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Ms Diane Brown
Deputy Secretary, Revenue Group
The Treasury
Langton Crescent
PARKES ACT 2600

Email: mintaxtrusts@treasury.gov.au

31 July 2026

Dear Diane

Minimum tax on discretionary trusts

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 176,000 members in over 100 countries and regions. Many of our members in public practice advise the small and family businesses that are the practical focus of this measure. We make this submission in response to the Treasury's **Minimum tax on discretionary trusts** on behalf of our members and in the broader public interest.

We appreciate that Treasury is consulting on design and implementation ahead of exposure draft legislation, and we make this submission in that constructive spirit.

CPA Australia understands the policy objective underpinning the minimum tax: addressing the concern that discretionary trusts allow lower tax rates to achieved through 'income splitting'. Our comments in the attached detailed submission are directed at design, proportionality and implementation.

We encourage Treasury to test each element of the final design against the established principles of good tax policy: equity, efficiency, simplicity, certainty and low compliance cost. A measure that is fair in intent but complex in operation will not deliver fair outcomes in practice. Several elements of the current design — the proposed requirements to perform an actual or a fictional restructure in particular — risk failing the simplicity and certainty tests in their current form, and we address these below.

We also note the Treasurer's stated productivity and red tape reduction agenda. This reform will be a practical test of that agenda: a measure affecting hundreds of thousands of small businesses that adds net compliance burden, or that forces costly restructuring without removing the frictions that make restructuring costly, would work against the Government's own productivity objectives. We encourage Treasury to weigh every design choice in this consultation against that broader agenda, not only against revenue integrity.

Discretionary trusts have been a legitimate and widely used structure for family businesses and investors for more than eighty years, and there was no indication before the Budget that they would be a target of reform. Advisers established these structures for clients in good faith, on the law as it stood, and members report that many of those clients now feel the ground has shifted beneath them — a perception compounded by the capital gains tax and negative gearing changes announced at the same time. Retrospective effect on arrangements entered into in good faith erodes the certainty on which a self-assessment system depends. While certainty already unsettled cannot be fully restored, the measure should provide appropriate transitional protection — so that taxpayers who acted reasonably on the law as it stood are not disadvantaged.

Our detailed submission with recommendations is attached.

If you have any queries, please contact Jenny Wong, Tax Policy Lead at jenny.wong@cpaaustralia.com.au.

Yours sincerely,

Elinor Kasapidis
Chief of Policy, Standards and External Affairs

Jenny Wong
Tax Policy Lead

Attachment:
Minimum tax on discretionary trusts – consultation paper, CPA Australia — submission to Treasury July 2026

Minimum tax on discretionary trusts – consultation paper

CPA Australia — submission to Treasury
July 2026

Executive summary

CPA Australia acknowledges the integrity objective behind the minimum tax — that discretionary trust income should not be taxed more lightly than comparable income earned directly. This submission is therefore made in a constructive spirit, directed at design, proportionality and implementation rather than at the policy intent.

Our central concern is proportionality. On Treasury's own figures, around 15 per cent of active small businesses operate through a discretionary trust, and the overwhelming majority are small, family-run operations without in-house tax capability. A measure aimed at aggressive income splitting is, as currently designed, reaching a far broader population, and doing so through mechanics requiring an actual or a fictional restructure that risk failing the simplicity and certainty tests on which a self-assessment system depends.

The most effective response is to reduce the need for restructuring rather than to subsidise it. We set out a staged architecture, in order of preference:

- **Exempt the trusts where no mischief arises.** A single-beneficiary election (Recommendation 1) removes from scope trusts that distribute wholly to one beneficiary, where no income splitting is possible. It is targeted, self-assessable and triggers no CGT or duty event. It would operate in addition to the exclusions already announced, such as for testamentary trusts, and the further categories identified in this submission, such as child maintenance trusts.
- **Reduce any minimum tax from 30 to 25 per cent.** If a minimum tax is nonetheless retained, the rate on active business income should be the base rate entity rate of 25 per cent, not 30 per cent (Recommendation 2), to align with the relevant company rate the measure is meant to mirror.
- **Make a genuine restructure affordable.** Income tax rollover is welcome but addresses only one cost, and generally is not the largest cost. State transfer duty is the binding constraint. For example, a trust holding real property in Victoria, the duty alone can exceed the entire cost of the restructure. The Commonwealth should secure matching state duty relief and, failing that, confirm deductibility of restructuring costs within its own control (Recommendation 3).
- **Treat deemed and elective models as second-best.** Where a genuine restructure remains blocked, an elective fixed trust, or a deemed-corporate model may assist (Recommendations 4 to 6). However, each embeds a legal fiction that accumulates interpretive problems over time, with the family trust election regime as the cautionary precedent. None should be settled without a further, dedicated consultation.

Appendices B and C set out the potential impacts of the measure, drawing on CPA Australia's own costing and the experience of members advising affected families and entities. A restructure is a substantial, multi-disciplinary project rather than a form-filling exercise.

Our analysis estimates the cost of restructuring between $9,500 to $23,400, excluding any state duties, with these costs being largely fixed. The income tax rollover the consultation paper offers covers only the easiest part of the job. Based on ATO data, around 350,000 discretionary trusts are carrying on a business. This represents a substantial number of businesses that will require tailored tax and legal advice, and we are concerned the profession lacks the capacity to support a large-scale restructuring program within the proposed timeframe. The challenge is compounded by the fact that much of this work is likely to be concentrated around 30 June each year, rather than spread evenly across the transition period. The burden of these changes will fall primarily on ordinary families and small business owners who arranged their affairs in good faith under the existing law

Several design settings must also be corrected for the measure to operate as the 30 per cent floor it is described to be, rather than the harsher outcome it currently delivers. On Treasury's own cameo, a beneficiary on $200,000 faces an effective rate of 32 per cent because the offset cannot reach the

Medicare levy, cannot be refunded and cannot be carried forward. We recommend a self-assessable statutory definition of "discretionary trust" (Recommendation 7); exclusion of exempt beneficiaries' entitlements from the minimum tax base, extending to all Division 50 entities (Recommendation 8); refundability of excess franking credits to exempt beneficiaries and trustees (Recommendation 11); a genuinely 30 per cent offset that is usable, refundable and able to be carried forward (Recommendation 9); a workable rollover and family-unit design that also carries deferred gains through the restructure (Recommendation 10); and collection integrated with the existing lodgement cycle (Recommendation 12).

Finally, the measure cannot be designed in isolation from the revised 2018–19 Budget measure and the High Court's decision in Bendel. We recommend the Government reconsider the ongoing role of the unpaid present entitlement framework in light of the minimum tax (Recommendation 13); accept Bendel as the law for past years without retrospective recharacterisation (Recommendation 14); and provide a statutory safe harbour for taxpayers who complied with the ATO's superseded guidance (Recommendation 15).

In addition, Treasury should use this reform as the opportunity to remedy the disproportionate family trust distribution tax outcomes the profession has separately raised in the Joint Bodies' submission of 6 May 2026 and CPA Australia's submission on the Family Trust Election provisions on 16 July 2025, rather than compounding them.

As a matter of process, we ask that Treasury commit to a further round of consultation on exposure draft legislation before the design is settled.

Summary of recommendations

Recommendation 1: Introduce a single-beneficiary election under which a discretionary trust is not subject to the minimum tax for any income year in which the whole of its net income is distributed, or made presently entitled, to a single beneficiary. This reflects that no income splitting, and therefore no mischief, arises where there is a sole entitlement. The election should be tested annually (requiring no irrevocable status or deemed characterisation), should permit substitution of the nominated beneficiary on death, loss of capacity or relationship breakdown, and should not be defeated by genuine arm's-length remuneration for work performed. As nothing is transferred and the trust remains discretionary at law, the election involves no CGT event, no state transfer or landholder duty consequence and no need to amend contracts and leases.

Recommendation 2: If a broad minimum tax is retained rather than a more targeted rule, the rate applying to active business income within scope should be calibrated to the base rate entity rate (currently 25 per cent) rather than 30 per cent, to restore proportionality with the company-rate outcomes the measure is intended to equalise.

Recommendation 3: The Commonwealth should coordinate with state and territory governments to secure matching transfer duty relief for restructures undertaken using the Commonwealth rollover, before the legislation is finalised. Without this, the transitional relief will not achieve its stated purpose for a large share of the affected population.

Recommendation 4: CPA Australia is open to Treasury developing the elective fixed trust model as a genuine alternative to physical restructuring. However, the income tax, trust law and state tax consequences identified in this submission, including the cost base on the deeming event, the interaction with tax consolidation, and the mechanics for death, incapacity, relationship breakdown and succession, remain unresolved, and several are not addressed in the consultation paper at all. Given the complexity of this option (see Appendix D), Treasury should release a further, dedicated consultation paper setting out the detailed design of the model, and consult on it specifically, before the design is settled and before exposure draft legislation is released.

Recommendation 5: If Treasury develops any deemed or elective entity characterisation model, it should:

a) confine the fiction to the narrowest set of provisions necessary, for example, applying it only to existing discretionary trusts with income and assets over a certain threshold
b) specify the full set of consequences at election time
c) consider bounded revocability; and
d) explicitly test the design against the lessons of the family trust election regime.

Recommendation 6: We recommend Treasury give further consideration to a distribution-based mechanism alongside the elective fixed trust model.

