to which the Bills and the EM do not address the recommendation

83. The recommendation has not been addressed. Subparagraph 101AG(1)(d)(i) denies the offset to a body corporate. EM paragraphs 1.63 and 1.69 explain the denial. Example 1.5 illustrates it: Frogmouth Pty Ltd pays company tax on its share of $3,600, with no offset, although the trustee has already paid minimum tax at 30 per cent.

84. The Impact Analysis (Option 3, sections 3 and 4) considered a non-refundable offset for all beneficiaries with separate tracking, and rejected it on the grounds of compliance cost, complexity and the retention of deferral benefits.

The Tax Committee's position and reasons

85. The Tax Committee acknowledges the Government's reasoning. It considers, however, that the resulting double taxation is grossly disproportionate to the integrity concern, and is the single most penal feature of the trust minimum tax.

86. The practical effect of denying the offset to corporate beneficiaries is to produce double taxation or an effective rate materially exceeding 30 per cent. The trustee pays minimum tax at 30 per cent, and the company then pays tax at 30 per cent on the whole of its share (25 per cent if it is a base rate entity) with no offset. The combined rate is therefore 60 per cent at the company level (55 per cent for a base rate entity). Once franked dividends are paid to an individual taxed at the top marginal rate, the combined rate rises to approximately 77 per cent. That is a penal outcome for a structure that involves no avoidance.

87. The effect is that the same income bears tax twice: once at 30 per cent in the hands of the trustee, and again at the corporate rate in the hands of the company, with no credit for the first. The penalty attaches to the identity of the recipient, not to any conduct that the Bills identify as objectionable. The Government's stated concern is refundability, and that concern does not arise where a company is taxed on the same income and no refund is claimed. A measure that imposes effective rates well above the top marginal rate on income retained in a company for reinvestment or asset protection penalises ordinary commercial behaviour and is likely to force the dismantling of structures that present no integrity risk.

88. The integrity concern identified by the Government is refundability, not recognition. A separate class of non-refundable credit addresses that concern.[47] Australia has previously operated with multiple classes of franking credit, so the design is not novel.

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[46] Ibid, 21-22.
[47] Ibid, 21-22.

89. Ordinary asset protection structures are penalised by the present design. A corporate beneficiary is commonly used to hold accumulated profits at the corporate rate, for reinvestment and for the protection of assets from the risks of an operating business. Those arrangements are unremarkable.

90. At a minimum, a credit should be available where the income of the corporate beneficiary is ultimately distributed to individuals. Alternatively, the offset should be available against the company's tax on the same income, without the corresponding amount becoming frankable.

Recommendation 7

- **The Tax Committee recommends that subparagraph 101AG(1)(d)(i) be amended so that a corporate beneficiary receives recognition of the trust minimum tax paid by the trustee, either by a separate class of non-refundable credit, or by an offset against the company's tax on the same income that does not give rise to a franking credit, or by a credit where the income is ultimately distributed to individuals.**

C8. Interaction with Bendel, Division 7A, Subdivision EA and section 100A

The recommendation in the Earlier Submission

91. The Earlier Submission addressed the interaction between the trust minimum tax and Division 7A, including the decision in *Commissioner of Taxation v Bendel* [2026] HCA 18 (*Bendel*).[48]

The extent to which the Bills and the EM do not address the recommendation

92. The recommendation has been addressed only to an extent. EM paragraph 2.69 concerns roll-over transfers only.

93. EM paragraphs 1.100 and 1.101 defer the interactions with CGT, international tax, administration and integrity to future legislation, and foreshadow further anti-streaming rules for corporate distributions. The Bills say nothing about deemed dividends under Division 7A on unpaid entitlements owed to corporate beneficiaries, about section 100A, about Subdivision EA outside the roll-over context, about Division 6AA, about family trust elections or about non-resident beneficiaries.

The Tax Committee's position and reasons

94. The trust minimum tax operates on the same amounts as several existing regimes. Without ordering and anti-duplication rules, the same income may be taxed under more than one provision. A trustee cannot determine its liability, and a beneficiary cannot determine its entitlement to a credit, until the relationship between the regimes is settled.

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[48] Ibid, 6-7

95. The position following *Bendel* makes the point sharper. The High Court held that the unpaid present entitlements in that case were held on separate trusts and were not loans for the purposes of subsection 109D(3) of the ITAA 1936. The Commissioner is now reviewing TR 2022/4 and PCG 2022/2 in light of the decision. Trustees and advisers must therefore reassess the consequences of unpaid present entitlements under Division 7A, section 100A and the trust minimum tax together. The Bills leave that question open.

96. Commencement should not precede the enactment of coordinated rules. A taxpayer should not be required to restructure, or to make an irrevocable election, while the interaction with Division 7A and section 100A remains unresolved.

Recommendation 8

- **The Tax Committee recommends that ordering and anti-duplication rules governing the interaction between the trust minimum tax and Division 7A (including Subdivision EA), section 100A, Division 6AA, the family trust election rules and the taxation of non-resident beneficiaries be enacted as part of the same package, or released for consultation before the Bills pass, and that commencement not precede their enactment.**

- **The Tax Committee further recommends that the Bills or the Explanatory Memorandum confirm whether compliance with the trust minimum tax affects the application of section 100A of the ITAA 1936.**

C9. Charities, deductible gift recipients, exempt entities, and social enterprises

The recommendation in the Earlier Submission

97. The Law Council's Earlier Submission addressed the treatment of charities, DGRs, exempt entities and social enterprises, including the need for greater clarification.[49]

The extent to which the Bills and the EM do not address the recommendation

98. The recommendation has not been addressed. Paragraphs 101AE(1)(d) and (e) and subsections 101AE(2) and (3) leave the conditions for the exclusions to be set by instrument. The power to impose a cap (paragraph 101AE(2)(b) and paragraph 101AE(3)(b)) applies only to the exclusion in paragraph 101AE(1)(e), being exempt entities that are neither registered charities nor DGRs. EM paragraphs 1.45 to 1.49 describe a cap as an integrity mechanism.

99. Nothing in the Bills or the EM addresses social enterprises, the retention of working capital or reinvested income. The offset is unavailable to exempt entities (subparagraph 101AG(1)(d)(ii); EM paragraph 1.70).

[49] Ibid, 7-8.

The Tax Committee's position and reasons

100. The entitlement of a charity or DGR to an exclusion is a matter of substance. It should be stated in the primary law, together with the conditions that attach to it. For the reasons in paragraphs 103 to 105, no cap is needed on the exclusion for other exempt entities, and none should be extended to charities or DGRs. If a cap is nonetheless imposed, its level determines whether the exclusion has practical value, and so it should be set by the Parliament.

101. Charitable trusts and philanthropic structures make long-term commitments. They cannot plan on the basis of conditions that have not yet been written. Draft conditions and any proposed cap should be published for consultation before the Bills pass.

102. Social enterprises present a distinct difficulty. They retain working capital and reinvest income in pursuit of their purposes. The Bills do not indicate how retained working capital and reinvested income are to be treated. The EM should address the point.

Integrity concerns relating to charities

103. Concern has been expressed that the charity exclusion lacks integrity measures, in particular that family trusts may distribute to a school or its building fund in place of parents paying school fees. The Tax Committee does not share that concern.

104. Such an arrangement would be caught by section 100A of the ITAA 1936. An entitlement conferred so that another person benefits, here by discharging a parent's school fees, is likely to arise under a reimbursement agreement and is not an ordinary family or commercial dealing (subsection 100A(13)). The trustee is then assessed at the top marginal rate under section 99A. The Commissioner regards arrangements of this kind as within section 100A and a compliance focus (Taxation Ruling TR 2022/4 *Income tax: section 100A reimbursement agreements*; Practical Compliance Guideline PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach*, although both are under review following *Bendel*). A payment made for a material benefit, such as reduced fees, is also not a deductible gift under Division 30 of the ITAA 1997, and Part IVA remains available.

105. Existing anti-avoidance rules are adequate, and no cap or further limit on the charity exclusion is needed.

Recommendation 9

- **The Tax Committee recommends that the substantive entitlement of deductible gift recipients, registered charities and exempt entities to the exclusion in section 101AE be set out in the primary law, and that no cap be imposed on that exclusion. If a cap is imposed, it should be set out in the primary law.**

- **The Tax Committee further recommends that draft conditions, and any proposed cap, be published for consultation before the Bills pass, and that the Explanatory Memorandum clarify the treatment of social enterprises, including retained working capital and reinvested income.**

C10. Primary production and mixed income tracing

The recommendation in the Earlier Submission

106. The Law Council's Earlier Submission sought tracing and apportionment rules for primary production income.[50]

The extent to which the Bills and the EM do not address the recommendation

107. The recommendation has not been addressed. Paragraph 101AE(1)(a), which refers to taxable primary production income, is unchanged. EM paragraph 1.40 does not add to it. There is no tracing or attribution rule for landholding trusts that derive rent from related operating entities, and no apportionment rule where a trust derives mixed income.

The Tax Committee's position and reasons

108. Family farming structures commonly separate the land from the operating business. A land-holding trust leases the land to a related operating entity. The income of the land-holding trust is rent. On the present drafting, that rent may not be taxable primary production income, although it is derived from the same farming enterprise.

109. A tracing rule would address that outcome without widening the exclusion beyond primary production. Where a trust derives income of several kinds, a clear apportionment rule is also required, so that the exclusion applies to the primary production component.

