Law Council
OF AUSTRALIA

Minimum tax on discretionary trusts

The Treasury

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Additional input has been received by the Charities and Not-for-profits Committee of the Law Council's Legal Practice Section, and is attributed accordingly.

Executive summary

1. This submission responds to Treasury's consultation paper, *Minimum tax on discretionary trusts*, released on 8 July 2026 (**Consultation Paper**), concerning the proposed 30 per cent minimum tax on discretionary trusts, which the Government proposes to introduce from 1 July 2028. This submission has been prepared by the Taxation Committee of the Law Council's Business Law Section, with additional input from the Legal Practice Section's Charities and Not-for-profits Committee.

2. Under the proposed measure, the trustee would pay a minimum 30 per cent tax on the taxable income of the trust, while beneficiaries would continue to be assessed, and to receive a corresponding non-refundable offset, on their share of that income under the existing framework in Division 6 of Part III of the *Income Tax Assessment Act 1936* (**ITAA 1936**).

3. The Taxation Committee supports a targeted integrity measure directed at income splitting through the use of trust arrangements but considers that the proposed regime is considerably broader than that objective requires.

4. The proposed measure proceeds from a chain of assumptions that do not hold for many trusts, including:

    - that a higher-rate taxpayer stands behind the trust and that, absent the flow of funds through the trust, the income would be that taxpayer's income;
    - that all beneficiaries belong to a single economic family unit;
    - that the absence of a fixed trust is a reliable proxy for an ordinary discretionary family trust, when in fact many forms of trust are not fixed but also not of the type that the Government's announcement appears to target;
    - that taxpayers establish trusts primarily to split income, whereas a substantial number of trusts are established for legitimate purposes including asset protection; keeping valuable assets out of the names of individuals exposed to commercial, professional, or personal risk; succession planning; and intergenerational wealth;
    - that testamentary trusts, corporate beneficiaries and capital gains grandfathering can be managed through narrow, mechanical carve-outs; and
    - that a modest increase in the small business turnover threshold can compensate for a material reduction in the value of the small business capital gains tax concessions.

5. Below, we examine each of those assumptions and explain why they are unsound.

6. The principal modifications proposed by this submission include:

   (a) The minimum 30 per cent rate should be disapplied where the nominated person under a family trust election is not taxed above 30 per cent.

   (b) Intergenerational trusts should not be treated as a single economic family unit merely because beneficiaries are broadly related.

   (c) The fixed trust concept should cease to operate as the sole test for scope. The legislation should expressly exclude conventional employee share trusts, managed funds and other managed investment structures, should address the treatment of modern commercial trusts where trustees retain unexercised powers, and should not rely on administrative guidance as a substitute for legislative certainty.

   (d) On trusts created for succession and estate planning, the testamentary trust exclusion should be broadened well beyond a narrow concept of a discretionary testamentary trust, so that it covers trusts under which interests are contingent on a future event, successive between beneficiaries, or liable to defeasance. It should permit such trusts to retain the benefit of the exclusion where replacement assets are acquired and where estate property is reinvested. It should not be limited to the physical assets held at the date of death.

   (e) Corporate beneficiaries should receive a proper, non-refundable credit for tax already paid by the trustee, rather than being denied credit recognition in a way that would produce double taxation or an excessive effective rate.

   (f) Grandfathered capital gains accrued before 1 July 2027 should not be indirectly subjected to a higher minimum tax outcome merely because they pass through a trust distribution, and the small business capital gains tax concessions in Division 152 of the *Income Tax Assessment Act 1997* (**ITAA 1997**) should be preserved in substance. The proposed increase in the small business turnover threshold does not address the binding, unindexed $6 million maximum net asset value test that remains the effective constraint for most small businesses. The minimum tax offset should not be lost entirely where a beneficiary is an income tax-exempt entity such as a registered charity.

   (g) The proposed minimum tax should preserve existing cross-border trust taxation settings: distributions to non-resident beneficiaries already subject to withholding tax or trustee assessment under subsections 98(3) and 98(4) of the ITAA 1936 should be excluded from the minimum tax.

   (h) Distributions by non-resident trusts to Australian resident beneficiaries should be addressed through direct assessment of the resident beneficiary rather than through a primary liability imposed on the non-resident trustee.

(i) The Government's commitment to double philanthropy by 2030 requires that the proposed minimum tax not reduce the quantum of distributions available for philanthropic purposes. The Taxation Committee's preferred solution is a pre-tax exclusion for distributions to income tax-exempt entities. If that solution is not adopted, the design should include a refundable offset or, at a minimum, a deduction for distributions to income tax-exempt entities, and the deductible gift recipient framework should not operate as an arbitrary barrier.

(j) On implementation, the rollover relief Treasury proposes is a necessary complement to the proposed measure but requires further work: the statutory family unit, clearly defined rights test and material discretionary element concepts should be given precise statutory content, and exposure draft provisions should be released for consultation, before the rollover commences. Excess franking credits should be refunded to trustees rather than carried forward. Any director liability for corporate trustees should adopt the procedural framework of the director penalty notice provisions in Division 269 of Schedule 1 to the *Taxation Administration Act 1953* (**TAA**). The interaction between the minimum tax and the proposed revival of the Division 7A unpaid present entitlement measure following *Commissioner of Taxation v Bendel* [2026] HCA 18 (***Bendel***) should be resolved before either measure commences.

(k) Finally, in relation to the existing family trust tax rules, the Taxation Committee submits that Family Trust Distribution Tax under Schedule 2F to the ITAA 1936 should be abolished, as the minimum tax would achieve broadly the same policy intent. Alternatively, at a minimum, the amendments proposed in the Taxation Committee's submission of 5 June 2026 should be implemented as part of this reform package.

Introduction

7. The Consultation Paper outlines the Government's proposal to introduce a 30 per cent minimum tax on discretionary trusts from 1 July 2028, together with transitional measures including rollover relief, the treatment of excess franking credits and collection mechanisms.

8. The Taxation Committee has a particular interest in the design, operation and administration of taxation laws affecting businesses, investors, trusts, companies, and capital markets. It draws its membership from senior tax practitioners across Australia, including those advising on trusts, small business, succession planning, employee participation, managed investments, and corporate tax.

9. The Taxation Committee's interest in this consultation lies in ensuring that any minimum tax measure is clear, targeted, proportionate, administrable, and consistent with the existing architecture of Australian trust taxation under Division 6 of Part III of the ITAA 1936, Division 7A of Part III of the ITAA 1936, the small business capital gains tax concessions in Division 152 of the ITAA 1997, and related integrity rules.

10. The Taxation Committee notes that the principles outlined in the Consultation Paper have not received Government approval and are not yet law. This submission therefore refers to the proposed measure throughout and uses conditional language to describe its intended operation.