Recommendation 7: Define "discretionary trust" by positive statutory criteria directed at the substantive capacity to redirect economic benefits between beneficiaries, disregarding unexercised administrative powers, and legislate safe harbours (drawing on PCG 2016/16) so that classification is self-assessable rather than dependent on the Commissioner's discretion.

Recommendation 8: The share of net income to which an income tax-exempt beneficiary is presently entitled should be excluded from the trustee's minimum tax base — covering all entities exempt under Division 50, both endorsed charities and entities exempt by operation of law, including government and statutory authorities under section 50-25 — so that the exemption is preserved without requiring the entity to fund the tax and then claim it back.

Recommendation 9: The minimum tax offset should:

a) be able to be applied against the Medicare levy, or the design otherwise adjusted so the effective floor is genuinely 30 per cent
b) be able to be carried forward by beneficiaries; and
c) not be extinguished where the beneficiary is itself a trust, with residual issues (such as wind-ups) addressed through targeted refundability.

Recommendation 10: Publish the statutory family unit definitions with the exposure draft; provide proportionate rollover relief where specific assets cannot legally or commercially be transferred; ensure the rollover applies to gains deferred on the 1 July 2027 deemed disposal, not only to post-1 July 2027 gains, through a CGT event J1-style deferral that realises the gain only on a later disposal by (or the family-group exit of) the recipient entity, with any accrued CGT discount preserved even on a rollover into a company; confirm the deductibility of restructuring costs and the preservation of accumulated tax losses through the rollover; and legislate the ability to extend the three-year window by instrument, with ATO guidance in place before the window opens; and make the rollover available for the transfer of trust assets to existing beneficiaries in their personal capacity, not only for entity-to-entity restructures, and not confined to trusts carrying on a business, provided economic ownership remains within the family group.

Recommendation 11: Excess franking credits should be refundable to the trustee. If a carry-forward model is nonetheless adopted, it should be uncapped and untimed, with refundability preserved at least on the vesting or wind-up of the trust.

Recommendation 12: Align beneficiary notification with the existing distribution statement and lodgement cycle rather than creating new reporting events; adopt PAYG instalments, if at all, on a GDP-adjusted and penalty-free-variation basis commencing no earlier than the measure's second year; exclude minimum-taxed trust distributions from affected beneficiaries' PAYG instalment income to prevent double instalments on the same amount, with any residual liability above the 30 per cent trustee rate collected through the beneficiary's return; and legislate director penalty notice-equivalent safeguards before any joint and several director liability applies.

Recommendation 13: The ongoing role of the UPE compliance legislative framework for future years should be carefully reconsidered (see our response to Question 17).

Recommendation 14: The Government should accept the High Court's decision in *Bendel* as the law for past income years and formally confirm that historical UPEs up to 30 June 2026 will not be retrospectively recharacterised as Division 7A loans.

Recommendation 15: The Government should also consider introducing an express statutory safe harbour to allow taxpayers who entered into complying loan agreements in reliance on previous legally incorrect ATO guidance to unwind or terminate those arrangements without triggering deemed unfranked dividends under section 109F for forgiveness of debt. Taxpayers who acted in good faith and sought to comply with ATO administrative guidance that has since been found by the High Court in *Bendel* to be inconsistent with the law should not be disadvantaged for having done so.

Detailed submission

CPA Australia provides this submission in response to Treasury's consultation paper on the minimum tax on discretionary trusts. We make this submission in a constructive spirit, seeking to ensure that any reforms achieve their policy objectives without imposing unnecessary costs, complexity or unintended consequences on Australian businesses and families.

CPA Australia has more than 176,000 members working in commerce, industry, public practice, government and academia across Australia and internationally. Many of our members in public practice advise the small and family businesses that are the practical focus of this measure.

CPA Australia understands the policy objective underpinning the minimum tax: addressing the concern that discretionary trusts allow lower tax rates to achieved through 'income splitting'. Our comments below are directed at design, proportionality and implementation.

We encourage Treasury to test each element of the final design against the established principles of good tax policy: equity, efficiency, simplicity, certainty and low compliance cost. A measure that is fair in intent but complex in operation will not deliver fair outcomes in practice. Several elements of the current design, particularly the proposed requirements to perform an actual or a fictional restructure, risk failing the simplicity and certainty tests in their current form. We address these below.

We also note the Treasurer's stated productivity and red tape reduction agenda. This reform will be a practical test of that agenda. A measure affecting hundreds of thousands of small businesses that adds net compliance burden, or that forces costly restructuring without removing the frictions that make restructuring costly, would work against the Government's own productivity objectives. We encourage Treasury to weigh every design choice in this consultation against that broader agenda, not only against revenue integrity.

Discretionary trusts have been a legitimate and widely used structure for family businesses and investors for more than 80 years, and there was no indication before the Budget that they would be a target of reform. Advisers established these structures for clients in good faith, on the law as it stood, and members report that many of those clients now feel the ground has shifted beneath them; a perception compounded by the capital gains tax and negative gearing changes announced at the same time. Retrospective effect on arrangements entered into in good faith erodes the certainty on which a self-assessment system depends. While certainty already unsettled cannot be fully restored, the measure should provide appropriate transitional protection, so that taxpayers who acted reasonably on the law as it stood are not disadvantaged.

The rules must be comprehensible and administrable for small businesses

The consultation paper indicate that less than 15 per cent of active small businesses operate through a discretionary trust structure. While this is a minority, it remains a substantial population of businesses, with the overwhelming majority being small, family-run operations without in-house tax capability and, in many cases, without a significant advisory budget.

The incidence of the measure warrants closer scrutiny. On the Government's figures set out in the Budget Tax explainer – Minimum tax on discretionary trusts, of the approximately 350,000 small businesses that operate through a discretionary trust, around 140,000 are not expected to pay any additional tax or to restructure in a given year, leaving around 210,000 potentially affected. The ATO's 2023–24 statistics show these to be modest enterprises: discretionary trusts carrying on a business had average net income of about $154,000 (around $176,000 among those reporting net income), well

short of the $200,000 to $300,000 investment and professional structures used to illustrate the measure in the Budget Tax Explainer.[1]

CPA Australia's concern is not with the objective of addressing artificial income splitting, but with the bluntness of the instrument. A single 30 per cent floor applies identically to a trust that distributes genuinely-earned profit among family members who work in the business and to one that allocates passive income to relatives with no role in it; the measure does not distinguish them. A blanket minimum tax, and the compliance and restructuring burden that comes with it, is a disproportionate response to an average benefit of some four percentage points, and it falls hardest on the smallest businesses least able to absorb the cost (see Appendix B).

The more proportionate course is to target the arrangements that produce the mischief directly, through the single-beneficiary election and genuine-remuneration carve-out, rather than imposing the requirement to pay a minimum tax on the whole population, relying on carve-outs, wages and restructures to relieve the cases that should never have been caught.

The design should therefore be assessed not against what a well-advised corporate group can comply with, but against what a family business with a part-time bookkeeper and an annual visit to their accountant can understand and administer.

A single-beneficiary election

For the large population of simple family trusts, the most direct way to give effect to the measure's purpose is to exempt the cases in which the mischief cannot arise. Where a trust distributes the whole of its net income to a single beneficiary in an income year, there is no income splitting: the income is taxed in full at that beneficiary's marginal rates, exactly as if it had been derived directly. There is no reduction in progressivity to correct, and so no principled basis for imposing a minimum tax. CPA Australia recommends that a trust be able to elect out of the minimum tax for any year in which its income is distributed to a single beneficiary.

This is a better answer than both the restructure pathway and the deemed fixed or corporate models. Nothing is transferred, so there is no CGT event, no need to amend contracts and leases, and critically, no state transfer duty or landholder duty event, avoiding the very cost that erodes the value of the Commonwealth rollover (Recommendation 3). The trust remains a discretionary trust at law, so there is no divergence between legal form and tax treatment, and none of the accumulating interpretive problems that a deemed fixed or corporate characterisation would create (Recommendations 4 to 6). It requires no second entity, no franking machinery and no Division 7A analogue, and it imposes no compliance cost beyond making the election. For the family business that simply distributes to a single working proprietor, it removes the measure altogether.

The election should be designed so that ordinary life events do not defeat it:

- **Tested annually.** Whether the exemption applies is determined year by year, on the income actually distributed. A trust that distributes to more than one beneficiary in a later year simply falls within the minimum tax for that year. There is no irrevocable status, no lock-in and no deemed characterisation, which is what distinguishes this option from the elective fixed trust model.
- **Substitution on death and other events.** The death, loss of capacity or relationship breakdown of the sole beneficiary must not force the trust into the minimum tax or a restructure. The election should allow the nominated beneficiary's entitlement to pass to their estate, or to a substitute beneficiary, on these defined events without loss of the exemption. A single-beneficiary structure has to be able to survive the death of that beneficiary. As the substitution responds to a genuine

[1] Budget 2026–27, Minimum tax on discretionary trusts; ATO Taxation statistics 2023–24, Trusts Table 4.

life event rather than a discretionary reallocation, it does not reintroduce the splitting the measure targets.

- **Genuine remuneration unaffected.** The election concerns the discretionary distribution of trust income. Arm's-length remuneration paid to a family member for work actually performed is a separate matter, governed by existing rules, and should not of itself disqualify a trust from making the election.