Recommendation 10

- **The Tax Committee recommends that section 101AE be amended to include a tracing or attribution rule, so that income derived by a land-holding trust from a related primary production operating entity is treated as taxable primary production income, and to include an apportionment rule for trusts deriving income of more than one kind.**

C11. Roll-over relief (Schedule 2)

110. As a general point, neither the roll-over nor the so-called fixed trust election (the electable regime in Schedule 3) solves the business disruption the trust minimum tax will cause for discretionary trusts that present no integrity risk. The roll-over requires every relevant asset to pass to a single transferee within a fixed period, gives no relief from State and Territory duty, and locks the transferee into a four-year integrity period. The electable regime requires a once-only, effectively irrevocable nomination of fixed shares that cannot respond to ordinary changes in family or business circumstances and imposes tax at the top marginal rate if the trustee departs from it. For many family businesses, farming families and commercial groups, the practical choice will be between an expensive and disruptive restructure and an ongoing 30

[50] Ibid, 36.

per cent liability. Neither outcome is justified where the trust presents no integrity risk. The detailed submissions below, and in Part C12, should be read in that light.

111. The Earlier Submission made a number of recommendations about the roll-over that have been addressed only in part. The treatment of Division 7A for roll-over transfers is renewed in Part C8. The Tax Committee renews the remaining recommendations below. Recommendation 11 collects the renewed recommendations into limbs (a) to (e), with two further recommendations on duty and worked examples.

C11(a). Multiple transferees and partial restructures

112. The Law Council's Earlier Submission asserted that consideration should be given to whether roll-over relief should be expanded to permit transfers to multiple eligible transferees and appropriate partial restructures, subject to continuity and integrity requirements.[51]

113. It has not been addressed. Paragraph 126-905(1)(a) and subsection 126-905(3) require all relevant assets to pass to "the transferee". Paragraph 126-910(1)(b) requires the choice to specify "the entity that is to be the transferee". EM paragraphs 2.10, 2.20 and 2.24 confirm the position; EM paragraph 2.20 states that "There cannot be more than one entity that receives the relevant assets". The only partial restructure available is the limited one for primary production (paragraph 126-905(4)(b); EM paragraph 2.6).

114. Many trusts conduct more than one undertaking. A family group may hold a business in one part of a trust and passive investments in another, with different family members associated with each. A requirement that everything pass to a single transferee forces those groups either to forgo the roll-over or to adopt a structure that does not reflect their arrangements. The roll-over should permit a transfer to more than one transferee, and the restructure of a distinct undertaking.

C11(b). Retained assets, deferred relief, and extension of time

115. The Earlier Submission noted that a trustee should be able to retain an asset that cannot reasonably or commercially be transferred, and that the Commissioner should have a confined discretion to extend the completion period where genuine impediments exist and the parties have taken reasonable steps to complete the restructure.[52]

116. This has been addressed only in part. Paragraph 126-905(4)(c) permits the retention of assets reasonably required to discharge liabilities. It provides no deferred roll-over once those liabilities have been discharged. Income from retained assets remains subject to the trust minimum tax.

117. There is no discretion to extend the deadline of 30 June 2030 (paragraph 126-905(1)(b); EM paragraphs 2.27 and 2.28 and Example 2.1). A restructure may be delayed by matters beyond the trustee's control, including litigation, the incapacity or death of a controller, a regulatory approval or a dispute about valuation. A fixed deadline with no extension power produces arbitrary outcomes.

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[51] Ibid, 4-5.
[52] Ibid, 50.

118. There are also no worked examples dealing with beneficiary loans and unpaid present entitlements. Those balances are present in most trusts that will consider a restructure.

C11(c). Continuity for trusts that are not family trusts

119. The Law Council's Earlier Submission recommended continuity requirements for trusts that are not family trusts should be included in the primary legislation or at least governed by statutory principles supported by a Commissioner's discretion.[53]

120. This has not been addressed. Subsections 126-925(3) to (5) leave continuity for trusts that are not family trusts to a ministerial determination. EM paragraphs 2.47 to 2.50 explain the design. EM paragraph 2.50 describes the power as "wholly beneficial". That description is not accurate while no determination exists, because subsection 126-925(5) means that there is no continuity pathway at all in that case (EM paragraph 2.48).

121. EM paragraph 2.46 also describes the fallback for family trusts more narrowly than subsection 126-925(2) provides (see Annexure A, item 46).

122. A trust that has not made a family trust election is not for that reason a vehicle for avoidance. Many commercial trusts, and many trusts with beneficiaries outside a single-family group, have sound reasons for not making an election. They should have a continuity pathway in the primary law.

C11(d). The four-year integrity rule

123. The Law Council's Earlier Submission noted that the four-year integrity rule may create uncertainty for transferees undertaking bona fide commercial transactions after a restructure.[54]

124. This has not been addressed. Subsection 126-905(5) and section 126-935 of the ITTP Act impose the integrity requirement. EM paragraphs 2.87 to 2.92 and Example 2.7 explain it. There is no exception for bona fide capital raisings, the admission of new investors, management equity, private equity transactions or succession transactions.

125. A four-year lock on the ownership of the transferee is a long period in commercial terms. A business that restructures in 2029 may need to raise capital, admit a new investor or implement a management incentive plan well before 2033. On the present drafting, a bona fide transaction of that kind may cause the roll-over to be unwound.

126. There is also a technical difficulty. The amendment period in paragraph 126-940(c) runs for four years from the notice of assessment for the transfer year. The integrity period ends four income years after the income year of the last transfer. Where transfers are spread over several years, the amendment period for an early-year assessment may expire before the integrity period ends. That difficulty is recorded in Annexure A, item 23.

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[53] Ibid, 5 and 50.
[54] Ibid, 5 and 50-51.

C11(e). State and territory duty

127. The Law Council has previously recommended that clarification is needed on whether arrangements have been, or will be, made with the States and Territories to provide relief from duty that may otherwise arise where trusts restructure to comply with the federal tax framework.[55]

128. This has not been addressed. EM paragraph 2.70 states that the roll-over does not affect State and Territory duties. The Impact Analysis records stakeholder estimates of legal, accounting and State duty costs of up to $50,000 per restructure, and an ACCI estimate that duty on a $1 million transfer could range from $36,590 to $55,000.

129. A Commonwealth roll-over that attracts State and Territory duty is of limited value. A trustee weighing a restructure must set the duty cost against the benefit. Where the duty cost is substantial, the trustee will not restructure, and the policy objective of the roll-over is not achieved. The Commonwealth should seek coordinated relief through the Council on Federal Financial Relations or provide an equivalent Commonwealth measure.

C11(f). Coordination between the roll-over and the electable regime

130. The Tax Committee has previously raised issues with the interaction between the electable regime and roll-over relief, and to whether the election window should be extended or reopened in appropriate circumstances.[56]

131. This has not been addressed. Subsection 126-910(3), paragraph 102UYC(7)(b) and EM paragraphs 2.13, 2.58, 3.18 and 3.19 require a trustee to choose between the two pathways without the benefit of settled administrative rules. The interaction between the roll-over choice and the election is also affected by the discrepancy recorded in Annexure A, item 19.

132. A trustee should be able to evaluate both pathways on the same information, and at the same time. The deadlines for each should be aligned, and a trustee who makes a choice that turns out to be unavailable should not be left without a remedy.

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[55] Ibid, 5 and 51.
[56] Ibid, 23.

Recommendation 11

- **The Tax Committee recommends that Subdivision 126-Z of the ITTP Act be amended to:**
  - **permit a transfer to more than one transferee and the restructure of a distinct undertaking, beyond the limited primary production case in paragraph 126-905(4)(b);**
  - **provide deferred roll-over relief for assets retained under paragraph 126-905(4)(c) once the relevant liabilities have been discharged, and confer on the Commissioner a discretion to extend the deadline in paragraph 126-905(1)(b);**
  - **provide a continuity pathway in the primary law for trusts that have not made a family trust election, rather than leaving the matter to a determination under subsection 126-925(4);**
  - **provide exceptions to the integrity rule in subsection 126-905(5) and section 126-935 for bona fide capital raisings, the admission of investors, management equity, private equity transactions and succession transactions, and align the amendment period in paragraph 126-940(c) with the integrity period; and**
  - **align the deadlines for a roll-over choice under section 126-910 and an election under section 102UYC and clarify the consequences where a trustee makes a choice that proves to be unavailable.**
- **The Tax Committee further recommends that the Commonwealth seek coordinated State and Territory duty relief for restructures undertaken in reliance on the roll-over or provide an equivalent Commonwealth measure.**
- **The Tax Committee further recommends that the Explanatory Memorandum include worked examples dealing with beneficiary loans and unpaid present entitlements.**

C12. The electable regime (Schedule 3)

133. The Earlier Submission made detailed recommendations about the electable regime. Several have been addressed in part. The Tax Committee renews the outstanding matters below. Recommendation 12 collects the renewed recommendations into limbs (a) to (h), with a further recommendation on duty.

C12(a). Model design: equal shares and the prohibition on accumulation

134. The Earlier Submission recommends replacing the proposed fixed-percentage EET model with a permitted-beneficiary class model that preserves genuine trustee discretion, accumulation and existing streaming rules.[57]

135. This has been addressed in part. Two features remain. First, the shares of income and of non-income earnings must be equal (subparagraph 102UYC(2)(b)(ii); EM paragraph 3.22). Second, 100 per cent must be allocated each year, and there can be no retention or accumulation (paragraph 102UYC(2)(c); EM paragraph 3.26).

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[57] Ibid, 42-43.