11. This submission should be read together with the Taxation Committee's submission of 5 June 2026 in relation to Family Trust Distribution Tax.

The 30 per cent rate is not a reliable proxy for a higher-rate taxpayer

12. Treasury's Consultation Paper explains that the reform is intended to address income splitting, under which trustees allocate income to lower-rate beneficiaries in circumstances not available to salary and wage earners, and that a minimum 30 per cent trustee-level tax is the mechanism chosen to address that mischief. The design, however, assumes that a minimum 30 per cent rate approximates the rate that would otherwise apply to the relevant taxpayer or family group. That assumption does not hold for many trusts.

13. Trusts are commonly established for asset protection, succession planning, intergenerational wealth maintenance, employee participation, investment pooling, estate administration, or small business purposes unrelated to the diversion of income from a higher-rate individual. In those cases, there is often no primary taxpayer subject to tax at 30 per cent or more standing behind the arrangement. Imposing the minimum rate in those circumstances would not advance the integrity objective. It would instead increase the tax payable by taxpayers who, for genuine commercial or family reasons, have chosen to use a discretionary trust. The result would, in many cases, be a higher tax outcome than if the beneficiaries who are, in substance, entitled to the income had derived it directly.

A nominated-person safeguard should determine when the minimum tax applies

14. A more appropriately targeted approach would test the proposed measure against the tax position of the person the policy is designed to reach. Where a trust has made a family trust election under Schedule 2F to the ITAA 1936, the nominated individual is already identified for tax integrity purposes. The Taxation Committee recommends that the minimum 30 per cent rate should not apply unless that nominated person is subject to tax at a rate exceeding 30 per cent in the relevant income year.

15. Under this approach, Treasury would ask, for any given trust, whether a family trust election is in place, who the nominated person is, and what that person's effective marginal rate is for the year. If that rate does not exceed 30 per cent, there is no higher-rate taxpayer for the measure to protect against, and the minimum tax should not apply.

16. This safeguard is administrable because it draws on machinery that already exists in the tax law, and it aligns the proposed measure more closely with the diversion of income from a higher-rate taxpayer to lower-rate beneficiaries that Treasury has identified as the underlying policy concern. If the relevant individual has died, the rules could be modified to allow or require a living person within the family group to be nominated as the replacement person.

Recommendation

The minimum 30 per cent rate should be disapplied where the nominated person under a family trust election is not subject to a marginal tax rate exceeding 30 per cent. Where the nominated person has died, the legislation should provide for nomination of a replacement person within the family group.

Beneficiaries of a trust are not necessarily part of a single economic family unit

17. The proposed measure also appears to assume that beneficiaries who receive distributions from a trust are related to, or share a household or economic resources with, a taxpayer who is subject to tax above 30 per cent. That assumption is too broad, particularly for intergenerational trusts.

18. A founder may establish a family trust for a broad class that includes siblings, their descendants, grandchildren, nieces, nephews, and other extended family. Once the founder has died, the trust may continue for the benefit of multiple branches of that family who do not share economic resources, do not form one household and are not supported by the same income earner.

19. Trustees of these trusts owe fiduciary duties to different branches of the family, and distributions between those branches are frequently made for legitimate succession or estate planning reasons, not to split income away from any single higher-rate

taxpayer. Treating one beneficiary's tax rate as a proxy for the tax position of the whole class is inappropriate in these circumstances.

Recommendation

The proposed measure should expressly recognise that beneficiaries of a trust, particularly an intergenerational trust, will often not constitute a single economic family unit, so that longstanding, multi-branch family trusts are not automatically drawn into a regime designed for a narrower mischief.

The fixed trust concept is an inappropriate test for determining the scope of the regime

20. Treasury's Consultation Paper acknowledges that the current framework defines a discretionary trust only by exclusion: it treats every trust that is not a fixed trust as a discretionary trust. Fixed trust status turns on the technical, equitable concept of vested and indefeasible interests under section 272–5 of Schedule 2F to the ITAA 1936. Reliance on that definition creates an artificially narrow class of trusts that would not be subject to the proposed measure. Consequently, the minimum tax would apply to a substantially broader group of trusts than the Government's stated policy objective requires.

21. The fixed trust concept is narrow and uncertain, and many trusts that fail it bear no resemblance to an ordinary discretionary family trust used for income splitting. These include:

    - conventional employee share trusts;
    - managed funds and other managed investment structures;
    - trusts created under wills;
    - trusts with contingent beneficiaries;
    - commercial pooling trusts; and
    - trusts where interests are defeasible only in limited or technical circumstances.

22. Each of these trusts falls outside the fixed trust definition even though the trustee does not hold the broad, family-directed discretion that the proposed measure is intended to target.

23. The proposed measure should not turn on a binary distinction between fixed and non-fixed trusts. A purpose-built statutory definition of a discretionary trust is required, and the sections that follow examine several categories where reliance on the fixed trust concept would produce results Treasury cannot have intended.

Modern commercial trusts and trustees' retained powers

24. Among the categories at risk from an approach anchored to the fixed trust concept are modern commercial trusts, where trustees typically retain powers to change entitlements, add beneficiaries or amend the trust deed, whether or not those powers are ever exercised. Treasury's Consultation Paper specifically invites feedback on the appropriate treatment of these entities.

25. The Taxation Committee considers that the retention of unexercised powers by a trustee should not, of itself, bring a trust within the scope of the proposed minimum tax. Modern commercial trusts routinely include amendment, addition, and removal powers as a matter of prudent trust administration and commercial necessity, and many such trusts operate in substance as if they were fixed trusts notwithstanding those reserved powers. If the proposed measure were to capture trusts solely because a trustee retains a power it has never exercised and has no present intention of exercising, the scope of the regime would extend far beyond income splitting arrangements and into the ordinary administration of commercial trust structures.

26. The Taxation Committee recommends that the legislation distinguish between trusts where a trustee holds and exercises a genuine discretion to allocate income among a class of family beneficiaries, and trusts where powers are retained for administrative, protective or commercial purposes but are not exercised to direct income flows for tax advantage.

Employee share trusts should be expressly excluded

27. An employee share trust holds shares for employees or participants under an employee share scheme. Its administrative, warehousing, forfeiture, vesting or allocation features can mean that beneficiaries do not have vested and indefeasible interests at any given time, so that the trust fails the fixed trust test despite bearing no resemblance to an ordinary discretionary family trust.

28. Its beneficiaries are employees or scheme participants rather than members of a family group. The trustee's powers are directed at implementing the terms of the employee share plan rather than at splitting family income. There is no primary taxpayer whose income is being diverted through the trust. Imposing a minimum 30 per cent rate on these trusts would interfere with the ordinary commercial operation of employee equity arrangements without addressing any income splitting mischief.