Recommendation 1: Introduce a single-beneficiary election under which a discretionary trust is not subject to the minimum tax for any income year in which the whole of its net income is distributed, or made presently entitled, to a single beneficiary; reflecting that no income splitting, and therefore no mischief, arises where there is a sole entitlement. The election should be tested annually (requiring no irrevocable status or deemed characterisation), should permit substitution of the nominated beneficiary on death, loss of capacity or relationship breakdown, and should not be defeated by genuine arm's-length remuneration for work performed. As nothing is transferred and the trust remains discretionary at law, the election involves no CGT event, no need to amend contracts and leases, and no state transfer or landholder duty consequence.

Reduce trust minimum tax from 30 per cent to 25 per cent

The incidence data above shows the measure reaching well beyond the cohort associated with aggressive income splitting. If, notwithstanding the more targeted single-beneficiary election in Recommendation 1, a broad minimum tax is retained across the discretionary trust population, its rate should be calibrated to the outcomes it is intended to equalise. For the active business income that predominates in the affected population, the natural comparator is the company rate: the base rate entity rate of 25 per cent, rather than 30 per cent, is the proportionate benchmark. We distinguish active business income deliberately; for purely passive income splitting, the wage-earner comparator the measure invokes may support a higher rate, but for the operating businesses that make up most of the affected population the company-rate comparator is the appropriate one. A 25 per cent rate would materially reduce the over-reach on small businesses while preserving the measure's integrity purpose against genuine income splitting, which can be addressed separately.

Recommendation 2: If a broad minimum tax is retained rather than a more targeted rule, the rate applying to active business income within scope should be calibrated to the base rate entity rate (currently 25 per cent) rather than 30 per cent, to restore proportionality with the company-rate outcomes the measure is intended to equalise.

Restructuring concerns - non-income-tax costs remain unaddressed

Before turning to those costs, it is worth stating the shape of the problem plainly. Where a business must respond to this measure, the structure it would generally prefer is a genuine company; a well-understood vehicle with the corporate rate, dividend imputation and a straightforward means of retaining working capital, not a deemed or elective substitute. The elective and deemed-entity models examined later in this submission exist only because that preferred outcome is, for many businesses, blocked. It is not blocked by income tax, which the proposed rollover largely addresses; it is blocked by state duty, costs associated with amending contracts and leases, and by the cost of restructuring advice.

The most effective response therefore has three parts, in order:

1. exempt the trusts where no income splitting arises, so they never need to move (Recommendation 1)
2. For those that remain, make a genuine restructure affordable, through coordinated duty relief and, failing that, deductibility of the costs of restructuring (Recommendation 3); and

3. only where neither is achievable, provide the elective and deemed alternatives (Recommendations 4 to 6), which are second-best to the above alternatives.

The rollover relief proposed in the paper is genuinely welcome, and broader than the Small Business Restructure Rollover on which it is modelled. However, income tax rollover relief addresses only one of the costs of restructuring, and in many cases not the largest one. The consultation paper does not address:

- **State and territory transfer (stamp) duty.** A restructure that is tax-neutral at the Commonwealth level can still trigger a substantial state duty liability, and the outcome varies significantly by jurisdiction. In the absence of coordinated relief, the practical value of the Commonwealth rollover is heavily eroded for many businesses, and eroded unevenly depending on where the business happens to be located.
- **Non-tax transaction costs.** A change of legal entity typically requires the novation or amendment of leases, employment agreements, supply contracts, financing arrangements and licences. These processes carry real legal cost, take time, create uncertainty with counterparties and staff, and elevate the risk of commercial disputes. The all-or-nothing design of the rollover; requiring essentially all trust assets to move in a single transaction, compounds this.

Income tax rollover relief addresses none of these costs. CPA Australia's compliance cost analysis estimates the cost of advice to restructure from a trust to a company restructure, before any state duty, between **approximately $9,536–$23,436** (see Appendix B for further details). That figure is a one-off cost only in theory. Members report that the original trust frequently cannot be wound up immediately; existing entitlements, unpaid present entitlements and beneficiary loan accounts often prevent it, so a business runs both the new structure and the legacy trust for a period, incurring duplicated compliance cost beyond the one-off figure (Appendix C).

Applied to a central take-up scenario of 105,000 businesses restructuring within the three-year window, the national fixed compliance cost is approximately $1.0 to $2.5 billion before state duty is added (it should be noted that all businesses run through a discretionary trust will require advice on whether they should restructure, so this estimate is on the low-side. A transitional cost of that order warrants formal regulatory impact analysis of the restructuring pathway itself, not only of the measure's ongoing compliance obligations, and reinforces the case for both coordinated duty relief (Recommendation 3) and the elective alternative that avoids physical restructuring altogether (Recommendation 4). The costs are also largely fixed while the benefit of restructuring scales with the tax otherwise payable, meaning the restructuring pathway is least viable for precisely the smaller businesses the transitional relief is meant to assist.

The concentration of that duty burden is best illustrated by member experience. In one completed restructure reported to CPA Australia, the operating business was moved to a company for approximately $22,000 because it held no land, while the related entity holding the group's real property faces Victorian duty of more than $600,000 on the same exercise (Appendix D). The duty does not fall on the trading business; it falls on the property-holding entity, and it can exceed the entire cost of the restructure, and in some cases the tax the restructure was intended to avoid.

Recommendation 3: The Commonwealth should coordinate with state and territory governments to secure matching transfer duty relief for restructures undertaken using the Commonwealth rollover, before the legislation is finalised. Without this, the transitional relief will not achieve its stated purpose for a large share of the affected population.

Where duty relief cannot be secured, the Commonwealth should provide the relief within its own control

Coordinated duty relief is the first-best response, and we urge the Commonwealth to pursue it. However, duty is a state impost, and the Commonwealth cannot legislate it away. If matching relief cannot be secured, it does not follow that nothing can be done. Two responses remain available:

- reducing the cost of restructuring through the income tax system for those who want to restructure into a corporate structure
    - reducing the need to restructure at all.

The first is entirely within the Commonwealth's control. The income tax treatment of the professional, legal, valuation and state-based transfer duty costs of a restructure is not addressed in the consultation paper. Those costs are presently likely to be capital in nature, with relief available if at all under section 40-880 over five years, and their treatment is uncertain where the transferor trust ceases to carry on the business. Where a business restructures in response to a legislative change rather than for a commercial purpose of its own, those costs should be deductible, and the position should be confirmed in the legislation rather than left to the operation of section 40-880 or general capital principles.

If a state and territory solution cannot be secured, an elective model should be considered for income tax purposes

If coordinated duty relief cannot be achieved, the case strengthens for approaches that reduce the need for physical restructuring at all. The consultation paper itself canvasses one such approach: allowing an existing discretionary trust to make an irrevocable election to be treated and taxed as a fixed trust for income tax purposes ("Alternative approaches"; discussion question 8).

CPA Australia considers this direction worth developing, because it addresses the transition problem at its source: no transfer of assets means no duty event, no novation of contracts, and no all-or-nothing asset test. However, an elective model raises significant design questions and potential complexity that must be worked through before it could be recommended:

- **Income tax issues.** The consequences of the election need to be fully specified: the treatment of existing carried-forward losses and the trust loss rules, CGT consequences (if any) of the deemed change of character, the position of existing unpaid present entitlements at the election date, and how the fixed entitlements are to be determined and evidenced for beneficiaries whose interests were previously discretionary.
- **Trust law issues.** An income tax election cannot itself alter the trust deed. A trust that is discretionary as a matter of trust law but fixed for tax purposes creates a divergence between legal form and tax treatment that trustees must administer, and raises questions about trustees' duties where the deed confers discretions the tax election effectively requires them not to exercise. Treasury should seek trust law advice under this proposal to determine if deed amendment may be required, causing a resettlement risk and cost. It would be a perverse outcome if an election designed to avoid duty-triggering restructures itself triggered duty in some states due to the resettlement risk.
- **Cost base on the deeming event.** Where interests become fixed, the absence of a cost base for those interests, and any trapped tax-deferred or CGT-discount components, can crystallise gains when amounts are later distributed. The model should deem a cost base for the fixed interests equal to the underlying net components (including tax-deferred and discount amounts) at the election date, so that the election does not itself create a latent CGT liability.
- **Interaction with tax consolidation.** Pairing a deemed fixed trust with a corporate beneficiary can, on some designs, draw small groups into the tax consolidation regime, an outcome many smaller practices avoid because of its complexity and error rate. The model should provide grouping relief that does not compel consolidation.
- **Cornerstone events and the meaning of "fixed."** At general law, a trust that retains a power of amendment is not a fixed trust, and whether a discretionary trust can distribute to a deceased beneficiary's estate depends on the terms of the deed. A workable model therefore needs both a statutory fixed-trust deeming for income tax purposes that does not depend on the general law

test, and express mechanics for death, incapacity, relationship breakdown and succession, including whether and how a fixed interest may pass through an estate or be re-nominated, so that ordinary life events do not fracture the structure.

Recommendation 4: CPA Australia is open to Treasury developing the elective fixed trust model as a genuine alternative to physical restructuring. However, the income tax, trust law and state tax consequences identified above, including the cost base on the deeming event, the interaction with tax consolidation, and the mechanics for death, incapacity, relationship breakdown and succession, remain unresolved, and several are not addressed in the consultation paper at all.