136. A requirement for equal shares prevents the streaming of different classes of receipt to the beneficiaries for whom they are suitable. A prohibition on accumulation denies a trust the ability to retain funds for working capital, for the repayment of debt or for a known future commitment. Neither feature is required by the policy. A fixed allocation can be maintained while permitting different income and capital percentages, and while permitting accumulation that is itself allocated in fixed proportions.

C12(b). Trustee duties and the fetter on discretion

137. The Earlier Submission raised the issue of the proposed measures and interactions with trustee duties owed to beneficiaries.[58]

138. This has not been addressed. EM paragraph 3.27 repeats that the nomination 'does not restrict the trustee's discretion'. EM paragraphs 3.13 and 3.53 direct trustees to consider their fiduciary duties. EM paragraph 3.94 confirms that the Commissioner's discretion is not intended to apply where the trustee departs from the nomination in the proper exercise of fiduciary duties because of a change in a beneficiary's personal circumstances.

139. A trustee who acts properly, in discharge of the duty to give real and genuine consideration to the circumstances of beneficiaries, loses the election and exposes the whole of the net income to tax at the top marginal rate. A trustee who adheres to the nomination in order to preserve the election may breach that duty.

140. The law should not place a trustee in that position. A statutory mechanism should permit a departure from a nomination where the trustee's duties require it. The trust minimum tax should then apply only to the amount by which the distribution departs from the nomination.

C12(c). The trustee's power under the deed

141. The Tax Committee has previously raised an issue with uncertainty about the trustee's power to make an election under the proposed reforms.[59]

142. This has not been addressed. EM paragraph 3.13 states only that trustees should consider whether they have power to make an election. Whether a trustee has power under the deed to make an election, and to make and maintain a nomination, is a question on which many trustees will require certainty. The Bills should confer an express statutory power, or the EM should address the question in terms.

C12(d). Variation of nominations

143. The Earlier Submission asserts that consideration should be given to whether the electable regime should include more proportionate consequences for inadvertent or minor departures from an election nomination, and greater flexibility to accommodate significant family circumstances.[60]

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58 Ibid, 40-21 and 25-27.
59 Ibid, 23.
60 Ibid, 27-28 and 46-47.

144. This has not been addressed. Subsection 102UYF(1) provides that a nomination generally cannot be varied. Paragraph 102UYF(2)(b) requires a replacement to be a beneficiary of the deceased individual's estate. Subsections 102UYF(3) and (4) deal with relationship breakdown and are confined to the two individuals concerned. EM paragraphs 3.9 and 3.58 to 3.72 explain the restrictions; EM paragraph 3.71 states that the trustee cannot allocate to any other beneficiary.

145. There is no variation available for the birth or adoption of a child, the incapacity or bankruptcy of a nominee, a nominee becoming a non-resident, the effect of a distribution on a nominee's means-tested support, an administrative error or a succession event other than death. There is also no mechanism for consequential change where a family trust election causes a nominee to fall outside the family group.

146. A nomination made in 2028 may remain in force for decades. Families change. A regime that permits no response to ordinary life events will either force trustees to accept outcomes that are unjust to beneficiaries or cause them to abandon the election. Neither outcome serves the policy.

C12(e). The consequences of revocation and the ability to correct

147. The Law Council's Earlier Submission explored the consequences of non-compliance with an election, raising concern that these are likely to be unduly severe.[61]

148. This has been addressed in part by section 102UYH, however several difficulties remain. Related errors in EM paragraphs 3.88 and 3.96 are recorded in Annexure A, items 62 and 63. We note that:

- the discretion applies only to the events in paragraphs 102UYG(2)(b) to (d). It does not apply to the company events in paragraphs 102UYG(2)(e) and (f), which may occur without the trustee's knowledge;
- an application must be made by the notification date (paragraph 102UYH(1)(a)). A trustee who learns of an event after that date has no remedy;
- there is no statutory correction period and no ability to cure a departure prospectively;
- the consequence of revocation remains the assessment of all of the net income at the top marginal rate plus the Medicare levy under section 99A (subsection 102UYI(3); EM paragraphs 3.7, 3.98 and 3.101). That consequence applies even to a voluntary revocation (EM paragraph 3.101). The year to which it applies on a voluntary revocation is unclear (see Annexure A, item 16); and
- there is no option to apply the 30 per cent minimum tax rate instead, and no mechanism for reinstatement of an election.

149. A consequence of that severity should be reserved for deliberate conduct. A trustee who makes an error, or who is affected by an event beyond its control, should be able to correct the position. A trustee that chooses to leave the regime should return to the ordinary treatment of a minimum tax trust, not be penalised at the top marginal rate.

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[61] Ibid, 6, 23-24 and 47.

C12(f). The election window and replacement elections

150. The Law Council's Earlier Submission recommended that further thought be given to the interaction between the electable regime and roll-over relief, and to whether the election window should be extended or reopened in appropriate circumstances and when replacement elections should be permitted.[62]

151. This has not been addressed. Paragraph 102UYC(5)(c) permits an election to be made only during the period starting on 1 July 2028 and ending on the last day of the trust's first income year commencing on or after 1 July 2028. Paragraph 102UYC(7)(a) prevents a new election after a revocation. EM paragraphs 3.12, 3.16, 3.18 and 3.75 explain the restrictions.

152. The decision period therefore begins before the administrative and collection rules are settled (EM paragraphs 1.17 and 1.64). A trustee must make a once-only, effectively irrevocable decision without knowing how the regime will be administered. The window should be reopened periodically, and a replacement election should be available where an election has been revoked for reasons that do not involve deliberate conduct.

C12(g). Eligible companies and change of control

153. The Earlier Submission raised an issue with the inclusion of a requirement for a company to be an eligible company for EET purposes to be the absence of material discretionary elements affecting members' rights.[63]

154. This has been addressed in part. Section 102UYD remains principles-based, with a ministerial override in subsection 102UYD(3). There is no safe harbour for a company with a single class of ordinary shares. The issue, redemption or transfer of shares other than for an allowable reason, and the winding up or deregistration of the company, still trigger automatic revocation (paragraphs 102UYG(2)(e) and (f)). The Bills do not address a change of trustee or appointor.

155. A company with one class of ordinary shares, all carrying the same rights, has no discretionary element. It should qualify under a statutory safe harbour, without the need to apply a principles-based test or to monitor a possible future determination.

C12(h). Trust-to-trust distributions involving an electable trust

156. The Tax Committee has previously noted that if a trust subject to the 30 per cent minimum tax distributes income to another trust that has made the EET election, it is uncertain whether the tax paid by the distributing trust, or any associated credit, will be recognised when the receiving trustee is not itself taxed under the election.[64]

157. This has been addressed in part. EM paragraph 3.30 addresses income received by a trust beneficiary from an EET. It does not address the converse case, where a minimum tax trust distributes to an EET and has paid minimum tax on that amount. The treatment of that tax should be stated.

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62 Ibid, 23-25 and 49.
63 Ibid, 24 and 47-48.
64 Ibid, 25.

C12(i). Duty consequences of an election

158. The Law Council's Earlier Submission sought clarification on whether arrangements have been, or will be, made with the States and Territories to provide relief from duty that may otherwise arise where trusts restructure to comply with the federal tax framework.[65]

159. This has been addressed in part. EM paragraphs 3.4 and 3.23 state that an election does not require a resettlement and is expected to limit duty costs. No State or Territory revenue authority has published a position, and no statutory relief is provided. A statement in a Commonwealth explanatory memorandum does not bind a State or Territory Commissioner. The Commonwealth should seek published confirmation from each jurisdiction before the election window opens.

C12(j). Family law effects of nominations

160. The Law Council's Earlier Submission noted the potential family law consequences of a nomination.[66] The Tax Committee records that matter for the Committee's attention. A regime that permits a wider range of variations, as sought in Part C12(d), would reduce the difficulty.

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[65] Ibid, 5-6, 23 and 48-49.
[66] Ibid, 49.

Recommendation 12

- **The Tax Committee recommends that Division 6F of Part III of the ITAA 1936 be amended to:**

  - **permit different income and non-income earnings percentages, and permit accumulation that is itself allocated in fixed proportions, rather than requiring equal shares under subparagraph 102UYC(2)(b)(ii) and full annual allocation under paragraph 102UYC(2)(c);**
  - **provide a statutory mechanism permitting a trustee to depart from a nomination where the trustee's duties require it, with the trust minimum tax applying only to the amount of the departure;**
  - **confer an express statutory power on a trustee to make an election and a nomination, or address the question in the Explanatory Memorandum;**
  - **permit variation of a nomination on the birth or adoption of a child, the incapacity, bankruptcy or non-residency of a nominee, the effect of a distribution on means-tested support, administrative error and succession events other than death, and permit consequential change where a family trust election causes a nominee to fall outside the family group;**
  - **extend the discretion in section 102UYH to the events in paragraphs 102UYG(2)(e) and (f), permit an application after the notification date, provide a statutory correction period and prospective cure, permit the application of the 30 per cent rate instead of the top marginal rate on revocation and permit reinstatement of an election;**
  - **reopen the election window periodically and permit a replacement election where an election has been revoked for reasons not involving deliberate conduct;**
  - **provide a statutory safe harbour for a company with a single class of ordinary shares carrying the same rights, and address a change of trustee or appointor; and**
  - **state the treatment of minimum tax paid by a trust that distributes to an excluded election trust.**

- **The Tax Committee further recommends that the Commonwealth seek published confirmation from each State and Territory revenue authority of the duty consequences of an election before the election window opens.**

C13. Administration, commencement, worked examples, and further consultation

The recommendation in the Earlier Submission

161. The Law Council's Earlier Submission raised concern with the absence of a complete legislative package through the consultation phase.[67]

The extent to which the Bills and the EM do not address the recommendation

162. It has not been addressed. Notification, collection and administration are deferred to subsequent legislation (EM paragraphs 1.17, 1.64, 1.99 and 1.100). Further

[67] Ibid, 8, 29 and 53-55.

amendments to the roll-over and to the electable regime are foreshadowed (EM paragraphs 2.109 to 2.111 and 3.103 and 3.104).