Recommendation

Conventional employee share trusts should be expressly excluded from the proposed regime, rather than left to rely on satisfying the technical fixed trust rules.

Managed funds and managed investment structures should be excluded

29. Managed funds frequently operate through trusts. The constitutions, issue and redemption provisions, class rights, streaming and amendment powers, and other ordinary commercial features of those trusts can create significant uncertainty about fixed trust status. Where the consequence of failing that test shifts from a compliance risk to a minimum 30 per cent tax rate, the commercial consequences are significant, potentially affecting product pricing, investor returns, product disclosure, tax distribution statements, fund administration systems, investor confidence and the range of products fund managers can viably offer.

30. Managed funds should not be exposed to a minimum tax rate of 30 per cent because of unresolved uncertainty in rules developed for a different purpose.

Recommendation

If managed funds are intended to be excluded from the minimum tax, that exclusion should be expressly stated in the legislation rather than left to depend on satisfying the fixed trust test.

Administrative guidance is not an appropriate substitute for legislative certainty

31. Administrative guidance can properly assist taxpayers in understanding the Commissioner's compliance approach, but it is not law. Guidance of this kind can be altered at any time and is directed to compliance risk rather than substantive liability. The factors relevant to a compliance risk assessment are not necessarily the factors relevant to whether a trust is being used for income splitting. Reliance on guidance also creates ongoing and unacceptable uncertainty for trustees, advisers, responsible entities, and investors, who should not be required to depend on a safe harbour—one that can be withdrawn without legislative instrument—merely to avoid an adverse tax outcome.

Recommendation

The legislation itself should provide clear exclusions and definitions, so that taxpayers can determine whether the proposed regime applies to them from the statute, rather than from a document the Commissioner can change.

The testamentary trust exclusion does not recognise the range of trusts created under a will

32. Treasury's Consultation Paper proposes that income from discretionary testamentary trusts be exempt from the minimum tax where the trust is established for genuine testamentary purposes, broadly conditioned on the income relating to assets of the deceased estate and not to assets injected after Budget night.

33. That exclusion does not adequately recognise the range of trusts created under a will: deceased estates during administration, conventional discretionary testamentary trusts, trusts for children or grandchildren, protective trusts, life interest trusts, trusts with contingent remaindermen, trusts for vulnerable beneficiaries, trusts for blended families, trusts with capital preservation requirements, and trusts with powers of advancement or maintenance are all meaningfully different arrangements. Drafting confined to a single, narrow concept of a discretionary testamentary trust is unlikely to operate satisfactorily across all of them.

34. Where a testamentary trust is created under a will that was executed before Budget night, such trust should be included in the grandfathering even if the trust does not come into existence until a later time. Without this protection, a trust established by a will where the testator has lost the capacity to alter the will but has not yet died would be subject to adverse treatment through no fault of the beneficiaries and with no practical means of obtaining the benefit of the exclusion.

The focus on assets held at death is too narrow

35. Estates and testamentary trusts regularly dispose of assets for reasons outside the control of beneficiaries, including to pay debts of the estate, to satisfy family provision claims, to meet tax liabilities, in the ordinary course of estate administration, because of a compulsory acquisition, takeover, merger or scheme of arrangement, because the trustee would otherwise breach its duties by retaining the asset, to fund a beneficiary's maintenance, education or support, or to resolve disputes between beneficiaries.

36. A rule that only protects the original asset held at death will not accommodate any of these ordinary events. The exclusion should instead ask whether property is held in connection with the deceased estate or a will trust, so that substituted property, replacement assets, reinvested estate property, proceeds of sale of estate assets and assets acquired in the course of administration are all covered, regardless of whether the precise original asset survives.

37. Where testamentary trusts are settled to provide for beneficiaries over an extended period, the trustee must be able to manage the pool of assets effectively without adverse tax implications for beneficiaries each time an asset is changed. The current proposal would require the trustee to preserve and maximise the value of the asset pool while each change of asset would cause income to cease to qualify for the exclusion.

38. The mischief this rule appears directed at could more readily be addressed by precluding the addition of subsequent gifts to a testamentary trust after the testator's death, or by denying income flowing from the investment of such gifts from obtaining the concessional treatment.

Recommendation

The testamentary trust exclusion should be broadened to cover trusts in which beneficiaries hold interests that are contingent, conditional, successive or subject to defeasance, where those trusts are created under a will, and should cover replacement assets and reinvested estate property rather than only assets held at death. Wills executed before Budget night should be grandfathered even if the trust does not come into existence until later.

Trusts with contingent, successive, or defeasible interests should not be treated as ordinary discretionary trusts

39. A related problem arises for trusts created under wills where beneficiaries hold interests that vest only on a future event, pass in succession to different beneficiaries, or are liable to be defeated in defined circumstances. Beneficiaries under arrangements of this kind may not have vested and indefeasible interests, so the trust fails the fixed trust test. None of these trusts resembles an ordinary discretionary testamentary trust, and the proposed measure should not treat a trust as discretionary merely because it fails that test.

Recommendation

Treasury should develop a purpose-built definition of a discretionary testamentary trust, broad enough to cover interests of a contingent, conditional, successive, or defeasible character created under a will, rather than relying on the binary fixed trust test.

Corporate beneficiaries should receive credit for tax paid by the trustee

40. The policy concern behind the treatment of corporate beneficiaries appears to be that tax paid by a trustee should not be converted, through a company, into a refundable franking credit that can ultimately be passed back to non-corporate shareholders. That is a legitimate concern, because allowing companies unrestricted access to the minimum tax offset would permit a corporate beneficiary to convert the benefit into a refundable credit and undermine the object of the proposed measure.

41. It does not follow, however, that the answer should be to deny corporate beneficiaries any credit recognition for tax the trustee has already paid on the same income. Doing so risks double taxation or an excessive effective tax rate on distributions to companies, which is a different and more severe problem than the

refundability the proposed measure is designed to prevent. The policy concern is properly confined to the refundability of the credit.

42. Trusts with corporate beneficiaries are commonly used for asset protection, to ensure that individuals exposed to commercial, professional, or personal risk do not hold valuable assets directly and that profits and non-business assets are kept separate from third party claims.

Example under current law

43. An operating company distributes $750,000 in fully franked dividends (franking credits of $250,000 at 25 per cent) to a share trust. The share trust distributes $750,000 to a corporate beneficiary. The corporate beneficiary pays tax of 30 per cent on $1,000,000 (including the franking credit) and receives a franking credit of $250,000, resulting in additional tax of $50,000. Total tax on the pre-tax profit of $1 million is $300,000.