Given the complexity with this option (see Appendix D for further details), Treasury should release a further, dedicated consultation paper setting out the detailed design of the model, and consult on it specifically, before the design is settled and exposure draft legislation is released.

The related question on how a business operating within an elected fixed trust retains working capital at a company-equivalent rate, is examined in Appendix D. We canvasses two approaches: a corporate beneficiary established on transition, and a 25 to 30 per cent trustee rate on income retained within the elected trust.

A deemed corporate model has merit but must not become a permanent fiction with permanent problems

Some stakeholders have suggested treating electing trusts under a corporate-style model (taxation at the corporate rate with franking-style integration). CPA Australia sees merit in the integration logic; the company tax system already solves the retention and later taxation problem through imputation, however, we urge caution on two grounds:

- **It is a fictional characterisation, and fictions accumulate issues over time.** A trust taxed as if it were a company remains a trust at law. Every point of divergence between the fiction and the underlying legal reality, including CGT event treatment, deceased estate interactions, family law property settlements, state tax classification, eligibility for concessions defined by entity type, becomes a future interpretive dispute. The measure being designed here is transitional in motivation; embedding a permanent deemed-entity regime to solve a transitional problem risks a disproportionate legacy.
- **The family trust election experience is the cautionary precedent.** Family trust elections were introduced as a targeted integrity mechanism and have become a source of long-lived, poorly understood, and effectively irrevocable consequences, including family trust distributions tax exposures that surprise taxpayers decades later. An elective corporate model with irrevocable, ongoing consequences risk repeating that pattern at greater scale. Any elective regime introduced here should have consequences that are known, bounded and clearly disclosed at the time of election, and Treasury should give genuine consideration to whether, and on what conditions, an election could be unwound.

Recommendation 5: If Treasury develops any deemed or elective entity characterisation model, it should:

a) confine the fiction to the narrowest set of provisions necessary, for example, it only applies to existing discretionary trusts with income and assets over a certain threshold
b) specify the full set of consequences at election time
c) consider bounded revocability, and
d) explicitly test the design against the lessons of the family trust election regime.

A distribution-based collection alternative also merits examination

Separately from the elective model, some members have suggested that the measure's objective could be achieved by taxing discretionary distributions as they are made, that is withholding on distributions that are discretionary in substance, rather than taxing the trustee on the whole of the trust's income and then relieving any over-reach through offsets.

Its central attraction is that the machinery already exists. Section 98 of the ITAA 1936 provides for assessment of the trustee on a beneficiary's share of net income; a withholding on discretionary distributions could be implemented by adapting that mechanism and rendering the resulting tax non-refundable, rather than by constructing a new trust-level minimum tax with its own offset, franking and characterisation regimes.

The model has three further advantages:

1. it does not require the fixed/discretionary boundary to be drawn with precision, as it operates on the character of the distribution rather than the classification of the trust, removing the need for a statutory fixed trust definition or an elective fixed trust option altogether
2. it does not sterilise losses within a family group, as distributions between grouped entities can be excluded rather than reduced by a non-refundable credit
3. it preserves corporate beneficiaries as a source of working capital, addressing retention through the ordinary Division 7A rules, with unpaid present entitlements treated as loans.

Scope would be set by exclusion, with family trust election and interposed entity election groups, companies, fixed trusts, bare trusts, nominees and testamentary trusts falling outside, with circumvention addressed by tainting. Where a tainted distribution is received by a trust, that trust's distributions for the year take the same character; where received by a company, the company's franking account becomes subject to a non-refundable regime. An "effectively discretionary" rule would address structures achieving the same result through multiple unit classes, for which there is precedent in s 276-210(4) of the AMIT provisions.

Two design points require attention:

1. the tracing that tainting requires through multiple tiers is not trivial, and any franking-tainting rule should be proportionate rather than perpetual; capped, for example, by reference to the tainted distribution.
2. the treatment of accumulation should also be stated expressly as income not appointed to a beneficiary continues to be assessed to the trustee under s 99A at the top marginal rate. The model needs no separate anti-accumulation rule, but entitlements arising under default or gift-over clauses would need to be treated as discretionary so that splitting cannot be achieved simply by declining to exercise the discretion.

Recommendation 6: We recommend Treasury give further consideration to a distribution-based mechanism alongside the elective fixed trust model.

Other matters

- **Consultation timeframe.** The consultation window (8 to 31 July) is short for a measure of this significance. We recommend Treasury commit to a further round of consultation on exposure draft legislation, particularly if any of the alternative approaches canvassed above are pursued. We emphasise that a single consultation round cannot resolve the design mechanics; and if Treasury is minded to proceed down a deemed fixed trust or deemed corporate (fictional characterisation) route, a further detailed consultation on design before exposure draft is essential, particularly given the compressed timetable to introduce legislation by year end. Member experience is that the usable window is shorter still. Clients will seek to restructure effective 30 June to avoid split accounting periods, so demand for restructuring advice concentrates into a few weeks each year

rather than evenly over the entire three year period. Further, advisers cannot responsibly begin advising until the legislation is settled, which is compressing the period in real time (Appendix D).

- **Guidance and support.** Whatever design is settled, ATO guidance, including on the definitional boundary of "discretionary trust," the operation of the rollover, and trustee payment obligations, should be available well before commencement, and the announced small business support arrangements should be operational before the restructuring window opens on 1 July 2027.
- **Primary production exclusion.** The announced exclusion for primary production income will not reach every genuine farming trusts, as many include income from non-farming activities such as agistment or leasing land to a related operating entity. The exclusion should be defined by reference to a trust forming part of a primary production enterprise, rather than by the character of the income the trust itself derives (Appendix C).
- **Child maintenance trusts**. The Budget materials name testamentary trusts and special disability trusts as excluded, and refer to an undefined category of income relating to vulnerable minors, but do not name child maintenance trusts. Income of a trust established on relationship breakdown to maintain and educate a child is already protected as excepted trust income under section 102AG of the ITAA 1936, and is taxed at the ordinary individual marginal rate because it is not income splitting for private advantage. If the minimum tax applies with no exclusion, that same income would instead be taxed at a flat 30 per cent. For example, a trust with $26,000 of annual income, the effective tax rate rises from roughly 4.5 to 30 per cent, cutting about $6,600 a year from money that exists only to provide for a child after a family breakdown. The exclusion should be made explicit, on the same footing as the testamentary and special disability trust exclusions already provided, removing what we believe is an unintended consequence rather than creating a new concession.
- **Transitional safe harbour.** Given the volume of restructuring work, its concentration at year end, and the number of advisers applying the new rules for the first time, a transitional safe harbour from penalties for genuine errors made in implementing a restructure or in applying the measure in its early years, should be provided, following the administrative approach taken on the introduction of the GST (Appendix C).

Appendix A- Answers to specific consultation questions

How should discretionary trusts be defined to appropriately distinguish them from fixed trusts for the purposes of the minimum tax? (Question 1)

Defining a discretionary trust residually as any trust that is not a fixed trust imports into a substantive taxing provision a concept ("vested and indefeasible" interests) that trust practice rarely satisfies in strict terms. The Commissioner's existing compliance approach recognises this. PCG 2016/16 exists precisely because very few trusts drafted as fixed satisfy the strict statutory test without the exercise of the Commissioner's discretion. Given the 30 per cent taxing point there will be a need for taxpayer certainty and increase in demand for ATO private rulings to confirm a trust's classification.

CPA Australia recommends the definition be constructed on two principles:

- Substance over formal powers. The test should turn on the substantive capacity to redirect economic benefits between beneficiaries from year to year — the mischief the measure targets — not on the formal existence of unexercised powers. A power to amend the deed, add or remove beneficiaries or vary entitlements that is constrained by the trustee's duties and has not been exercised should not, of itself, make a trust discretionary.
- Self-assessable classification. Trustees should be able to determine their status against legislated criteria supported by public ATO guidance, rather than through private rulings or the exercise of a Commissioner's discretion trust by trust.

Recommendation 7: Define "discretionary trust" by positive statutory criteria directed at the substantive capacity to redirect economic benefits between beneficiaries, disregarding unexercised administrative powers, and legislate safe harbours (drawing on PCG 2016/16) so that classification is self-assessable rather than dependent on the Commissioner's discretion.

What is the appropriate minimum tax treatment for income tax-exempt entities? (Question 2)

As the consultation paper acknowledges, a distribution to a registered charity or other income tax-exempt beneficiary generates a minimum tax offset the recipient cannot use. The practical effect is a 30 per cent tax on philanthropic distributions from discretionary trust structures through which a significant share of private giving is conducted. That outcome is inconsistent with the policy settings elsewhere in the law: endorsed charities are entitled to refunds of excess franking credits precisely so that entity-level tax does not become an economic burden on exempt recipients.

This outcome also sits outside the measure's own rationale. The minimum tax is directed at income splitting to low-rate individual beneficiaries, that is the redirection of trust income to family members on lower marginal rates. A registered charity is not a family member on a low marginal rate. It is a regulated, not-for-private-benefit entity that cannot return the distributed funds to the family or to any private individual, and whose endorsement is administered and policed by the Australian Charities and Not-for-profits Commission and the ATO. Taxing a distribution to such an entity does nothing to advance the integrity objective the measure pursues; its only effect is to reduce by 30 per cent the funds reaching the charitable sector.