163. The Impact Analysis acknowledges a risk that the Australian Taxation Office's collection mechanisms will not be ready and identifies difficulties in recovery where a corporate trustee is involved. The compliance cost is estimated at $141.5 million per year over ten years (EM, general outline), and the Impact Analysis records a one-off cost of $939 million.

164. The exposure draft consultation ran for 15 days, from 3 to 18 September 2026, and the Bills were introduced shortly afterwards. The director liability, pay as you go instalment and reimbursement measures referred to in the Letter, paragraph 36 have not been released.

165. Section 7 of the Impact Analysis states that the Government "will consider the timing for an evaluation in the future". No statutory post-implementation review is provided.

The Tax Committee's position and reasons

166. A measure of this scale should be enacted as a complete package. Trustees must decide whether to restructure, whether to elect and how to meet their obligations. Those decisions cannot be made while the rules on notification, collection and administration are unwritten.

167. The compliance cost estimates confirm the scale of the task. A cost of this order warrants a longer period of scrutiny than a 15-day exposure draft consultation followed by immediate introduction.

168. A statutory post-implementation review would allow the Parliament to assess whether the trust minimum tax has achieved its objectives, and at what cost. A statement that evaluation will be considered in the future is not a substitute.

Recommendation 13

- **The Tax Committee recommends that:**
  - **the administrative and integrity tranche, all draft legislative instruments and all approved forms be released before the Bills pass;**
  - **the commencement of the trust minimum tax, the opening of the election window under paragraph 102UYC(5)(c) and the roll-over choice deadlines under section 126-910, be deferred so that there is a sufficient period after enactment, and after those materials are final, for taxpayers to respond;**
  - **additional worked examples be included in the Explanatory Memorandum; and**
  - **an independent post-implementation review be legislated.**

C14. The CGT minimum tax: deceased estates and testamentary trusts (Schedule 4)

169. In the CGT Submission, the Tax Committee addressed the minimum tax treatment of deceased estates and testamentary trusts under the 30 per cent minimum tax on capital gains in Division 119 of the ITAA 1997. Those provisions now appear in

sections 119-20 and 119-25, inserted by Schedule 4 of the Main Bill (EM paragraphs 4.137 to 4.158). Because the testamentary trust concepts are shared with section 101AD, we restate those submissions for the Committee.

170. The exclusion of deceased estates and testamentary trusts from the CGT minimum tax is welcome. It recognises that traditional estate planning arrangements should not be subject to the policy concerns that underpin the broader minimum tax regime. The use of the existing concepts in paragraph 102AG(2)(a) and subsection 102AG(2AA) of the ITAA 1936, rather than a separate definition, is also appropriate.

171. To the extent the exclusion remains limited to assets held by the deceased at the time of death, its scope is concerningly narrow. It fails to recognise the broader pool of estate-derived capital held and administered after death. Assets in an estate or testamentary trust frequently change as a consequence of prudent trustee decision-making, portfolio rebalancing, corporate actions, compulsory acquisitions, mergers, demergers, roll-overs and other transactions that may occur wholly outside the control of the legal personal representative or trustee. Assets that represent the continuation of estate wealth should not cease to qualify merely because their form has changed. The focus should be on preserving the integrity of estate-derived capital, supported by practical guidance on tracing replacement assets, mixed funds and later additions of non-estate property.

172. The integrity rule is problematic. The threshold at which the exclusion may be denied is exceptionally low. A test that can be triggered by one purpose of an arrangement, with the taxpayer required to establish that any purpose of obtaining the concession is no more than merely incidental, does not give taxpayers or advisers a meaningful degree of certainty. In practice, it creates an effective veto over the concession. A concession intended to support long-established testamentary trust arrangements should be supported by objective criteria capable of practical application. This is the same concern raised in Part C6(d) in relation to section 101AD.

173. Several operational questions also remain. The final materials should explain how the exclusion applies where an attributed gain reflects cost base indexation, and how it applies to revised AMIT member annual statements and to unders and overs. They should include examples of the ordering where the individual has other minimum tax gains, losses, offsets and attributed trust gains, and identify the records needed to trace estate-derived property. For special disability trusts, the exclusion does not, without a separate rule, extend to a later gain made by a beneficiary after an asset leaves the trust; examples should address 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.

Recommendation 14

- **The Tax Committee recommends that sections 119-20 and 119-25 of the ITAA 1997 be amended to extend the exclusion for deceased estates and testamentary trusts to assets representing the continuation of estate-derived capital, rather than limiting it to the identical asset held at death, and that the integrity rule be replaced with, or supported by, clear objective criteria.**

- **The Tax Committee further recommends that the Explanatory Memorandum and Australian Taxation Office guidance provide tracing rules and worked examples for replacement assets, mixed funds, later distributions, attributed and indexed gains, and special disability trusts.**

C15. The Tranche 2 CGT changes for AMITs and managed funds (Schedule 4)

174. The CGT Submission was directed principally at the application of the reinstated indexation regime to AMITs, the treatment of capital losses, and the trustee choice not to apply indexation. The Tax Committee welcomes the extent to which Schedule 4 responds to those submissions, and records below one continuing concern.

Uniform treatment of AMIT members

175. The CGT Submission expressed concern that an AMIT trustee would need to identify which members were entitled to indexation and report different amounts to different classes of member, departing from the standardised attribution on which Division 276 was built, and it preferred a universal approach. The Bill now provides that indexation is reversed out uniformly in working out every member's determined member component, so that all members are attributed a gain, commensurate with their interest, with indexation removed (subsections 276-85(4A) and (4B); EM paragraphs 4.16 and 4.17). The EM acknowledges that it is often difficult for the trustee of a widely held trust to know each member's eligibility for indexation, and places the recalculation on the trustee uniformly, with each member then applying its own entitlement (EM paragraphs 4.20 and 4.77). The trustee therefore does not need to differentiate between members in determining the amounts attributed to them. The Tax Committee welcomes that approach, which preserves the standardised architecture of the AMIT regime.

176. The Tax Committee also welcomes the confirmation that trust payments reflecting indexation do not cause cost base adjustments under CGT events E4 and E10 (subsection 104-71(4), table item 1A, and the note to subsection 104-107E(4); EM paragraphs 4.86 to 4.90), which responds to the concern in the CGT Submission about double adjustment.

Capital losses and complying superannuation funds

177. The CGT Submission identified a loss-ordering disadvantage under which a complying superannuation fund investing through a MIT or AMIT could bear a higher effective tax burden than a fund holding the same assets directly, and urged that it be corrected before commencement. The Bill responds in two ways. First, new section 102-35 permits a complying superannuation entity, and a trust for which a choice under section 110-36A applies and which has a complying superannuation entity as a direct or indirect beneficiary or member, to choose the capital gains against which capital losses are applied. Second, new section 295-500 gives a complying superannuation entity an additional capital loss where it is entitled to a share of a trust's capital gain (EM paragraphs 4.101 to 4.106). The Tax Committee welcomes the Government's recognition that the loss-ordering rules should not disadvantage superannuation savings invested through pooled vehicles.

178. Two qualifications should be noted. The amount of the additional capital loss under section 295-500 is to be worked out using a method determined by the Minister by legislative instrument (EM paragraph 4.106). Its practical value therefore cannot yet be assessed, which is a further example of the deferral discussed in Part A. The draft instrument should be released before the Bills pass. In addition, the first limb of the response is available to a trust only if it can make the choice under section 110-36A; and so inherits the narrowness of that choice discussed below.

179. The Tax Committee wishes to emphasise the second qualification. Under paragraph 102-35(1)(b), a trust may choose its loss ordering only if a choice under section 110-36A applies to it, which in turn requires that no direct or indirect beneficiary or member could apply indexation (EM paragraphs 4.33 and 4.103).

180. The class of trusts that can benefit is therefore unnecessarily narrow. Most pooled vehicles through which superannuation funds invest, including widely held unit trusts, MITs and AMITs and fund-of-funds structures, have at least some investors who are individuals or other entities entitled to indexation, or cannot verify that they do not. Those trusts cannot use section 102-35, and the superannuation funds that invest through them will remain exposed to the loss-ordering disadvantage, relying entirely on an additional capital loss whose method has not been determined.

181. The result will significantly and adversely affect superannuation funds holding interests through other managed funds, contrary to the stated policy intent that the CGT reforms do not apply to complying superannuation entities (EM paragraph 4.101). The loss-ordering choice should be available to any trust that has a complying superannuation entity as a direct or indirect beneficiary or member, at least to the extent of that entity's share, without the section 110-36A precondition.

The choice not to apply indexation remains too narrow and too technical

182. The Tax Committee continues to be concerned about the narrowness of the circumstances in which a fund can elect out of indexation. Section 110-36A permits the choice only if indexation could not have applied had each of the trust's beneficiaries or members made the gain, tested just before each CGT event for direct gains and just before the end of the income year for indirect gains (subsections 110-36A(3) and (4)). Where a member is itself a trust, the choice is available only if each trust further down the chain has first made its own choice (EM paragraphs 4.33 and 4.36).