Example under the proposed measure

44. The operating company distributes $750,000 in fully franked dividends (franking credits of $250,000 at 25 per cent) to a share trust. The share trust pays minimum tax of 30 per cent on $1,000,000 (including the franking credit), with additional tax of $50,000. The share trust distributes to the corporate beneficiary. The corporate beneficiary pays 30 per cent tax on the $1,000,000 distribution without the benefit of the franking credit. Total tax on the pre-tax profit of $1 million is $600,000. The effective tax rate would be 60 per cent before any distribution to an individual. If the corporate beneficiary subsequently distributes the remaining $400,000 as a fully franked dividend to individual shareholders, the aggregate tax burden in the hands of those individuals would approach 70 per cent—a result that is plainly disproportionate to any income splitting concern.

45. This outcome is disproportionate and would distort ordinary commercial decisions and cannot be reconciled with the policy objective of addressing income splitting.

Suggested credit mechanism for corporate beneficiaries

46. The Taxation Committee recommends that Treasury adopt a separate, non-refundable class of credit for tax paid by a trustee under the minimum tax regime, modelled on the existing exempting credit framework. Such a credit could be made available to the corporate beneficiary, recorded separately in the company's tax accounts, and passed through to shareholders in a form that reduces the tax otherwise payable by them, while remaining incapable of refund.

47. This design would preserve the trustee's tax as a genuine credit against tax already paid, prevent refundability, and avoid the double taxation or excessive effective rate that a blanket denial of credit would otherwise produce. The tax system has previously operated with different classes of franking credits, and this arrangement would operate on the same basis, other than that the trust credits would not be refundable.

Recommendation

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

The minimum tax should not impose an irrecoverable cost on distributions to income tax-exempt entities

48. Treasury's Consultation Paper explains that the minimum tax would be levied at the trustee level and would generate a non-refundable offset for beneficiaries, reducing the income tax otherwise payable by them. The Consultation Paper specifically asks what the appropriate treatment should be for income tax-exempt entities.

49. Because an income tax-exempt beneficiary, such as a registered charity, has no income tax liability against which to apply a non-refundable offset, a distribution from a discretionary trust to such a beneficiary would bear an effective, irrecoverable 30 per cent tax cost, even though the beneficiary itself pays no tax on amounts it receives. That outcome is inconsistent with the existing refundability of franking credits for exempt entities under Subdivision 207-B of the ITAA 1997, and risks discouraging distributions from discretionary trusts to charities and other tax-exempt beneficiaries for reasons unrelated to income splitting.

Recommendation

The Taxation Committee's preferred approach, consistent with the order of preference set out below, is a pre-tax exclusion that removes distributions to income tax-exempt entities from the calculation of the trustee's minimum tax liability. If a pre-tax exclusion is not adopted, Treasury should provide for the offset to be refunded to the exempt entity or, failing that, allow the trustee an appropriate deduction for those distributions.

Non-resident beneficiaries

50. The Consultation Paper states that special rules would apply where the underlying income of the trust reflects dividends, interest or royalties and the payment is to a non-resident beneficiary subject to withholding tax. The Taxation Committee considers that the scope of this exclusion should be extended or clarified so that it also applies where payments are subject to specific withholding tax exemptions, such as franked dividends and conduit foreign income.

Charitable beneficiaries

51. The Consultation Paper indicates that special rules would be needed to address the situation where a charitable trust receives a distribution from a trust that has been subject to trustee taxation. The Taxation Committee submits that the most appropriate approach would be to create a two-level mechanism:

    - The trustee could apply for an exclusion from the minimum tax if the charity provides an appropriate reference number and subsequently a valid charity donation receipt. This would tend to apply to larger donations.
    - The charity could apply for an immediate refund of the minimum tax if the trustee had not followed the exclusion process.

52. In the absence of such a mechanism, there would be a significant impact on the cash flow of any charity that must wait until the end of the income year to recover the tax paid.

53. The Taxation Committee and the Charities and Not-for-Profits Committee note that the Government's commitment to double philanthropy by 2030 reinforces the need for a solution within the design of the proposed minimum tax. The imposition of a 30 per cent tax on discretionary trust distributions to charities, without an effective mechanism for recovery, would materially reduce the quantum of distributions available for philanthropic purposes and would work directly against that stated policy objective.

Options for addressing the charitable entity problem

54. The Taxation Committee and the Charities and Not-for-Profits Committee have identified three options, in order of preference, for addressing the impact of the proposed minimum tax on distributions to income tax-exempt entities:

    - Pre-tax exclusion: distributions to income tax-exempt charities should be deducted from the trust's assessable income before the 30 per cent minimum tax is calculated. This would ensure that the minimum tax applies only to the net income after distributions to exempt entities and would preserve the full value of philanthropic distributions.
    - Refundable offset: the minimum tax offset generated by a distribution to an income tax-exempt entity should be made refundable to that entity. The discretionary trust could be required to provide notice of the refundable tax offset to the income tax-exempt entity, and the ATO could provide refunds using

a process similar to that which already exists for refunding franking credits to charities under Subdivision 207-B of the ITAA 1997.

- Deduction for DGR distributions: at a minimum, the discretionary trust should be entitled to claim a tax deduction for distributions made to deductible gift recipients. Although this option would still adversely affect the current level of distributions to income tax-exempt entities compared with the pre-tax exclusion, it would at least partially ameliorate the cost.

55. The distinction between deductible gift recipients and income tax-exempt charities does not currently apply to distributions from discretionary trusts. That distinction has not been a factor in relation to the introduction of the proposed minimum tax, and the Committees submit that it should not be introduced as an additional barrier. If only the third option is adopted, the DGR framework should not operate to restrict the class of entities that can benefit from the deduction.

Deductible gift recipient reform

56. The Taxation Committee and the Charities and Not-for-Profits Committee notes that the Productivity Commission's Future Foundations for Giving inquiry report (May 2024) recommended reform of the DGR framework to remove the distinction between entities with DGR status and those income tax-exempt entities without DGR status. The Government should prioritise that reform so that the DGR system does not operate as an arbitrary barrier to the third option outlined above. A reformed DGR framework would ensure that all income tax-exempt charities benefit equally from whichever mechanism is adopted.

Interaction with cross-border trust taxation rules

57. The proposed minimum tax regime does not adequately address its interaction with the existing taxation provisions governing cross-border trust arrangements. The announcement is silent on the relationship between the proposed measure and the existing trustee liability provisions in subsections 98(3) and 98(4) of the ITAA 1936, the withholding tax provisions in Division 11A of Part III of the ITAA 1936, and the managed investment trust withholding tax regime in Subdivision 12-H of Schedule 1 to the TAA and Subdivision 840-M of the ITAA 1997.

58. The issues raised by the proposed measure fall into two distinct categories. The first concerns the taxation and collection of Australian tax on distributions made by Australian trusts to non-resident beneficiaries. The second concerns the taxation and collection of Australian tax on distributions made by non-resident trusts to Australian resident beneficiaries. These involve fundamentally different taxpayers, different policy objectives and different collection considerations. They should be analysed and addressed separately.