There is also a question of policy coherence. The Australian Government has adopted a goal of doubling philanthropic giving by 2030 and commissioned the Productivity Commission's Future Foundations for Giving inquiry (final report, May 2024) specifically to inform the strategy for achieving it. A measure that imposes a flat 30 per cent tax on giving conducted through discretionary trusts cuts directly against that agenda, and against the refundability settings the law already extends to endorsed charities elsewhere. Correcting the treatment of exempt beneficiaries would remove an unintended consequence, not create a new concession, and would align the measure with the Government's own philanthropic objective.

The same logic should apply here. Two approaches would work:

- make the minimum tax offset refundable to endorsed income tax-exempt beneficiaries, mirroring franking credit refundability; or
- exclude from the trustee's minimum tax base amounts to which such beneficiaries are made presently entitled.

Either approach preserves integrity, but we submit exclusion is the better mechanism, and the consultation paper's reference to "exclusions" contemplates it. That is, the trustee may lack the liquidity to fund 30 per cent on a beneficiary's share of net income, which frequently differs from the trust law income actually available to distribute, and exempt entities, whether charities or government bodies, are not equipped to lodge returns and pursue refunds. Therefore a credit-and-refund model loads cost and cash flow challenges onto the very entities the exemption is meant to protect.

Recommendation 8: The share of net income to which an income tax-exempt beneficiary is presently entitled should be excluded from the trustee's minimum tax base, covering all entities exempt under Division 50, both endorsed charities and entities exempt by operation of law, including government and statutory authorities under section 50-25, so that the exemption is preserved without requiring the entity to fund the tax and then claim it back.

Are there any other implementation matters not addressed in this paper that should be considered in designing the minimum tax on discretionary trusts? (Question 3)

The stated design intent is a floor: tax on distributed trust income should not be lower than 30 per cent. The offset settings as described deliver something materially harsher than a floor, because the offset cannot be applied against the Medicare levy, cannot be refunded, and cannot be carried forward.

Treasury's own cameo demonstrates the first problem. Individual A, on $200,000 with no other income, pays $59,602 (including Medicare levy) under current law, an effective tax rate of 29.8 per cent. Under the measure, total tax on the same income is $64,000 ($60,000 minimum tax paid by the trustee plus a $4,000 Medicare levy the offset cannot reach), an effective tax rate of 32 per cent, with $4,398 of the offset wasted. A beneficiary whose marginal rate already exceeds 30 per cent pays more, not because the floor binds, but because the offset is quarantined from the Medicare levy. The measure as described is a 32 per cent floor presented as a 30 per cent one.

The absence of carry-forward compounds this for beneficiaries whose incomes fluctuate, a common profile in small business families. An offset wasted in a low-income year is lost permanently; it cannot be recovered in a later year even though the trustee's tax was real and the income was fully assessed. This restates a position CPA Australia has previously put to Treasury: unused minimum tax offsets should be able to be carried forward, with any residual cohorts (such as trusts winding up) addressed through targeted refundability.

We also note an asymmetry within the paper itself. For the trustee's excess franking credits, the Government is considering refund or carry-forward. For the beneficiary's excess minimum tax offset,

both are ruled out. These are two credits arising under the same measure, each representing tax actually paid; there is no principled basis for opposite settings.

Finally, where the beneficiary is itself a discretionary trust subject to the minimum tax, excess offset is extinguished, that is, it is neither refunded, carried forward nor passed on. Multiple-trust groups are common in ordinary commercial structures, not only in aggressive planning. Extinguishing offsets within chains converts a floor into compounding taxation of the same income.

Present entitlement to a gross amount

A further implementation issue arises from the mechanics of trust law rather than tax. If the trustee is required to pay 30 per cent tax at the trust level, the trust retains only 70 per cent of the relevant income. Many trust deeds, however, do not permit a trustee to reduce a beneficiary's present entitlement by reference to tax paid by the trustee. On those deeds a beneficiary could demand the gross amount to which they were made presently entitled, leaving the trustee unable to fund the liability from the income concerned.

Resolving this at the deed level is not a realistic answer. It would require amendment of a very large number of trust deeds; many deeds cannot be amended at all, and many others cannot be amended without giving rise to resettlement, capital gains tax or duty consequences, the same constraints identified elsewhere in this submission. The issue should instead be resolved statutorily.

There is existing precedent: sections 12A-215(4) and (5) of Schedule 1 to the Taxation Administration Act 1953 deem a withholding amount to be due and payable to the trustee by the beneficiary, so that it may be offset against amounts otherwise owing to that beneficiary. An equivalent provision should apply here, so that the minimum tax paid by the trustee is set off against the beneficiary's entitlement as a matter of law rather than depending on the terms of each deed.

We note that this problem does not arise under a collection mechanism that operates as a withholding on amounts distributed mentioned above, because the tax is paid on behalf of the beneficiary from the outset.

Recommendation 9: The minimum tax offset should:

a) be able to be applied against the Medicare levy, or the design otherwise adjusted so the effective floor is genuinely 30 per cent
b) be able to be carried forward by beneficiaries; and
c) not be extinguished where the beneficiary is itself a trust, with residual issues (such as wind-ups) addressed through targeted refundability.

Rollover design settings (questions 4 to 7)

The integrity settings proposed for the rollover; the single class of ordinary shares condition for corporate transferees, and denial where assets move into partnerships or comparable arrangements that preserve discretionary allocation, are appropriate and consistent with the stated objective of fixed and transparent economic outcomes. We support them (question 5).

We note at the outset, however, that rollover relief addresses only the income tax consequences of restructuring. As set out elsewhere in this submission, income tax is rarely the largest cost of a restructure, and for trusts holding dutiable property it is not the binding constraint. The architecture proposed is appropriate so far as it extends, but it does not of itself make restructuring a practical option for much of the affected population (question 4).

The proposed FTDT protection is appropriate (question 6). Trusts with existing family trust elections or interposed entity elections would otherwise face family trust distributions tax at the top marginal rate plus Medicare levy on the rollover; a penalty for complying with the Government's own transition policy. We support the protection, and note it is consistent with the broader FTDT reform issues CPA

Australia has separately raised with Treasury and recommend the family trust election reforms should also be included in these trust reforms.

We note further that the measure will in some cases compel transfers to entities that are not capable of making a family trust election at all; most obviously where the test individual of the existing election has died. The protection should be drafted to accommodate those cases, rather than assuming that an equivalent family group election can always be made by the transferee.

The following design details remain unspecified, and each is an obstacle to planning a restructure (question 7):

- **The family unit definitions**. The "clearly defined rights test" and "no material discretionary elements" will otherwise generate the same classification uncertainty as the discretionary trust definition itself. Both need statutory definition, with worked examples in the explanatory materials.
- **The all-or-nothing asset requirement.** Some assets cannot lawfully or commercially be transferred, such as statutory licences and permits, and contracts containing prohibitions on assignment. The nominal-asset allowance does not address this. Relief should be proportionate where specific assets are legally or commercially non-transferable, rather than denied in full
- **Interaction with the 1 July 2027 deemed disposal**. We understand the separate CGT changes deem the disposal of pre-CGT (and other) assets from 1 July 2027, removing pre-CGT status and crystallising a gain that is deferred rather than taxed immediately. Preservation of pre-CGT status through the rollover is therefore no longer a live issue; the deferred gain is. The rollover's interaction with that deferred gain must be made explicit. If entering a rollover restructure is itself a realisation event that crystallises the deferred gain, restructuring becomes prohibitive for most affected taxpayers, who would face immediate tax on the full accumulated gain merely for complying with the Government's transition policy. The rollover must therefore apply to the deferred gain, not only to gains accruing after 1 July 2027. We recommend a deferral modelled on CGT event J1: the trust's deferred gain should be preserved and realised only when the recipient entity actually disposes of the rolled-over asset, or when that entity leaves the statutory family group. To encourage the move into corporate structures the measure contemplates, any accrued CGT discount on the deferred gain should be preserved on the rollover even where the transferee is a company.
- **Consecutive (double) rollovers.** Guidance on back-to-back rollovers is presently inconsistent. Where a restructure requires two consecutive rollovers, they should be permitted.
- **Deductibility of restructuring costs.** The income tax treatment of the professional, legal and valuation costs of a restructure is unaddressed. Where a business restructures in response to a legislative change rather than for a commercial purpose of its own, those costs should be deductible, and the position should be confirmed rather than left to the operation of section 40-880 or general deductibility principles.
- **Preservation of tax losses.** Trust losses do not automatically transfer to a transferee on restructure, and the interaction between the trust loss rules and the company loss recoupment tests may strand accumulated losses in an entity that has ceased to carry on the business. The rollover should expressly preserve accumulated revenue and capital losses through the restructure.
- **The three-year restructure window**. Member experience is that deed review, valuations, financier and landlord consents and (where relevant) state duty rulings take 12 to 24 months, and adviser capacity will be most constrained in the back half of the window. The legislation should include the ability to extend the window by legislative instrument, and ATO guidance must be available when the window opens on 1 July 2027, not after it.