183. The EM confirms that the choice is "available only in a narrow set of circumstances", gives as its example a wholesale MIT restricted in membership, and states that no choice should be made where the trustee is unsure whether any beneficiary is entitled to indexation or where that entitlement could change (EM paragraph 4.38).

184. As the CGT Submission explained, a single individual member, including a small retail holding through a platform, will prevent the choice for the whole fund. A listed or widely held fund with continuous dealing cannot verify the characteristics of every member at the moment of each disposal, and the recursive look-through test is unworkable in multi-layered structures managed by different responsible entities. The choice is therefore available only to funds with homogeneous membership, which are arguably the funds least in need of it.

185. The choice need not be made in any particular form and is reflected only in the way the trust's return is lodged (EM paragraph 4.41). The Bill does not address the standard of verification, the consequences if a condition is later found not to have been satisfied, or a safe harbour for unplanned CGT events. An election to forgo indexation surrenders a concession; it does not confer a tax benefit requiring protection against misuse. The appropriate safeguard is a transparent fund-level choice, applying to all of the fund's dealings, rather than a requirement to demonstrate at each CGT event that no holder could use indexation.

186. The gateway for a trust to elect out of indexation is, in the Tax Committee's view, unworkable in practice and unnecessary. It is unworkable because a trustee of a widely held or continuously dealing fund cannot verify the tax profile of every investor just before each CGT event. It is unnecessary because the market already provides the relevant protection: an investor entitled to indexation would not choose to invest in a fund that has elected to forgo it, unless other features of the fund justified that trade-off, and that choice is made with full disclosure. The election should therefore not be limited by reference to the particular kinds of investor that hold units in the fund. The Tax Committee does not see any integrity risk in a simple fund-level election, because forgoing indexation can only increase the tax payable on the fund's gains. Removing the gateway would be an important improvement, reducing compliance costs for trustees and administrators without any cost to the revenue.

Recommendation 15

- **The Tax Committee welcomes the uniform reversal of indexation for AMIT members and the measures addressing loss ordering for complying superannuation entities. It recommends that the condition in subsection 110-36A(2) be removed and that a fund be permitted to make a fund-level choice, applying to all of its dealings, that indexation will not be available to any of its investors.**
- **If that recommendation is not adopted, the Tax Committee recommends that the Bill specify a register-based or reasonable-inquiry verification standard, a safe harbour for unplanned CGT events, and the form, timing and consequences of the choice.**
- **The Tax Committee further recommends that the loss-ordering choice in section 102-35 be extended to any trust with a complying superannuation entity as a direct or indirect beneficiary or member, without the section 110-36A precondition, and that the draft instrument under section 295-500 be released for consultation before the Bills pass.**

C16. The Tranche 2 CGT changes: matters in the CGT Submission that remain unanswered (Schedule 4)

187. The CGT Submission made twelve recommendations directed to making the reforms clear, administrable and capable of implementation by 1 July 2027 without disproportionate compliance costs. Apart from the matters acknowledged in Part C15 and the exemption discussed in Part C14, Schedule 4 and Chapter 4 of the EM do

not respond to most of them. Several of the principal recommendations have not been adopted, and in one respect the Bill moves in the opposite direction. The Tax Committee draws these matters to the Committee's attention because Schedule 4 applies to assessments for the income year that includes 1 July 2027 (EM paragraph 4.177), so that taxpayers, trustees and fund administrators must act on these rules within months.

Valuation: the burden has increased, not reduced

188. The CGT Submission identified the requirement to establish a value for all CGT assets at 1 July 2027 as a substantial compliance burden and source of uncertainty. It observed that the single apportioning method offers little comfort for significant assets and strongly recommended a range of alternative benchmark and safe harbour methodologies under section 112-185, including for shares in unlisted entities, private companies, units in trusts and partnership interests, with penalty protection for taxpayers who follow a prescribed method.

189. None of those recommendations has been adopted. Instead, Schedule 4 withdraws the apportioning method for units, interests and shares that have had a cost base adjustment under CGT events E4, E10 or G1 on or after 1 July 2027, and for MITs and AMITs subject to unit pricing or financial reporting valuation obligations (subsections 112-155(3A), 112-165(3A) and 112-175(3A); EM paragraphs 4.111 to 4.120). The EM confirms that holders of affected units and shares will need to determine market value at 1 July 2027 (EM paragraph 4.113). For the many investors in unit trusts and private companies, the only remaining option is therefore a formal valuation, which is the outcome the CGT Submission sought to avoid.

Commencement, transitional relief and compliance protection

190. The CGT Submission warned that, because the amendments apply to the income year that includes 1 July 2027 but commence only after Royal Assent, they may operate retrospectively, and recommended a phased commencement under which MITs, AMITs, CCIVs, investor directed portfolio service (IDPS) arrangements and other institutionally administered structures would apply the existing methodology during 2027–28, with the revised rules applying from 1 July 2028. It also sought safe harbours, remission of penalties for unintentional errors, elevated de minimis thresholds for unders and overs and a documented transitional compliance approach for the first two income years. The Bill retains the same commencement and application provisions (EM paragraphs 4.176 and 4.177), and the Tax Committee has not identified any provision in Schedule 4 or Chapter 4 of the EM giving effect to the phased commencement, the safe harbours or the elevated thresholds. That is so although the CGT Submission noted industry estimates that the direct cost to custody and administration providers alone will exceed $30 million, and the EM provides no updated compliance cost estimate for Schedule 4, referring instead to the estimate prepared for the first tranche.

AMIT loss mechanics and implementation

191. While the uniform reversal of indexation is welcome, the interpretive questions raised in the CGT Submission about subsection 276-85(4B) remain. The subsection still requires the reversal to be made while holding the application of losses constant,

including “how much of each loss or amount was applied” and “the capital gain against which each loss or amount was applied” (EM paragraphs 4.16 and 4.19).

192. The EM does not explain the meaning of “capital gain remaining”, the treatment of multiple gains, some indexed and some not, or a gain reduced to nil, and the worked example continues to assume that no capital losses are available. The CGT Submission’s requests for legislative protection of trust deed amendments and restructures undertaken solely to implement the new rules, and for ASIC class order relief, also have no counterpart in the Bill or the EM.

Guidance, sequencing and further tranches

193. The CGT Submission requested a Law Companion Ruling, with approved forms, data specifications and worked examples, by 31 March 2027, and a consolidated roadmap confirming that the current provisions will operate independently of, and not be adversely affected by, future amendments. The EM contains no commitment to either. Instead, it lists a substantial further programme of amendments, including the CGT treatment of roll-overs and similar concessions (among them the Division 128 roll-over for beneficiaries receiving assets from deceased estates), remaining aspects of foreign, mixed and temporary residents, value shifting, consolidated groups, listed investment companies, employee share schemes, demergers and options (EM paragraph 4.179). The interaction between deferred gains and roll-overs has been expressly held over to a later tranche (EM paragraph 4.136), as has the treatment of mixed residents who make gains through a trust (EM paragraph 4.162). Those are not peripheral matters. They include the ordinary transmission of assets on death and the ordinary operation of trusts. Taxpayers are therefore being asked to apply a regime from 1 July 2027 whose content for common transactions remains to be legislated.

The commercial use of unit trusts

194. The matters above bear with particular force on the ordinary commercial use of unit trusts. Unit trusts are used throughout the Australian economy for property syndicates, joint ventures, unlisted and wholesale funds, family business groups that admit external investors, infrastructure and development projects and as the transferee vehicle for restructures. Many are not MITs or AMITs and so receive none of the targeted relief in Schedule 4. The combined effect of the Tranche 2 CGT changes, the trust minimum tax and the new fixed trust definition is to make each of these uses materially more uncertain and more costly.

Valuation of units

195. The CGT Submission specifically sought safe harbour valuation methodologies for units in trusts and other non-market assets, noting that valuation difficulties commonly arise for those interests. The Bill instead withdraws the apportioning method for a unit or interest in a trust whose cost base has been adjusted under CGT event E4 at any time on or after 1 July 2027 (subsection 112-165(3A); EM paragraphs 4.111 to 4.115). Most commercial unit trusts make tax-deferred distributions, for example from building allowances, capital works deductions or timing differences, so that CGT event E4 cost base adjustments are routine rather than exceptional.

196. The EM confirms that unitholders will need to determine the market value of their units at 1 July 2027 and track an adjusted market value cost base from that date (EM paragraph 4.113). For unlisted units, for which there is no market price, that requires a formal valuation of every holding, often by reference to a valuation of the underlying property or business. The burden falls on every unitholder, including retail and family investors in small syndicates, for whom the cost may be disproportionate to the amounts involved.

The election out of indexation

197. The concerns about section 110-36A discussed in Part C15 apply equally to non-MIT unit trusts. A commercial unit trust with a mixture of corporate, superannuation and individual unitholders cannot make the choice, because a single individual unitholder entitled to indexation prevents it, and the test must be satisfied just before each CGT event (subsections 110-36A(3) and (4); EM paragraph 4.38). Where units are held through other trusts, each trust down the chain must first make its own choice (EM paragraph 4.36). The trustee of an ordinary unit trust must therefore maintain the indexation calculations, and the associated records, even where only a small minority of the capital could benefit from them.