Distributions to non-resident beneficiaries

59. Australia already has a comprehensive framework governing both the taxation of non-resident beneficiaries and the collection of Australian tax in respect of trust income distributed to those beneficiaries. That framework comprises subsections 98(3) and 98(4) of the ITAA 1936, Division 11A of Part III of the ITAA

1936 (withholding tax on interest), section 128B (withholding tax on dividends, interest and royalties), the managed investment trust withholding tax regime in Subdivision 12-H of Schedule 1 to the TAA and Subdivision 840-M of the ITAA 1997, sections 98A, 98B, 99E, 99G and 99GA of the ITAA 1936, and Australia's network of double taxation agreements.

60. Collectively, these provisions already determine the amount of Australian tax that should be imposed on relevant income and provide mechanisms through which that tax is collected. The announcement does not explain why the existing framework is considered inadequate or identify any systemic deficiency requiring legislative intervention.

61. Subsections 98(3) and 98(4) already contain carefully designed collection mechanisms directed towards circumstances involving non-resident beneficiaries. Their purpose is to enable Australian tax to be recovered where the ultimate beneficiary is located outside Australia. These provisions have formed part of Australia's trust taxation framework for many decades and are supported by extensive administrative practice and judicial authority. The legislation should expressly state that subsections 98(3) and 98(4) continue to operate according to their existing terms and that the proposed minimum tax does not supplement, replace or otherwise modify the operation of those provisions.

62. Australia's withholding tax provisions represent longstanding legislative choices regarding the taxation of non-resident investors. The applicable rates reflect deliberate policy decisions concerning Australia's international competitiveness, capital mobility, foreign investment objectives and treaty obligations. Withholding taxes generally operate as final taxes, so the withholding tax outcome represents the intended Australian tax result rather than an interim collection mechanism. A 30 per cent non-refundable minimum tax imposed in respect of non-resident beneficiaries would effectively override those longstanding policy settings and would be difficult to reconcile with the architecture of Australia's current international tax regime.

63. The introduction of a further minimum tax layer in this area would not address an obvious gap in the existing law. Rather, it would create the need for complex interaction provisions governing credits for tax paid by trustees, allocation of credits between beneficiaries, timing mismatches, tracing requirements, interaction with withholding tax regimes, treatment of tax attributes, treaty interactions and the prevention of double taxation. The need for such provisions is itself evidence that the measure would operate in an area where existing law already produces appropriate tax outcomes.

64. These issues are of particular importance to the managed funds industry. The managed investment trust withholding tax regime is a fundamental component of Australia's international investment framework. The concessional rates within that regime reflect deliberate policy settings designed to encourage foreign investment into Australia. Substantial amounts of foreign capital have been committed to Australian investment vehicles based on those statutory settings. Any suggestion that a proposed minimum tax could effectively increase the Australian tax burden borne by foreign investors would create significant uncertainty and undermine confidence in Australia's taxation framework.

Distributions by non-resident trusts to Australian resident beneficiaries

65. A different issue arises where a non-resident trust makes an Australian resident beneficiary presently entitled to trust income. The resident beneficiary is already within the Australian taxation system, is subject to Australian taxing jurisdiction, must lodge Australian income tax returns, and is capable of direct assessment and direct recovery action by the Commissioner.

66. Where a resident beneficiary derives income through a non-resident trust, the starting point should be that the resident beneficiary is the taxpayer. The beneficiary receives the economic benefit of the income, is within the Australian tax base, is already capable of direct assessment and is already within the Commissioner's enforcement jurisdiction. Imposing primary liability on a foreign trustee in these circumstances would represent an unnecessary and inefficient collection mechanism. The foreign trustee may have no practical connection with Australia other than the existence of a resident beneficiary, may be situated in a jurisdiction where enforcement is difficult or costly, and may owe duties to multiple beneficiaries resident in different jurisdictions.

67. Direct assessment of the resident beneficiary is both the simpler and more principled approach. It aligns the tax liability with the person who derives the economic benefit, avoids unnecessary enforcement difficulties, avoids duplication of liabilities, removes the need for complex crediting mechanisms, and produces a more coherent taxation outcome.

Recommendation

The legislation should expressly confirm that: (a) the proposed minimum tax does not alter the operation of subsections 98(3) and 98(4) of the ITAA 1936; (b) existing withholding tax and final tax regimes, including the managed investment trust withholding tax, continue to apply unaffected; (c) income already subject to withholding tax or existing trustee assessment provisions is excluded from the minimum tax; (d) the regime does not impose a 30 per cent non-refundable tax that overrides existing withholding tax outcomes or treaty-based outcomes; and (e) where a resident beneficiary derives income through a non-resident trust, the resident beneficiary should be assessed directly rather than through a primary liability imposed on the non-resident trustee.

Grandfathering of pre-1 July 2027 capital gains should be preserved in substance

68. Treasury's Consultation Paper states that expanded rollover relief would assist businesses to restructure out of discretionary trusts. That measure does not, however, address the extent to which the proposed minimum tax, as designed, reduces the effect of the grandfathering of capital gains accrued before 1 July 2027.

69. Where a trust holds an asset acquired before that date, sells it after the proposed measure commences, and the resulting gain qualifies for the 50 per cent capital gains tax discount, the discounted gain distributed to a beneficiary would still attract the minimum 30 per cent rate, producing an effective minimum rate of 15 per cent on the gross, grandfathered gain.

70. That result substantially reduces the benefit that grandfathering was intended to confer and alters the expected tax treatment of assets acquired by family trusts before the proposed measure was announced.

Recommendation

The grandfathering rule should be designed so that pre-1 July 2027 capital gains are not indirectly subjected to a higher minimum tax outcome merely because they pass through a trust distribution after the proposed measure commences.

The minimum tax reduces the value of the small business capital gains tax concessions

71. The small business capital gains tax concessions in Division 152 of the ITAA 1997 exist to support business succession, retirement planning, and reinvestment. Discretionary trusts are one of the most common vehicles through which family businesses, farming enterprises, professional practices, and trading businesses are held. The proposed minimum tax reduces the value of those concessions. The proposed increase in the small business turnover threshold does not offset that reduction, because it leaves the binding, unindexed $6 million maximum net asset value test untouched.

72. The erosion in value can be illustrated by an example. If a trust sells an eligible active business asset for a capital gain of $1,000,000, the general 50 per cent discount reduces the gain to $500,000, and the 50 per cent active asset reduction reduces the taxable amount further to $250,000. Distributed to a beneficiary taxed at 25 per cent, that amount would currently bear tax of $62,500, an effective rate of 6.25 per cent on the original gain. Once the minimum 30 per cent rate applies to the same $250,000, the tax becomes $75,000, an effective rate of 7.5 per cent on the original gain. This represents a 20 per cent increase in the tax burden notwithstanding that the taxpayer has satisfied every condition Parliament has set for access to the small business concessions.