Recommendation 10:

- Publish the statutory family unit definitions with the exposure draft; provide proportionate rollover relief where specific assets cannot legally or commercially be transferred
- ensure the rollover applies to gains deferred on the 1 July 2027 deemed disposal, not only to post-1 July 2027 gains, through a CGT event J1-style deferral that realises the gain only on a later disposal by (or the family-group exit of) the recipient entity, with any accrued CGT discount preserved even on a rollover into a company
- confirm the deductibility of restructuring costs and the preservation of accumulated tax losses through the rollover
- legislate the ability to extend the three-year window by instrument, with ATO guidance in place before the window opens; and
- make the rollover available for the transfer of trust assets to existing beneficiaries in their personal capacity, not only for entity-to-entity restructures, and not confined to trusts carrying on a business, provided economic ownership remains within the family group.

Other approaches that would reduce the need for upfront restructuring (question 8)

The most effective way to reduce the need for restructuring is to avoid creating the need for it. CPA Australia has set out three approaches in the body of this submission, in order of preference.

First, **a single-beneficiary election** (Recommendation 1). Where the whole of a trust's net income is distributed to a single beneficiary in an income year, no income splitting arises and there is no mischief for the minimum tax to address. An election of this kind removes a large population of simple family trusts from the measure without any transfer of assets, and therefore without a CGT event, without state transfer or landholder duty, without needing to novate or assign contracts or leases, and without the trust ceasing to be a discretionary trust at law.

Second, **the elective 'fictional' fixed trust or corporate model** (Recommendations 4 to 6). We are open to Treasury developing these models as a genuine alternative to physical restructuring out of a discretionary trust structure, subject to the income tax, trust law and state tax consequences identified in the body of this submission being resolved. Those matters are substantial enough that they warrant a further, dedicated consultation on detailed design before the model is settled.

As to the practical and legal considerations the question raises, **each of these approaches must be tested against trust law and trustees' duties**. An income tax election cannot of itself alter the terms of a trust. Where an election requires a trustee to fetter, or to decline to exercise, a discretion that the deed confers, it raises questions about the trustee's duties to the objects of that discretion and may require deed amendment, with the resettlement, CGT and duty consequences noted above.

The single-beneficiary election is the least exposed of the three, as it operates on the distribution actually made in a given year rather than by altering entitlements or characterising the trust as something it is not. Any elective model should also be assessed for its effect on the asset protection that motivated the use of a discretionary trust in the first place, which members identify as the principal non-tax reason these structures exist.

Excess franking credits should be refunded, not carried forward (questions 9 to 11)

Of the two options in the consultation paper, refunding excess franking credits to the trustee is materially better against each of the criteria in question 9. The credits represent company tax actually paid. Refunding them does not reduce the minimum tax collected, the consultation paper's own cameo

shows both options converge on the same 30 per cent average outcome. The integrity risk of refunding is therefore low; the compliance cost difference between the options is not.

The carry-forward option requires exactly the apparatus the paper concedes: trustees maintaining franking credit balances year over year, tracing between carried-forward credits and the beneficiaries whose distributions bore the minimum tax, new integrity rules for beneficiaries who join the trust later, and possible caps and time limits. All of that lands on the trustee population least equipped to administer it, the same small business trustees described earlier in this submission. That is also the direct answer to question 10: the tracing and record-keeping requirements a carry-forward model would generate are themselves the case against adopting it. Existing integrity rules, including the qualified person (45-day holding) rules that police access to credits at the point they enter the trust, are sufficient under a refund model without new machinery.

Carry-forward also strands credits. Trusts approaching their vesting dates, and trusts that wind up after the restructure window, would accumulate carried-forward balances that expire worthless; the tax actually paid and never relieved. Refunding avoids that problem. It also preserves the refundable character franking credits already have in the hands of resident individuals, complying superannuation funds and endorsed charities, rather than creating a new non-refundable class of credit for one entity type only (question 11).

Recommendation 11: Excess franking credits should be refundable to the trustee. If a carry-forward model is nonetheless adopted, it should be uncapped and untimed, with refundability preserved at least on the vesting or wind-up of the trust.

Collection mechanisms should follow the existing lodgement cycle (questions 12 to 15)

The consultation paper's own description of the existing framework makes the central design point: the trust's taxable income, each beneficiary's share and the associated offsets are typically not known until close to lodgement. Any collection or notification design that assumes earlier knowledge will generate estimates, amendments and penalty exposure rather than earlier revenue.

Notification (question 13) should therefore be integrated with the existing distribution statement and trust return lodgement process, a single notification of entitlement and associated minimum tax offset, produced as part of lodgement, rather than any new standalone or mid-year reporting obligation. The recurring compliance tasks the measure creates for every affected trust are already identifiable: determining the trustee's minimum tax liability, calculating and reconciling each beneficiary's minimum tax offset, notifying beneficiaries, and confirming continued eligibility for exclusions each year. Every additional reporting event multiplies each of those tasks.

On the complementary collection measures (questions 12 and 14): a Commissioner's right of reimbursement from trust assets, mirroring the trustee's own indemnity, is acceptable in principle. PAYG instalments at the trustee level sit awkwardly with income that is not determinable during the year; if instalments are adopted, they should be based on GDP-adjusted prior-year amounts with penalty-free variation, and should not commence before the second year of the measure's operation.

There is a parallel problem on the beneficiary side. Where the trustee pays 30 per cent on an amount, the beneficiaries presently entitled to that same amount should be removed from PAYG instalments referable to their share of the trust's income, otherwise the same income bears instalments twice, once at the trustee level and again in each beneficiary's instalment base. The instalment system also has no obvious way to collect only the residual: where a beneficiary's marginal rate exceeds 30 per cent (up to 47 per cent), there is no straightforward mechanism to capture the additional 17 per cent above the trustee's 30 per cent through instalments. Requiring instalments on both the trustee's 30 per cent and the beneficiary's full liability would demand up to 77 per cent of the income in instalments across the year, with 30 per cent refunded only on lodgment, a cash-flow burden out of proportion to

the tax ultimately payable. Minimum-taxed trust income should instead be excluded from the beneficiary's instalment base, with any residual liability collected through the beneficiary's return.

As a matter of principle, trustee tax liabilities are not ordinarily made jointly and severally recoverable from the directors of a corporate trustee merely by reason of their office, and extending personal liability in this context would be a significant departure from that position. If it is to proceed, director joint and several liability requires the safeguards set out earlier in this submission, including defences, thresholds, notice and review rights equivalent to the director penalty notice framework are in place. Without these safeguards, it cannot be regarded as proportionate for the corporate trustees of ordinary family trusts.

The design will also need clear rules for common situations the consultation paper does not address (question 15), including:

- amended assessments that change the trust's taxable income after beneficiaries have been notified of entitlements and offsets
- the treatment of non-cash distributions and unpaid present entitlements for collection purposes; and
- the interaction between the trustee's payment obligation and the trustee's indemnity where trust assets are insufficient to meet the liability.

Recommendation 12:

- Align beneficiary notification with the existing distribution statement and lodgement cycle rather than creating new reporting events.
- Adopt PAYG instalments, if at all, on a GDP-adjusted and penalty-free-variation basis commencing no earlier than the measure's second year.
- Exclude minimum-taxed trust distributions from affected beneficiaries' PAYG instalment income to prevent double instalments on the same amount, with any residual liability above the 30 per cent trustee rate collected through the beneficiary's return.
- Legislate director penalty notice-equivalent safeguards before any joint and several director liability applies.

Consequential interactions arise between the minimum tax on discretionary trusts and the revised 2018-19 Budget measure (Question 16)

The interaction between the proposed 30 per cent minimum tax on discretionary trusts and the unlegislated 2018–19 Budget measure concerning UPEs raises significant policy, integrity and implementation issues. It also creates significant consequential interactions that should be carefully considered as part of the design of both measures. These issues should also be considered in light of the High Court's decision in *Commissioner of Taxation v Bendel (Bendel)* (see our response to Question 17).

If the revised 2018–19 Budget measure is legislated alongside the proposed minimum tax, it has the effect of overriding the High Court's decision in *Bendel*. This would create two distinct regulatory tiers applying to the same allocation of discretionary trust income to a corporate beneficiary:

- **Tier 1 — Minimum tax:** The proposed minimum tax would deny non-refundable credits to corporate beneficiaries, resulting in an immediate additional tax cost on the allocated trust income and materially reducing the economic benefit of distributing income to a corporate beneficiary.
- **Tier 2 — Revised 2018–19 measure:** Where the corresponding cash distribution is retained by the discretionary trust, the revised measure may also treat the UPE as giving rise to Division 7A consequences unless the arrangement is placed on a complying seven-year or 25-year loan agreement with principal and interest repayments.

The primary policy objective of the 2018–19 UPE measure was to address arrangements through a corporate beneficiary, where company tax rates of 25 per cent or 30 per cent were used to defer or reduce tax on trust income while the corresponding cash remained within the trust. However, the proposed minimum tax would already substantially reduce the economic benefit of distributing income to corporate beneficiaries by denying access to the 30 per cent trustee credit. As a result, further Division 7A consequences for the same income allocation may be unnecessary or duplicative**.**

Requiring a family group to comply with Division 7A loan agreements and benchmark interest obligations under the revised 2018–19 measure, where the same allocation has already been subject to the proposed minimum tax, imposes an additional layer of complexity and compliance cost. The minimum tax substantially achieve the policy objective of discouraging future corporate beneficiary distributions.

Recommendation 13: We submit that the ongoing role of the UPE compliance legislative framework for future years should be carefully reconsidered (see our response to Question 17).