Fixed trust status and the trust minimum tax

198. A unit trust that fails the new fixed trust definition in section 272-65 is a minimum tax trust and bears tax at 30 per cent at trustee level (Part C3). That definition now applies across the whole of the tax law, including for the CGT provisions. Ordinary commercial features of unit trusts, such as powers to issue units at a price set by the trustee, to redeem units, to amend the deed or to create new classes, may be argued to be material discretionary elements. The EM contains no worked example for an unlisted unit trust, and the only fixed trust example concerns a MIT (Example 1.7). For a commercial unit trust, the consequence of an adverse view is not merely a different CGT outcome but a 30 per cent liability on all of its net income. The same uncertainty affects unit trusts used as the transferee for a roll-over, which must remain free of material discretionary elements for four income years (subsection 126-905(5)).

Matters deferred

199. Several of the matters deferred to later tranches are central to the commercial use of unit trusts, including the interaction between the Tranche 2 CGT changes and the value shifting rules, the treatment of roll-overs and similar concessions, and the interaction between the deemed sale and reacquisition and rules that require a cost base to be determined before an asset is realised (EM paragraph 4.179). The interaction between deferred gains and roll-overs is also deferred (EM paragraph 4.136). Unit trusts are routinely restructured, merged, redeemed and used in scrip-for-scrip and other roll-over transactions. Until those rules are settled, the CGT consequences of ordinary unit trust transactions after 1 July 2027 cannot be determined with confidence.

200. The Tax Committee is concerned that the cumulative effect of these measures will discourage the use of unit trusts for legitimate commercial purposes, including in the property and infrastructure sectors on which the Government's housing supply

objectives depend. That outcome is not required by, and is inconsistent with, the policy of either the Tranche 2 CGT changes or the trust minimum tax.

201. The Tax Committee regrets that the detailed technical engagement reflected in the CGT Submission has, in these respects, received no visible response. It renews those recommendations for the Committee, consistently with the theme of certainty discussed in Part A.

Recommendation 16

- **The Tax Committee recommends that Schedule 4 be amended, before the Bills pass, to:**

  - **provide a range of alternative benchmark and safe harbour valuation methodologies under section 112-185, including for unlisted shares, private companies, units in trusts and partnership interests, with penalty protection for taxpayers who follow a prescribed method, and reconsider the withdrawal of the apportioning method in subsections 112-155(3A), 112-165(3A) and 112-175(3A), in particular for units in trusts that have made ordinary tax-deferred distributions;**
  - **provide a phased commencement for MITs, AMITs, CCIVs, IDPS arrangements and other institutionally administered structures, together with safe harbours, penalty remission and elevated de minimis thresholds for the first two income years;**
  - **clarify the operation of subsection 276-85(4B) for losses and multiple gains;**
  - **protect trust deed amendments and restructures undertaken solely to implement the new rules; and**
  - **make the choice under section 110-36A available to commercial unit trusts at fund level.**

- **The Tax Committee further recommends that the Explanatory Memorandum include worked examples confirming the fixed trust status of ordinary commercial unit trusts, that the Australian Taxation Office publish a Law Companion Ruling with worked examples, and that the Government publish a consolidated roadmap of the remaining CGT tranches, including value shifting and roll-overs, as a matter of urgency.**

Part D: Drafting errors

202. Annexure A sets out 64 drafting errors and inconsistencies in the Bills and the Explanatory Memorandum. Of these, 23 are in the Main Bill, 3 are in the Imposition Bill and 38 are in the Explanatory Memorandum.

188. Most of the items are minor. Six of them affect the operation of the law, and the Tax Committee regards them as priority corrections:

- item 2: paragraph 101AD(1)(c) is inconsistent with EM paragraph 1.38 on whether corporate and trust beneficiaries deny a testamentary trust the exclusion;

- item 4: EM paragraph 1.39 describes a right of objection against a decision under subsection 101AD(3), but the Bill confers none;
- item 16: the year to which the top-rate consequence of a voluntary revocation applies is unclear across paragraph 102UYG(1)(a), section 102UYI and Example 3.3;
- item 19: paragraph 102UYC(7)(b) and EM paragraph 3.18 differ on when a roll-over choice bars an election;
- item 23: the amendment period in paragraph 126-940(c) of the ITTP Act is not aligned with the integrity period in subsection 126-905(5); and
- item 24: paragraph 28(2)(a) of the *Income Tax Rates Act 1986*, as substituted by the Imposition Bill, does not state the rate for the purposes of paragraph 98(3)(b) on minimum tax income.

189. The Tax Committee recommends that all of the corrections in Annexure A be made before the Bills proceed. Where a correction involves a divergence between the Bills and the Explanatory Memorandum, the statutory text should be settled first, and the Explanatory Memorandum then amended to describe it accurately.

Part E: Conclusion and summary of recommendations

Conclusion

203. The Tax Committee acknowledges the Government's policy of measures targeted at the mischief it has identified, and appreciates the changes designed to improve the operation of the trust minimum tax and to respond to matters raised in the Earlier Submission.

204. A number of the principal recommendations in the Earlier Submission remain unaddressed or have been addressed only in part. The central concerns are these. Core criteria for liability are left to delegated legislation. The definitions of a minimum tax trust and of a fixed trust remain uncertain, and that uncertainty now extends across the whole of the tax law. The testamentary trust provisions do not cater for ordinary wills, ordinary estate administration, or trusts that arise on death outside a will. Distributions to corporate beneficiaries are taxed twice, with no recognition of tax already paid, a penalty out of proportion to any integrity concern. The interaction with Division 7A and section 100A is unresolved. Neither the roll-over nor the electable regime solves the business disruption the trust minimum tax will cause for trusts that present no integrity risk: the roll-over does not accommodate common commercial structures, and the electable regime puts trustees in conflict with their fiduciary duties and imposes a severe consequence for departures that may be inadvertent.

205. Underlying many of these concerns is a single policy point. Important questions continue to be left to future legislation, to ministerial instruments or to guidance from the Australian Taxation Office, while taxpayers are required to make irrevocable decisions within fixed timeframes. The detail of the regime should be settled before enactment, and there should be a sufficient period after enactment for taxpayers to respond before those decisions must be made.

206. The Bills and the Explanatory Memorandum also contain the drafting errors set out in Annexure A. Several of those errors affect the operation of the law.

207. The Tax Committee recommends that the Committee examine Schedules 1 to 3 of the Main Bill and the Imposition Bill in detail, and that the Bills not proceed until the renewed recommendations and the drafting corrections have been addressed and the complete legislative package is available.

208. The Tax Committee would welcome the opportunity to engage further with the Committee and with the Treasury on these matters. It is available to appear before the Committee at any public hearing and to provide any further material that may assist the inquiry.

Annexure A: Drafting errors in the Bills and the Explanatory Memorandum

This Annexure sets out the drafting errors and inconsistencies summarised in Part D, grouped by document. Items 2, 4, 16, 19, 23 and 24 are priority corrections. References in the table to section numbers in the Main Bill are references to the provisions inserted by Schedules 1 to 3, unless otherwise stated.

Document	Section / paragraph reference	Nature of error	Suggested correction
Main Bill: Treasury Laws Amendment (Tax Reform No. 3) Bill 2026			
Main Bill	Item 1: Schedule 1, item 9, subsection 101AD(1) (chapeau)	The chapeau refers to 'so much of the net income of a trust estate for a year of income for which all of the following conditions are met'. The words 'for which' attach grammatically to 'year of income', but paragraphs (b) and (c) state conditions about the income concerned and about the beneficiary.	Redraft as: 'so much of the net income of a trust estate for a year of income as is income in relation to which all of the following conditions are met'.
Main Bill	Item 2: Schedule 1, item 9, paragraph 101AD(1)(c)	It is ambiguous whether the test applies to the particular beneficiary referred to in paragraph 101AD(1)(b), or to the whole class of beneficiaries under the instrument. The provision is inconsistent with paragraph 1.38 of the Explanatory Memorandum.	Clarify the text, preferably by adopting a test based on actual benefit, and align paragraph 1.38 of the Explanatory Memorandum.
Main Bill	Item 3: Schedule 1, item 9, subparagraph 101AD(1)(c)(iii); EM paragraph 1.38	The Bill refers to 'a trustee of a special disability trust'. The Explanatory Memorandum refers to 'a special disability trust'.	Align the wording of paragraph 1.38 of the Explanatory Memorandum with the Bill.
Main Bill	Item 4: Schedule 1, item 9, subsection 101AD(3); EM paragraph 1.39	Paragraph 1.39 of the Explanatory Memorandum states that a taxpayer may object under Part IVC of the TAA against the Commissioner's decision. Subsection 101AD(3) contains no express objection right, in contrast to subsection 102UYH(3).	Insert an express objection provision equivalent to subsection 102UYH(3) or amend paragraph 1.39 of the Explanatory Memorandum to describe the review pathway accurately.