The distortion between direct and trust ownership of small businesses

73. The effect is more pronounced where the beneficiary would otherwise be taxed below 30 per cent, which is precisely the retirement planning scenario the concessions are intended to serve. It produces an unjustified distortion between two economically identical businesses that differ only in whether the asset is held directly or through a trust. A business held directly by an individual and an identical business held through a discretionary trust, both satisfying the conditions for the small business concessions, would face different effective tax outcomes purely because of the ownership structure. There is no obvious policy justification for that difference given that trusts are common, ordinary small business ownership vehicles.

The turnover threshold increase does not offset the reduction in concession value

74. Treasury may consider that the proposed increase in the small business turnover threshold from $2 million to $10 million compensates for this erosion. That increase does not have the effect Treasury appears to expect. The turnover threshold principally broadens access to only one part of the concession framework. It leaves untouched the $6 million maximum net asset value test that gates access to the retirement exemption and the 15-year exemption. That test has not been adjusted since 2007, a period of nearly 20 years over which property values, goodwill multiples, replacement costs for plant and equipment, and working capital requirements have all increased substantially, while inflation has eroded the real value of the fixed dollar threshold.

75. A commercially successful business operating near the upper end of the new turnover threshold will typically combine valuable goodwill, established customer relationships, a trained workforce, intellectual property, plant and equipment, inventory and working capital so that its enterprise value exceeds $6 million well before its turnover approaches $10 million. This is particularly the case for farming enterprises, primary production businesses, manufacturing and construction businesses, professional practices, transport businesses, and other asset-intensive operations.

76. The turnover threshold increase is largely unrelated to the reduction the proposed minimum tax would cause to the small business concessions, because it operates on a different and less binding constraint than the one that limits access to the regime.

Recommendation

Treasury should not treat the turnover threshold increase as an adequate answer to the reduction in the value of the small business concessions and should ensure that the proposed minimum tax does not reduce the practical value of Division 152 concessions where business assets are held through a discretionary trust, including by considering a corresponding increase to the maximum net asset value threshold.

Rollover relief

77. Treasury proposes expanded rollover relief for three years from 1 July 2027 to assist businesses and others to restructure out of discretionary trusts into companies or fixed trusts without immediate capital gains or other income tax consequences. This relief is a necessary and welcome complement to the proposed measure because many trusts cannot practically restructure without incurring significant commercial cost even once the income tax consequences are removed.

78. A legal restructure from trust to company or fixed trust can give rise to costs beyond those that an income tax rollover addresses: state and territory transfer duty, the need to renegotiate or refinance existing borrowings, assignment or novation of commercial agreements, re-registration or transfer of regulatory licences, and potential disruption to asset protection, existing succession planning and stakeholder relationships. A move to a company forfeits access to the capital gains tax discount, while a move to a fixed trust may not suit families or businesses that genuinely need ongoing flexibility.

79. A rollover removes some income tax consequences but does not eliminate the cost of restructuring. Treasury should not treat rollover relief as a substitute for properly targeting the proposed regime in the first place, which is why the exclusions and safeguards discussed elsewhere in this submission remain necessary even with rollover relief available.

80. The design of rollover concessions requires comprehensive consideration. Simple rollover concessions may accommodate some straightforward restructures, but more complex restructures also require attention. For instance, where a discretionary trust holds shares in a company that is the head company of a tax consolidated group and seeks to apply the transitional CGT rollover relief by transferring the shares to another tax consolidated group or inserting a company in place of the trust, this would result in a deconsolidation under existing laws with significant ramifications and material costs. A concession similar to Subdivisions 615-B or 715-W of the ITAA 1997, enabling the resetting of cost bases to be disregarded in the context of restructures under Subdivision 124-M, would be necessary to avoid punitive outcomes for taxpayers undertaking legitimate structural changes.

The statutory family unit test

81. The Taxation Committee welcomes Treasury's proposal to introduce a new statutory family unit for the ultimate economic ownership test, deeming that test satisfied where the economic interests in the transferee entity are held by the same family unit that controlled the transferor trust. This is a considerably more workable approach than requiring an irrevocable family trust election with ongoing tax consequences as the price of accessing relief.

82. However, the concepts of clearly defined rights and no material discretionary element remain at a high level of abstraction. Without precise statutory content, those concepts risk becoming a fresh source of the same interpretive difficulty that has long affected fixed trust status and could discourage trustees from relying on the rollover.

83. The definitions will need to accommodate the practical diversity of family and trust structures. A family unit may span more than one household or relationship, as arises in blended families or successive partnerships. The transferee arrangement may need to include trusts that serve protective, testamentary, or disability-related purposes alongside the core business or investment assets. Interposed entities such as service trusts or investment vehicles may be shared across more than one family or business group. If the statutory definitions do not address those circumstances, they will either exclude arrangements that the rollover is intended to cover or generate the need for individual rulings.

Recommendation

Treasury should publish exposure draft provisions setting out the statutory family unit, the clearly defined rights test, and the material discretionary element concept, and should allow a further consultation period before the rollover commences.

The all-assets requirement should allow for practical exceptions

84. The Taxation Committee supports the general requirement that all, or essentially all, of a trust's assets be transferred to the new entity. That requirement should, however, accommodate assets whose transfer depends on matters outside the trustee's control: for example, assets subject to a consent or approval obligation that has not yet been satisfied, interests encumbered by restrictions on disposal such as pre-emptive or tag-along rights, rights that are not capable of assignment because they are personal to the current holder, or assets requiring a fresh regulatory licence or registration in the name of the transferee.

Recommendation

A mechanism such as a reasonable endeavours standard or an extended transition period should accommodate assets that cannot practically be transferred, without disqualifying the balance of the restructure from relief.

Family Trust Distribution Tax relief should align with the ultimate economic ownership test

85. The Taxation Committee supports Treasury's proposal to ensure that Family Trust Distribution Tax does not arise merely because a discretionary trust restructures out of trust form under the new rollover. However, Family Trust Distribution Tax currently operates by reference to the existing family group concept in the trust loss provisions under Schedule 2F to the ITAA 1936, while the new rollover is proposed to operate by reference to the new statutory family unit. If those two concepts are not aligned, a transferor could satisfy the ultimate economic ownership test for rollover purposes while still triggering Family Trust Distribution Tax, or the reverse, producing an inconsistent and potentially punitive result.

Recommendation

Treasury should adopt a single, consistent definition of family membership for both the rollover and Family Trust Distribution Tax relief. Alternatively, Family Trust Distribution Tax should be abolished, as the broader operation of the proposed minimum tax would address the concerns it was originally intended to deal with.