A particularly significant and complex interaction concerns the treatment of historical UPEs accumulated before the proposed 1 July 2028 commencement date.

- **Retrospective Division 7A exposure:** If the 2018–19 Budget measure is enacted with standard transitional rules, many private groups with legacy pre-2028 corporate UPE balances may be required to bring those balances within Division 7A compliance.
- **Rollover safe harbour interaction:** The 2026–27 Budget provides a three-year rollover window from 1 July 2027 to 30 June 2030 to allow small businesses to restructure out of discretionary trusts. However, unwinding historical corporate UPEs can be complex and may give rise to adverse deemed dividend consequences (e.g. section 109F) without appropriate statutory or administrative relief.
- **Design consideration:** If the 2018–19 UPE rule is implemented without appropriate transitional rules or clear statutory guidance, it may materially reduce the effectiveness of the 2027 rollover relief. Private groups may be unable to restructure out of discretionary trusts where historical UPEs are subject to newly enacted Division 7A rules, creating uncertainty and potential practical barriers to accessing the intended relief.

To support effective compliance by SMEs and private groups, Treasury should ensure that the statutory boundaries of the two measures are clearly coordinated and expressed in the legislation.

- **Prospective application:** From 1 July 2028, the 2018–19 UPE rules should be carefully reconsidered for new corporate trust distributions, given that the denial of the 30 per cent credit under the proposed minimum tax would already substantially reduce the economic benefit of such arrangements.
- **Treatment of legacy balances:** The legislation should expressly provide for the treatment of pre-existing corporate UPE balances accumulated before the commencement of the minimum tax. This may include an exemption, quarantine mechanism or clear transitional pathway that allows legacy balances to be unwound safely within the 2027–2030 rollover window, without unintended Division 7A or deemed dividend consequences (see our response to Question 17).

Other issues or implications because of the High Court's decision in Bendel that should be considered as part of the design and implementation of the revised 2018-19 Budget measure? (Question 17)

The High Court's decision in *Commissioner of Taxation v Bendel* [2026] HCA 18 (*Bendel*) handed down on 10 June 2026 invalidates the ATO's 16-year administrative stance (originally in TR 2010/3 and reinforced in TD 2022/11); by ruling that a corporate beneficiary's inaction or failure to call for payment of a UPE is not a loan or financial accommodation" under Division 7A.

In light of the High Court's decision, the context has materially changed since the measure to bring UPEs within Division 7A was first announced in 2018–19. If the Government proceeds with a legislative override through the revised 2018–19 Budget measure, it would in effect, validate and entrench the ATO's previous administrative position, despite the High Court having found that position to be inconsistent with the law. A legislative response introduced primarily as a corrective measure to restore the ATO's previous position will give rise to further concerns among small businesses and private groups, particularly where they are required to continue making Division 7A repayments and bearing tax costs in respect of historical UPE arrangements.

Therefore, any legislative response should be carefully designed to address the consequences of the High Court decision in a principled, equitable and prospective manner, rather than simply overriding the Court's reasoning. A measured approach is particularly important to avoid further disadvantaging taxpayers who acted in good faith and sought and complied with the ATO's previous guidance, especially given the ATO's position outlined in its Bendel Decision Impact Statement. The Government should prioritise statutory certainty, fairness and compliance simplicity for small businesses and private groups in light of the *Bendel* decision.

In our view, any retrospective legislation that characterises historical UPEs as loans under Division 7A would further risk undermining business confidence and equity in the tax system.

Recommendation 14: We submit that the Government should accept the High Court's decision as the law for past income years and formally confirm that historical UPEs up to 30 June 2026 will not be retrospectively recharacterised as Division 7A loans.

As the 30 per cent minimum trust tax commencing on 1 July 2028 is intended to address the tax advantage of allocating income to corporate beneficiaries by denying non-refundable credits, additional UPE rules under Division 7A would be unnecessary or duplicative. As a result, the Government should consider whether the 2028 minimum tax framework provides a more appropriate basis for addressing future trust distributions, without imposing additional complex Division 7A "loan" requirements.

Recommendation 15: The Government should also consider introducing an express statutory safe harbour to allow taxpayers who entered into complying loan agreements in reliance on previous legally incorrect ATO guidance to unwind or terminate those arrangements without triggering deemed unfranked dividends under section 109F for forgiveness of debt. Taxpayers who acted in good faith and sought to comply with ATO administrative guidance that has since been found by the High Court in *Bendel* to be inconsistent with the law should not be disadvantaged for having done so. By respecting established legal precedents, and focusing on a clean, forward-looking minimum tax model, the government can protect tax system integrity while safeguarding SME cash flow and commercial certainty.

Notwithstanding the above, if the Government proceeds with implementing the revised 2018–19 Budget measure, notwithstanding our concerns and reservations, several important structural issues and legal implications arising directly from the High Court's reasoning should be carefully addressed.

1. Subdivision EA and potential double taxation

The High Court majority drew important structural context from the text and history of Division 7A, noting that Parliament had specifically enacted Subdivision EA to address the relevant mischief in *Bendel*. Subdivision EA applies where a trust has a corporate UPE and subsequently transfers value by making a loan or payment to a shareholder of that company.

The High Court also observed that treating the UPE itself as a loan under section 109D may give rise to double taxation, where the same trust income is taxed at the corporate level and may then be brought to account again in later years. If the revised 2018–19 measure reclassifies future UPEs as loans by statute, it needs to harmonise the operation of section 109D and Subdivision EA. In particular, clear exclusions for pre-2009 UPEs or amendments will be required to avoid legislative overlap and the risk of multiple deemed dividend outcomes arising from the same retained trust funds.

2. UPEs and separate trusts

A significant factor in the High Court's *Bendel* decision was the precise wording of the trust deed, which required distributed but unpaid net income to be held on a valid separate trust for the beneficiary pending payment. The majority held that this mechanism did not create an unconditional debtor-creditor relationship. Rather, it gave rise to an equitable obligation. The mere recording of the UPE as a liability in the trust accounts did not alter its legal character.

Therefore, High Court's reasoning confirms the importance of the legal architecture established by the trust deed. Mere inaction by a beneficiary should not, of itself, be treated as a transaction or as the provision of financial accommodation. If the revised legislation seeks to bring all UPEs within Division 7A, it needs to be drafted with sufficient precision to address separate trust structures and equitable obligations. A broadly framed rule targeting unpaid amounts may give rise to further uncertainty and potential disputes about whether funds held on a separate trust can be deemed to constitute a loan in the absence of an active, bilateral transaction.

3. Taxpayers who complied with ATO guidance

For over 15 years, many SMEs and private wealth groups arranged their affairs in reliance on the ATO's administrative views, which have now been displaced by the High Court's decision in *Bendel*. In doing so, taxpayers entered into formal seven-year or 25-year complying loan agreements, paid benchmark interest and made principal repayments from active business working capital to avoid deemed dividend outcomes. The *Bendel* decision indicates that these taxpayers were seeking to comply with an administrative position that the High Court has found to be inconsistent with the law. Therefore, the implementation framework should include appropriate transitional relief to allow taxpayers with active Division 7A loan agreements relating to historical UPEs the option to unwind those arrangements, or cease benchmark interest payments, without triggering a deemed dividend under section 109F, in particular for 2009 to 2022 income tax years. The design should also include a clear statutory mechanism for managing retrospective amendment requests for prior-year assessments where tax was paid on the basis that a UPE was treated as a loan, without requiring taxpayers to pursue costly objection processes and in a manner that is equitable and administratively practical.

Appendix B - The cost and practicality of restructuring

This appendix sets out, from CPA Australia's perspective as a professional accounting body, what is actually involved when a small business restructures out of a discretionary trust, whether into a company or into a fixed trust, in response to the proposed minimum tax. It describes the steps, estimates the costs, assesses the burden the exercise places on small business, and considers whether the Australian tax profession has the capacity to deliver this volume of specialist work within the proposed transition period.

Our conclusions are threefold:

- a restructure is a substantial, multi-disciplinary project rather than a form-filling exercise.
- restructure costs are largely fixed, and so impacts hardest on the smallest businesses, the very population the measure predominantly reaches.
- the profession does not have the spare capacity to advise several hundred thousand affected trusts within a three-year window, at a time when Jobs and Skills Australia finds that taxation accountants are an occupation in shortage across the nation.

These findings reinforce the submission's central point: for most small businesses the restructure can be very costly, which is why we support targeted alternatives that avoid restructuring altogether.

Part A — What a restructure actually involves

A restructure is not a matter of lodging a form. It is a project that simultaneously engages income tax, state duties, trust law, corporations law, employment law, finance and commercial contracts, and it requires the coordinated work of an accountant, a lawyer and, in most cases, a valuer. The steps below are those a competent adviser would need to complete for a genuine small business restructure.