Document	Section / paragraph reference	Nature of error	Suggested correction
Main Bill	Item 5: Schedule 1, item 9, subparagraph 101AE(3)(b)(ii)	The expression 'specified kinds of trust' is inconsistent with 'trust estates', used elsewhere in Division 6 and in subparagraph 101AE(3)(b)(i).	Replace with 'specified kinds of trust estates'.
Main Bill	Item 6: Schedule 1, item 9, subsection 101AG(2)	The subsection uses 'income year' and 'entity's tax offset' in a provision of the ITAA 1936 whose subsection (1) uses 'year of income' and 'beneficiary'.	Replace 'for the income year' with 'for the year of income' and align the remaining terminology with subsection 101AG(1).
Main Bill	Item 7: Schedule 1, item 10, paragraph 272-65(3)(a); Schedule 2, item 1, paragraph 126-935(2)(a) of the ITTP Act; Schedule 3, item 1, paragraph 102UYD(2)(a)	The punctuation is inconsistent: 'clearly defined specific and enforceable' in sections 272-65 and 126-935, and 'clearly defined, specific and enforceable' in section 102UYD. The terminology also differs: section 272-65 refers to 'entitlements or rights', section 126-935 to 'rights or interests' and section 102UYD to 'rights and interests'.	Use 'clearly defined, specific and enforceable' consistently in all three provisions, and use 'rights or interests' in sections 126-935 and 102UYD.
Main Bill	Item 8: Paragraph 272-65(3)(b); paragraph 102UYD(2)(b)	Subparagraphs (vii) and (viii) of paragraph 272-65(3)(b), and subparagraphs (vi) and (vii) of paragraph 102UYD(2)(b), continue the numbering of the list of powers, although they form a separate list of consequences following the words 'the powers cannot be exercised to significantly:'.	Restructure each provision so that the consequences form a separate paragraph, or separate sub-subparagraphs, by splitting the existing paragraph into two paragraphs.
Main Bill	Item 9: Paragraph 272-65(3)(c); paragraph 126-935(2)(c) of the ITTP Act; paragraph 102UYD(2)(c)	The parallel provisions differ without explanation. Sections 272-65 and 102UYD refer to 'all or a majority', permit a special resolution, and use 'cannot materially, or significantly, adversely affect'. Section 126-935 requires the consent of 'all members', uses 'cannot adversely affect', and has no special resolution limb.	Harmonise the three provisions or explain the policy reason for the difference in paragraph 2.95 of the Explanatory Memorandum (see also item 51).

Document	Section / paragraph reference	Nature of error	Suggested correction
Main Bill	Item 10: Subparagraph 126-935(2)(b)(iv) of the ITTP Act	The subparagraph omits the words 'or set the price for the redemption', which appear in subparagraphs 272-65(3)(b)(iv) and 102UYD(2)(b)(iv).	Harmonise with the corresponding subparagraphs.
Main Bill	Item 11: Paragraph 126-935(2)(c) of the ITTP Act	The expression 'the entity's constituent documents establishing the entity' is tautologous.	Replace with 'the entity's constituent documents'.
Main Bill	Item 12: Schedule 3, subparagraph 102UYD(2)(a)(ii)	The subparagraph refers to 'income or capital of the entity' in a provision that concerns a company.	Replace 'entity' with 'company'.
Main Bill	Item 13: Paragraph 102UYD(4)(a)	The expression 'income and capital of the company' is inconsistent with 'income or capital' in subsection 102UYD(3) and paragraph 102UYD(4)(b). The error is repeated in paragraph 3.44 of the Explanatory Memorandum.	Replace 'and' with 'or' in paragraph 102UYD(4)(a) and in paragraph 3.44 of the Explanatory Memorandum.
Main Bill	Item 14: Subsection 102UYD(1)	The subsection omits the words 'to the income or capital of the company', which appear in subsections 102UYD(3) and (4) and in section 126-935 of the ITTP Act.	Insert the words for consistency.
Main Bill	Item 15: Paragraph 102UYG(2)(c)	The paragraph omits the opening words 'in respect of a year of income', which appear in paragraphs 102UYG(2)(b) and (d).	Insert the words for consistency.
Main Bill	Item 16: Paragraph 102UYG(1)(a); subsections 102UYI(1) to (3)	The phrase 'decides to do so before the end of a year of income for any future year of income' is unclear. Section 102UYI refers to the year in which the election is 'revoked', which leaves unclear whether the top-rate consequence applies to the year of the decision or to the following year. Paragraphs 3.76 and 3.77 of the Explanatory Memorandum and Example 3.3	Redraft paragraph 102UYG(1)(a), for example as 'the trustee decides, before the end of a year of income, to revoke the election with effect from the start of the next year of income', and state expressly in subsection

Document	Section / paragraph reference	Nature of error	Suggested correction
		treat the following year as the revocation year, but paragraph 102UYJ(1)(b) keeps the election in force for the year of the decision.	102UYI(1) the year of income to which the section applies in the case of a voluntary revocation.
Main Bill	Item 17: Note to subsection 102UYI(3)	The note uses 'for that income year' in a provision of the ITAA 1936 that uses 'year of income'.	Replace with 'for that year of income'.
Main Bill	Item 18: Paragraph 102UYH(2)(d)	The paragraph is grammatically awkward: 'the extent to which other beneficiaries, another eligible class of beneficiary or no other beneficiaries, were entitled'.	Redraft as: 'whether, and to what extent, any other beneficiary or eligible class of beneficiary was entitled to receive, or otherwise benefited from, amounts representing a share of the income or non-income earnings of the trust estate'.
Main Bill	Item 19: Paragraph 102UYC(7)(b); EM paragraph 3.18	The Bill bars an election if a roll-over under Subdivision 126-Z 'applies in respect of the assets'. Paragraph 3.18 of the Explanatory Memorandum states that the bar applies once the trustee 'has chosen' the roll-over, 'regardless of whether the roll-over is completed'. If a restructure is not completed, the roll-over does not apply (subsection 126-905(3)), so the text and the Explanatory Memorandum diverge.	Amend the Bill to refer to a choice made under subsection 126-910(1), or correct paragraph 3.18 of the Explanatory Memorandum.
Main Bill	Item 20: Schedule 2, item 1, paragraph 126-905(1)(a) of the ITTP Act	The expression 'that discretion-based trust structure' has no antecedent and is not a defined term.	Replace with 'out of the minimum tax trust'.
Main Bill	Item 21: Paragraphs 126-910(1)(c) and (5)(c) compared with paragraph 126-920(2)(b) of the ITTP Act	Section 126-910 uses 'the earlier of: (i) …; and (ii)', while section 126-920 uses '(i) …; or (ii)'.	Use 'and' consistently, as in subsections 102UYC(6) and 102UYG(4).

Document	Section / paragraph reference	Nature of error	Suggested correction
Main Bill	Item 22: Section 126-940 of the ITTP Act	The word 'and' is missing at the end of paragraph (c) in a cumulative list introduced by 'all of the following apply'.	Insert '; and' after paragraph 126-940(c).
Main Bill	Item 23: Paragraph 126-940(c) and subsection 126-905(5) of the ITTP Act	The amendment period (four years after the notice of assessment for the transfer year) is not aligned with the integrity period (ending four income years after the income year of the last transfer). Where a restructure is spread over several years, the amendment period for an early-year assessment may expire before the integrity period ends.	Measure the amendment period from the end of the integrity period, or otherwise align the two periods, and correct paragraph 2.92 of the Explanatory Memorandum accordingly.
Imposition Bill: Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026			
Imposition Bill	Item 24: Item 3, paragraph 28(2)(a) of the *Income Tax Rates Act 1986*	The paragraph specifies the section 101AA rate (30 per cent) for the minimum tax income portion but does not state the rate for the purposes of paragraph 98(3)(b) for that portion. The note implies that the paragraph 23(2)(a) rate applies only to the remainder. Paragraphs 28(3)(b) and 28(4)(b) state both rates. The paragraph also overlaps with the top-up method in subsection 12AB(2), without a priority rule.	State expressly the rate applying for the purposes of paragraph 98(3)(b) on minimum tax income, if a nil rate is intended, and clarify that subsection 28(2) applies despite section 12AB.
Imposition Bill	Item 25: Item 3, paragraph 28(4)(a)	The phrase 'the maximum rate specified in column 3 of the table applicable to the year of income in Part II of Schedule 7 to this Act that applies for the year of income' repeats the temporal qualifier.	Delete 'that applies for the year of income' or delete the earlier phrase.
Imposition Bill	Item 26: Item 2, subsection 12AB(1)	The expression 'the net income of the trust estate' has no antecedent reference to a trust estate.	Replace with 'the net income of a trust estate'.
Explanatory Memorandum			

Document	Section / paragraph reference	Nature of error	Suggested correction
Explanatory Memorandum	Item 27: General outline (Schedule 1, Date of effect); paragraph 1.97	The Explanatory Memorandum states that Schedule 1 commences 'immediately after' the Imposition Bill. Clause 2 (table item 2) of the Main Bill provides that Schedules 1 to 3 commence 'at the same time' as the Imposition Act, and paragraphs 2.112 and 3.106 of the Explanatory Memorandum use 'at the same time'. The text also refers to the 'Imposition Bill' commencing.	Replace with 'at the same time as the Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Act 2026 commences'.
Explanatory Memorandum	Item 28: General outline (Schedule 1, Date of effect)	The Explanatory Memorandum states that the amendments apply 'to the income year that includes 1 July 2028 and later income years'. Item 21 of Schedule 1 and paragraph 1.98 refer to income years 'starting on or after 1 July 2028'. The formulations differ for substituted accounting periods.	Align the general outline with item 21 of Schedule 1.
Explanatory Memorandum	Item 29: Paragraphs 1.8 and 1.99; general outline heading for Schedule 2	The spelling 'rollover relief' is inconsistent with 'roll-over', used in the Bill and elsewhere in the Explanatory Memorandum.	Use 'roll-over' consistently.
Explanatory Memorandum	Item 30: Paragraph 1.8	The paragraph describes the electable regime as an election 'to be treated as a non-discretionary trust'. Paragraph 102UYE(1)(a) provides only that the trust is taken not to be a minimum tax trust.	Replace with 'to elect for the trust not to be treated as a minimum tax trust'.
Explanatory Memorandum	Item 31: Paragraph 1.26 (first and fourth bullets); paragraph 1.11	AMITs are described as trusts that 'would be expected to meet' the fixed trust definition, and the text refers to 'most' AMITs. That is inconsistent with section 276-55 of the ITAA 1997, with the note in Schedule 1, item 19 of the Main Bill, and with paragraph 4.11 of the Explanatory Memorandum. The fourth bullet also contains the ungrammatical phrase 'which are expected would meet'.	State that AMITs are treated as fixed trusts under section 276-55 of the ITAA 1997 and replace 'which are expected would meet' with 'which are expected to meet'.