The irrevocable election alternative

86. Some stakeholders have suggested, as an alternative to rollover relief, allowing a discretionary trust to make an irrevocable election to be treated and taxed as a fixed trust for all income tax purposes. The Taxation Committee supports further consideration of that alternative, which would allow the trust to remain in place while accepting fixed tax treatment for Commonwealth income tax purposes without requiring a transfer of assets that may attract duty or necessitate refinancing.

87. Irrevocability, however, raises significant trust law concerns. Family and business circumstances inevitably change: beneficiaries may die, separate, lose capacity or come into conflict with one another, and a trustee whose dispositive discretion has been permanently fettered may be unable to respond to those events consistently with its fiduciary obligations. The interaction between an irrevocable election and a trustee's existing powers of amendment, appointment and resettlement also requires further consideration, because a trust deed may never have contemplated a permanent limitation of this kind.

88. If an irrevocable election is adopted, the Taxation Committee recommends three safeguards. First, the legislation should provide a limited mechanism for variation, requiring the approval of the Commissioner or a court in circumstances such as the death or incapacity of a principal beneficiary, the breakdown of a relationship or a material change in the composition of the beneficiary class. Second, Treasury should clarify that a trustee who makes the election in the reasonable belief that it is in the interests of beneficiaries is not, by doing so, exposed to a breach of its fiduciary obligations. Third, the election should permit the interest of a beneficiary to pass under that beneficiary's will, so that the benefit is not extinguished on death.

Existing integrity rules for alternative legal structures

89. Treasury asks whether existing integrity rules are sufficient to address arrangements that substantially preserve discretionary economic outcomes through alternative legal structures. The Taxation Committee considers that existing integrity rules, including Part IVA of the ITAA 1936 and the specific anti-avoidance provisions already present in the trust taxation regime, are sufficient for this purpose provided the minimum tax is itself properly targeted. If the proposed measure is confined to trusts that are genuinely used for income splitting, there is less incentive to develop alternative structures that replicate discretionary outcomes, and the existing general anti-avoidance rule provides adequate protection against artificial arrangements designed to circumvent the minimum tax while preserving its economic benefits.

Excess franking credits should be refundable to the trustee

90. Treasury's Consultation Paper identifies two options for excess franking credits arising after a trustee has applied its franking credits against its income tax liability, including any minimum tax liability: refunding the excess to the trustee, or allowing it to be carried forward against future liabilities. The Taxation Committee favours refunding, for the following reasons.

91. Refunding is consistent with the treatment that already applies under the imputation system and avoids the need for a separate credit regime applying only to discretionary trusts subject to the minimum tax.

92. A carry-forward model, by contrast, would require trustees to maintain credit ledgers across multiple income years and to trace each credit to the beneficiary whose distribution gave rise to the minimum tax. Changes in trustee, changes in the beneficiary class and vesting events would all complicate that exercise. The model would also require additional integrity provisions to prevent credits generated by one beneficiary's distribution from being used to reduce tax on another beneficiary's income in a later year, and it would leave unresolved the treatment of carried-forward credits for trust law purposes, including whether they affect the calculation of trust income under the deed.

93. The carry-forward model also assumes that the credit would be capable of being offset against income in a later year. However, if the pattern of distributions continues year on year, the result would be a trust with material unused credits at vesting. The carry-forward option also leaves the trustee with a cash flow difficulty, in that the amount distributed for tax purposes would be materially greater than the available cash in the hands of the trustee.

94. If a carry-forward model is nevertheless adopted, the Taxation Committee recommends that credits be refunded after a fixed period (for example, three or five years) and that Treasury prescribe standardised tracing rules so that trustees are not required to develop bespoke record-keeping systems.

Recommendation

Excess franking credits should be refunded to the trustee rather than carried forward. If a carry-forward model is adopted, it should be subject to a capped period and clear tracing rules.

Collection mechanisms should be proportionate

95. The Taxation Committee recognises the need for effective collection mechanisms, particularly where a corporate trustee holds few assets of its own. However, the proposal to make directors of corporate trustees jointly and severally liable for the minimum tax is a significant departure from the ordinary principle of limited liability and requires careful targeting.

96. Corporate trustees are commonly used for entirely legitimate asset protection and succession planning purposes, often with family members, independent professional directors and other advisers who may have limited practical control over, or knowledge of, a particular year's distribution decisions. Imposing personal liability on all directors regardless of their involvement risks deterring suitable people from acting as directors of corporate trustees.

Recommendation

Any director liability should adopt the procedural framework of the director penalty notice provisions in Division 269 of Schedule 1 to the TAA. Under that framework, the Commissioner should first issue a written notice specifying the unpaid amount and allow the director a defined period to cause the liability to be discharged. Personal liability should arise only where a director who was in office at the relevant time has not taken all reasonable steps to secure payment, and a director who was not in office when the obligation fell due should not be exposed to the penalty.

Timing and notification of collection

97. The Taxation Committee raises a concern about the timing of collection, including any proposal to collect the minimum tax through pay as you go instalments. In practice, the full extent of a beneficiary's entitlement, and therefore the trustee's minimum tax liability, is often not known until shortly before the trust's lodgment date, when the trustee determines each beneficiary's share of trust income for the year. Requiring in-year instalments based on earlier estimates could produce significant under- or over-payments that do not reflect the trustee's actual liability and create unnecessary compliance costs and cash flow difficulties.

98. The Taxation Committee recommends that notification arrangements should be designed to minimise compliance costs while ensuring that both trustees and beneficiaries have clear and timely information about their respective obligations. Existing trustee reporting obligations should be used where possible, rather than creating duplicative notification requirements. Any notification framework should allow sufficient time for trustees to calculate and verify entitlements before reporting to beneficiaries.

Recommendation

Any instalment or early collection mechanism should be designed around the practical timing of trustee decision-making, rather than assuming a trustee's ultimate liability can be reliably estimated earlier in the income year. Notification arrangements should draw on existing reporting obligations and allow adequate time for calculation and verification.

The interaction between the minimum tax and Division 7A

99. The High Court's decision in *Bendel*, decided on 10 June 2026, confirmed that a corporate beneficiary's unpaid present entitlement to trust income is not a loan for the purposes of Division 7A of the ITAA 1936, contrary to the Australian Taxation Office's longstanding administrative position. The ATO's decision impact statement confirms that no Division 7A loan arises merely because a private company beneficiary does nothing in respect of its entitlement to trust income.

100. Treasury's Consultation Paper notes that there is an announced but unenacted measure from the 2018–19 Budget that would bring unpaid present entitlements within Division 7A, on which Treasury is separately seeking feedback. The Taxation Committee considers that the interaction between that measure and the proposed minimum tax on discretionary trusts is significant enough that the two should be designed together, rather than developed as separate measures in isolation.