Document	Section / paragraph reference	Nature of error	Suggested correction
Explanatory Memorandum	Item 32: Paragraph 1.36	The sentence 'it must meet be established as a testamentary trust … and satisfy the integrity rules and other requirement rules' is ungrammatical.	Replace with 'it must be established as a testamentary trust, as outlined in this paragraph, and satisfy the integrity rules and other requirements'.
Explanatory Memorandum	Item 33: Paragraph 1.39	The paragraph describes the integrity purpose as 'avoiding the minimum tax'. Subsection 101AD(3) refers to causing property to form part of the trust estate and causing subsection 101AD(1) to exclude the net income. The paragraph also attributes to subsection 101AD(3) a scheme purpose test that appears in subsection 101AD(2).	Describe subsections 101AD(2) and (3) separately, using the statutory language of each.
Explanatory Memorandum	Item 34: Paragraph 1.45 (second bullet)	The phrase 'conditions relating to form, processes or integrity rules' differs from 'requirements, processes, or integrity rules' in subparagraph 101AE(3)(a)(ii).	Use the statutory words.
Explanatory Memorandum	Item 35: Paragraph 1.47	The paragraph uses 'neither a DGR or registered charity'. The second bullet ('to work out the portion of the share of specified beneficiaries of the minimum tax trusts from being minimum tax income') is garbled.	Replace 'or' with 'nor' and redraft the bullet as: 'a method for applying such a cap to work out the portion of the shares of specified kinds of beneficiaries of specified kinds of trust estates that is excluded from being minimum tax income'.
Explanatory Memorandum	Item 36: Paragraph 1.50	The paragraph uses 'non-exempt non-assessable income'.	Replace with 'non-assessable non-exempt income'.
Explanatory Memorandum	Item 37: Paragraph 1.51 (bracketed reference)	The bracketed reference is to 'subsection 95(6)'. Item 2 of Schedule 1 amends subsection 95(1).	Replace with 'subsection 95(1)'.

Document	Section / paragraph reference	Nature of error	Suggested correction
Explanatory Memorandum	Item 38: Paragraph 1.58 (text and bracketed reference)	The paragraph refers to 'the note to section 12AB'. Section 12AB contains an example, not a note.	Replace 'note' with 'example'.
Explanatory Memorandum	Item 39: Paragraphs 1.54 to 1.60 (bracketed references)	The references to 'Imposition Bill, schedule 1' use a lower case 'schedule'.	Use 'Schedule 1'.
Explanatory Memorandum	Item 40: Paragraph 1.61	The paragraph refers to 'Subsection 98(3)(b)'.	Replace with 'Paragraph 98(3)(b)'.
Explanatory Memorandum	Item 41: Examples 1.3 and 1.4	Each example refers to a tax offset 'for the 2028-29 financial year'.	Replace with '2028-29 income year'.
Explanatory Memorandum	Item 42: Paragraph 1.88	The paragraph begins 'Providing this does not confer a discretion'.	Replace with 'Provided this does not confer a discretion'.
Explanatory Memorandum	Item 43: Paragraph 1.90 (bracketed reference)	The reference to 'Schedule 2F of the ITAA 1936' is inconsistent with 'Schedule 2F to the ITAA 1936' in paragraph 1.80.	Use 'Schedule 2F to the ITAA 1936'.
Explanatory Memorandum	Item 44: Paragraph 1.95 (bracketed reference)	The reference to '207-110 (note)' omits the subsection.	Replace with 'subsection 207-110(2) (note)'.
Explanatory Memorandum	Item 45: Paragraph 4.140 (compare paragraph 1.21)	The paragraph refers to the 'Veterans Affairs Act 1986'. The Act is the *Veterans' Entitlements Act 1986*, correctly cited at paragraph 1.21.	Correct the citation to *Veterans' Entitlements Act 1986*.

Document	Section / paragraph reference	Nature of error	Suggested correction
Explanatory Memorandum	Item 46: Paragraph 2.46	The paragraph describes the ministerial continuity pathway for family trusts as limited to trusts administered under a mistaken understanding of the election. Subsection 126-925(2) applies whenever subsection 126-925(1) is not satisfied.	Align the description with subsection 126-925(2) or narrow the Bill if the narrower operation is intended.
Explanatory Memorandum	Item 47: Paragraph 2.74	The paragraph cross-refers to 'Table 5.1 below'. The table is Table 2.1.	Replace with 'Table 2.1'.
Explanatory Memorandum	Item 48: Example 2.5	The example describes the first-year obligation as a requirement to 'notify the Commissioner of this transfer'. The first-year deadline is the deadline for the roll-over choice under paragraph 126-910(1)(c); the progress notice under section 126-915 applies only to transfers in later income years. The example also uses 'lodgement', whereas the Bill uses 'lodgment'.	Redraft the example to distinguish the roll-over choice from the progress notification and use 'lodgment' consistently.
Explanatory Memorandum	Item 49: Paragraph 2.88	The paragraph refers to 'the right or interests held indirectly'.	Replace with 'the rights or interests held indirectly'.
Explanatory Memorandum	Item 50: Paragraph 2.91	The paragraph refers to 'If materially discretionary elements'.	Replace with 'If material discretionary elements'.
Explanatory Memorandum	Item 51: Paragraph 2.95	The paragraph refers to 'adversely affect members' rights or interests or income or capital of the transferee'.	Replace with 'members' rights or interests in the income or capital of the transferee'.
Explanatory Memorandum	Item 52: Paragraph 2.98 (bracketed reference)	The paragraph cites paragraph 126-935(2)(d), which concerns matters suggesting the absence of material discretionary elements, in support of a statement about a determination that such elements exist.	Replace with 'subsection 126-935(3) and paragraph 126-935(4)(b)'.

Document	Section / paragraph reference	Nature of error	Suggested correction
Explanatory Memorandum	Item 53: Paragraph 2.103	The paragraph omits interposed entities and their members from the list of entities whose assessments may be amended (subparagraph 126-940(a)(v)).	Add interposed entities and their members to the list.
Explanatory Memorandum	Item 54: Paragraphs 3.10 and 8.20	The sentence 'A year in which an election is revoked, the trustee must pay tax' is ungrammatical.	Replace with 'In a year in which an election is revoked, the trustee must pay tax'.
Explanatory Memorandum	Item 55: Paragraph 3.12	The paragraph refers to the 'first income year that begins after 1 July 2028'. Paragraph 102UYC(5)(c) refers to an income year that 'commences on or after 1 July 2028'.	Replace 'after' with 'on or after'.
Explanatory Memorandum	Item 56: Paragraph 3.15 (bracketed reference)	The reference is to 'paragraph 102UC(5)(d)'.	Replace with 'paragraph 102UYC(5)(d)'.
Explanatory Memorandum	Item 57: Paragraph 3.42	The paragraph repeats 'income or capital of the entity' in relation to a company.	Replace 'entity' with 'company', and correct subparagraph 102UYD(2)(a)(ii) (see item 12).
Explanatory Memorandum	Item 58: Paragraph 3.68 (first bullet)	The bullet refers to 'consent orders made by the Family Court'. The relevant court is the Federal Circuit and Family Court of Australia.	Update the name of the court.
Explanatory Memorandum	Item 59: Paragraph 3.80	The paragraph lists as an automatic revocation event that 'a trust estate specified as a beneficiary in the EET nomination vests … or is wound up'. Subsection 102UYG(2) contains no such event: paragraph (a) concerns the electable trust itself, and paragraphs (e) and (f) concern companies.	Delete the bullet or amend the Bill if such an event is intended.
Explanatory Memorandum	Item 60: Paragraph 3.81	The sentence 'When a company is wound up or deregistered for the purposes of automatic revocation is set out under the Corporations Act 2001' is ungrammatical.	Replace with 'Whether, and when, a company is wound up or deregistered for the purposes of automatic revocation is determined under the *Corporations Act 2001*'.

Document	Section / paragraph reference	Nature of error	Suggested correction
Explanatory Memorandum	Item 61: Paragraph 3.85	The paragraph defines 'the initial income year' and then refers to 'the first income year'.	Replace 'first income year' with 'initial income year'.
Explanatory Memorandum	Item 62: Paragraph 3.88	The paragraph lists only two of the three automatic revocation events to which the Commissioner's discretion applies. It omits paragraph 102UYG(2)(d) (corpus inconsistency), which subsection 102UYH(1) also covers.	Add the corpus inconsistency event.
Explanatory Memorandum	Item 63: Paragraph 3.96 (text and bracketed reference)	The paragraph cites 'subsection 102UYJ(3)'. Section 102UYJ has no subsection (3), and the objection right is in subsection 102UYH(3). The text also repeats the words 'if the trustee is dissatisfied'.	Replace the citation with 'subsection 102UYH(3)' and delete the repetition.
Explanatory Memorandum	Item 64: Paragraph 3.98 (third sub-bullet)	The sub-bullet uses the undefined expressions 'non-income earnings gain' and 'trust distribution'. Subparagraphs 102UYI(2)(b)(i) and (ii) refer to a 'capital gain made by the trust estate' and to a 'franked distribution'.	Use the statutory terms.