101. If a corporate beneficiary's unpaid present entitlement is treated as an unfranked deemed dividend under a revived Division 7A measure, while the same beneficiary is unable to access any offset for the minimum tax already paid by the trustee on the underlying income, the combined burden on a single stream of trust income could reach a level that is disproportionate to the policy objectives of either measure considered alone.

Recommendation

Treasury should clarify the intended ordering and interaction between the minimum tax offset rules for corporate beneficiaries and any revived Division 7A unpaid present entitlement measure, consult on transitional arrangements for unpaid present entitlements that exist at the commencement of either measure, and ensure that the combined effect of the two measures does not produce an aggregate tax outcome disproportionate to the policy concerns each measure separately seeks to address.

Family Trust Distribution Tax should be repealed or substantially reformed

102. The Government introduced in 1995 a regime including Family Trust Distribution Tax under Schedule 2F to the ITAA 1936 as a means to discourage trust loss trading and franking credit streaming. At the time, the Government expressed the hope that no tax would ever be collected under these provisions. At the same time, it was recognised that the provisions imposed additional administrative burdens on the system and taxpayers.

103. The proposed changes in this reform would effectively address the risks that Family Trust Distribution Tax was originally directed at, through the broad operation of the minimum tax and the limits on passing franking credits from trusts through companies. The protections provided to the system through the Family Trust Distribution Tax regime have therefore become redundant. The Taxation Committee submits that the provisions should be repealed, removing the added costs from the broader system with no material detriment.

104. This would also assist in providing appropriate rollovers, which would otherwise require further complexity in those arrangements.

105. If the Government is not prepared to repeal these provisions, the Taxation Committee submits that at a minimum the reform package should include the recommendations set out in the Taxation Committee's submission of 5 June 2026. Those recommendations may be summarised as follows:

    (a) Introduction of a statutory time limit and assessment regime. The Taxation Committee recommended that Family Trust Distribution Tax be brought within a formal assessment regime, subject to a four-year amendment window consistent with section 170 of the ITAA 1936, aligning it with the standard limitation period applicable to income tax assessments generally.

    (b) Greater flexibility to make, amend and revoke family trust elections and interposed entity elections. The Taxation Committee recommended reforms to permit elections under sections 272–80 and 272–85 of Schedule 2F to be varied, revoked, or made retrospectively in a wider range of circumstances than currently allowed, including the death of a specified individual, arm's-length sale of an entity, relationship breakdowns, administrative errors, and testamentary trusts unable to satisfy the family control test.

    (c) Introduction of a Commissioner's discretion. The Taxation Committee recommended that the Commissioner be given a statutory power, drawing on the model in section 109RB of the ITAA 1936 (which allows the Commissioner to disregard a deemed dividend under Division 7A in appropriate cases), to treat an election as valid or to reduce a Family Trust Distribution Tax liability where the liability arose from an honest mistake or inadvertent omission and no underlying tax avoidance purpose was present.

(d) Interim moratorium on ATO compliance activity. Pending implementation of the above legislative reforms, the Taxation Committee recommends a legislative moratorium on ATO compliance activity in relation to Family Trust Distribution Tax.

Recommendation

Family Trust Distribution Tax under Schedule 2F to the ITAA 1936 should be repealed, as the proposed minimum tax would achieve the same policy intent. Alternatively, at a minimum, the amendments recommended in the Taxation Committee's submission of 5 June 2026 should be implemented as part of this reform package.

Conclusion

106. The Taxation Committee supports appropriately designed measures to address the diversion of income through discretionary trusts to lower-rate beneficiaries. However, the Taxation Committee considers that the proposed minimum 30 per cent tax on discretionary trusts is too broad in its current form.

107. The proposed measure proceeds from assumptions that do not hold for many ordinary trust arrangements: that a higher-rate taxpayer always stands behind the trust, that beneficiaries form a single economic family unit, that the fixed trust concept is a reliable test of scope, that testamentary trusts and corporate beneficiaries can be managed through narrow mechanical rules, and that a turnover threshold increase can offset a material reduction in the value of the small business concessions.

108. The Taxation Committee's principal positions may be summarised as follows:

- The proposed regime should not assume that all discretionary trusts involve a higher-rate taxpayer or a single economic family unit. The minimum 30 per cent rate should be disapplied where the nominated person under a family trust election is not taxed above 30 per cent.
- The fixed trust concept should not be the sole test for determining scope. Employee share trusts, managed funds, other managed investment structures, and commercial trusts should be expressly addressed, and administrative guidance should not be used as a substitute for legislative certainty.
- Testamentary and estate planning trusts require a broader exclusion covering interests that are contingent, conditional, successive, or defeasible in character, and extending to replacement assets and reinvested estate property. Wills executed before Budget night should be grandfathered even if the trust does not come into existence until later.
- Corporate beneficiaries should receive proper non-refundable credit recognition for tax paid by trustees, to avoid double taxation or an effective rate materially exceeding 30 per cent.
- Small business CGT concessions in Division 152 of the ITAA 1997 and grandfathered capital gains should be preserved in substance. The unindexed $6 million maximum net asset value test remains the binding constraint for most small businesses.

- Income tax-exempt entities and charities should not suffer an irrecoverable tax cost.
- The Government's commitment to double philanthropy by 2030 requires that the minimum tax design include a pre-tax exclusion, refundable offset or at minimum a deduction for distributions to income tax-exempt entities, and the DGR framework should be reformed so that it does not operate as an arbitrary barrier.
- Existing cross-border trust taxation settings should be preserved. Distributions to non-resident beneficiaries already subject to withholding tax or trustee assessment should be excluded from the minimum tax, and distributions by non-resident trusts to Australian resident beneficiaries should be addressed through direct assessment of the resident beneficiary.
- Rollover relief and collection mechanisms require precise legislative design, including clear statutory definitions of the family unit concept, the clearly defined rights test, and the material discretionary element concept. Excess franking credits should be refunded to trustees rather than carried forward, and any director liability should follow the procedural framework of the existing director penalty notice provisions.
- Family Trust Distribution Tax under Schedule 2F to the ITAA 1936 should be repealed or substantially reformed.
- The interaction with Division 7A and the decision in *Bendel* should be resolved before commencement.

109. The Taxation Committee considers that the measure should be directed squarely at the identified mischief—being the use of a trust to divert income away from a higher-rate taxpayer to lower-rate beneficiaries within a family group and should not impose a minimum tax rate on ordinary commercial, succession, employee equity, managed investment, estate planning and small business arrangements merely because a trust does not satisfy the technical and narrow definition of a fixed trust. The final legislation should be clearly drafted and confined to the mischief identified.

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