1. Restructuring a discretionary trust into a company

a) **Advice and planning.** Confirm eligibility for rollover relief (the small business restructure rollover in Subdivision 328-G, Division 122-A, or the proposed Commonwealth rollover); review the whole asset base — pre-CGT assets, depreciating assets, trading stock, goodwill, real property and their cost bases; and model the tax outcomes, including CGT, balancing adjustments, GST, Division 7A, franking and loss continuity.

b) **Establish the company.** Incorporate with ASIC, settle the constitution and share structure, and determine the shareholders (typically the individuals who were beneficiaries of the trust).

c) **Transfer the business.** Prepare asset transfer agreements; novate or assign leases, supply and finance contracts, licences, permits, intellectual property, business names and domain names; convey any real property; deal with security interests on the PPSR; and notify customers, suppliers and financiers.

d) **Employees.** Transfer employment to the company, deal with accrued entitlements and superannuation, re-establish payroll, and apply the Fair Work transfer-of-business rules.

e) **Finance.** Refinance or novate loans, obtain financier consents, grant new security, and re-execute personal guarantees.

f) **Registrations and elections.** Obtain a new ABN, TFN, GST and PAYG registration for the company; make and document the rollover choices in writing; and wind up or repurpose the trust, including any deed steps.

g) **Duty.** Assess and pay state transfer or landholder duty on any dutiable property, and apply for the limited relief available in some jurisdictions.

h) **Ongoing obligations.** A company brings a new and heavier compliance regime: company income tax returns, the ASIC annual review, Division 7A loan agreements for any funds drawn by owners, and dividend and franking administration. The business also gives up access to the 50 per cent CGT discount on future asset sales.

2. Restructuring a discretionary trust into a fixed trust

The elective fixed trust path avoids transferring assets, but substitutes a different and less well-understood set of legal and duty problems.

a) **Legal analysis.** Determine whether the trust can be made "fixed" at all. This requires close analysis of the deed against the narrow legal meaning of a fixed trust and the "fixed entitlement" rules, and an assessment of resettlement risk.

b) **Vary the deed.** Draft a variation conferring fixed entitlements and fixing the proportions between beneficiaries, supported by a legal opinion on whether the variation causes a resettlement (and so triggers CGT event E1 or E2).

c) **Tax.** Assess the CGT consequences of the deemed change of character, the cost base of the newly fixed interests, and the permanent loss of income streaming and discretionary distribution.

d) **Duty.** Assess duty on the declaration or variation of trust where beneficial interests change, which several states impose, and landholder duty where the trust holds land and fixed interests are created.

e) **Ongoing consequences.** The trust must distribute in fixed proportions each year, permanently surrendering the discretion that supports asset protection and succession planning; a structural cost that persists for the life of the trust.

Part B — The cost of restructuring

The figures below are our professional estimates on the cost of restructuring. They represent the fixed cost for a straightforward small business converting to a company. Actual costs rise with complexity, such as multiple properties, group entities, employees, and finance or interstate assets, as well as state transfer or landholder duty is uncapped and additional to every figure shown.

1. The fixed cost of restructuring a trust into a company

Cost component	Rate	Illustrative range (per business)
Legal fees — transfer documentation, deed amendments, trust deed review	Hourly rate × hours	$3,000–$7,000
Accounting and tax advisory — rollover eligibility, Division 7A, cost base, CGT interaction	Hourly rate × hours	$2,500–$6,000

Cost component	Rate	Illustrative range (per business)
ASIC company registration	Statutory fee	$636 (FY26–27; indexes annually)
ABN/TFN/GST/PAYG re-registration, business name transfer	Bookkeeper/accountant time	$800–$2,000
Financier consent, PPSR re-registration, potential refinancing	Lender fees + professional time	$500–$2,500
Contract and lease novation, licence re-application	Legal fees + disruption time	$1,000–$3,000
Owner/manager time (estimated basis, 15–25 hours)	Loaded wage rate	$1,100–$2,300
Total fixed cost, excluding state duty		**$9,536–$23,436**

2. How the fixed-trust path compares

The fixed trust conversion path draws on the same core cost drivers, the legal, accounting and valuation components above, but does not require company registration, business name transfer, or the novation of contracts and finance. In their place it adds a resettlement and CGT opinion and, in several states, duty on the variation of the trust deed. Its fixed cost is therefore broadly comparable to, and at the simpler end somewhat below, the company figure above, before duty. We have not set out a separate costing for it, because the drivers are the same; the material difference between the two paths is their duty treatment, addressed next.

3. State/Territory duty

Neither table above includes state/territory transfer or landholder duty, because it cannot be estimated in a range as it depends entirely on the value of the dutiable property and the jurisdiction, and relief is limited and inconsistent across the states. For a trust that holds commercial or business real property, duty can exceed every other cost of the restructure combined, and in some cases will exceed the tax the restructure was intended to avoid. This is the single largest and least predictable cost, and it is the reason the restructure pathway is unworkable for asset-holding trusts absent coordinated duty relief (addressed in the body of this submission).

Ongoing costs

The one-off cost is only part of the burden. A company carries a permanently higher compliance cost than a trust, including company tax returns, ASIC obligations, Division 7A loan administration wherever owners draw funds, and dividend and franking management. A converted fixed trust permanently loses the discretion that underpins asset protection and succession flexibility. These recurring costs are borne every year for the life of the structure.

Non-financial costs

Beyond fees, a restructure consumes owner and adviser time, disrupts banking and supplier relationships during the transfer, creates a window of commercial and legal uncertainty, and diverts scarce management attention from running the business. For a small owner-operated business these disruption costs are real, even if they do not appear on an invoice.

Part C — The burden on small business

The costs described above are largely fixed: they do not scale down with the size of the business. A restructure costing on the order of $9,500 to $23,400 before duty is broadly the same whether the business earns $100,000 or $1 million, and in this sense has a regressive effect. On the ATO's 2023–24 statistics, the discretionary trusts carrying on a business that the measure predominantly reaches had average net income of about $154,000. For such a business, the fixed restructure cost absorbs roughly 6 to 15 per cent of a full year's net income before any state/transfer duty, and where the trust holds real property, duty can multiply that figure.

The transitional rollover relief compounds rather than relieves this problem, because its value scales with the tax otherwise payable while the cost of restructuring does not. The income tax relief is therefore least valuable to precisely the smallest businesses it is meant to assist. Many of these businesses also lack the standing advisory relationship or the budget to commission a restructure at all: they are small, family-run operations without in-house tax capability. For a large part of the affected population, the practical choice is not "restructure or pay" but simply "pay".

Part D — Does the tax profession have the capacity?

According to ATO's 2023–24 statistics, there are approximately 350,000 discretionary trusts carrying on a business, within a wider population of some 848,000 discretionary trusts. If the measure proceeds, most will need specialist advice on whether and how to restructure, and the transition window is only three years. Even on conservative take-up assumptions, that concentrates tens of thousands of complex restructures into each year of the window, each requiring many hours of tailored accounting, legal and valuation work, on top of the profession's existing compliance workload.

There are 64,658 registered tax and BAS agents on the Tax Practitioners Board register. That headline number materially overstates the relevant capacity. BAS agents cannot provide the tax advice a restructure requires; of the tax agents who can, only a fraction have the specialist expertise in CGT rollovers, Division 7A, trust law and state duties that a restructure demands. The work is inherently multi-disciplinary, and further, it also needs to draw on a limited pool of lawyers who can vary trust deeds and manage duty, and of registered valuers.

The restructure work would not arrive in isolation. It would coincide with business-as-usual compliance and with the other reform demands already in train, including the announced Division 7A changes, the consequences of the Bendel decision, new anti-money laundering obligations and payday superannuation. Concentrating a large, specialist, one-off workload into a three-year window, on top of this, would create additional workload the profession cannot absorb. The results are likely to be rushed and error-prone restructures, sharply higher fees as scarce expertise is bid up, long delays for small businesses seeking advice, and a cohort of businesses that simply pay the tax because they cannot obtain timely advice, defeating the policy's own stated intent of offering a workable transition.

Conclusion

A restructure out of a discretionary trust is a costly, complex and multi-disciplinary undertaking whose burden falls hardest on the smallest businesses. Further, the Australian tax profession does not have the spare capacity to deliver it at the scale and speed the transition assumes. The restructure option is, for most of the affected population, not a genuine option. This reinforces the recommendations in the body of this submission for targeted alternatives, in particular the single-beneficiary election, that achieve the policy objective without requiring hundreds of thousands of small businesses to restructure at all.

Appendix C - Member evidence: the practical experience of restructuring

Following the release of the consultation paper, CPA Australia invited members in public practice to describe what restructuring out of a discretionary trust involves, what it costs, what their clients intend to do, and whether the profession has the capacity to deliver the work within the proposed transition. This appendix records what members told us and supports the commentary in Appendix B. Responses came from practitioners in Victoria, South Australia, New South Wales and regional border communities, ranging from sole practitioners to national firms, and include one completed restructure with actual costs.

1. What members told us

The consistent theme is that the rollover addresses the least difficult part of the exercise. As one firm put it, the rollover itself may be the easiest part; the real challenges are the commercial, legal, administrative and trust law issues involved in implementing the restructure and managing the legacy trust afterwards. Members identified six practical problems the consultation paper does not address:

a) The cost is disproportionate to the businesses affected, and is incurred for no commercial gain. One member described it as an administrative cost incurred only to avoid a penalty, which is then recharacterised as a commercial reason.

b) The original trust frequently cannot be wound up, producing duplicate structures and duplicate compliance costs.

c) Demand will concentrate around 30 June each year to avoid split accounting periods, rather than spread across the three-year window.

d) Advisers cannot begin work until the legislation is settled, which is compressing the window in real time.

e) A change of entity triggers re-registration of occupational licences, which puts the right to operate at risk.

f) Capacity constraints extend well beyond accountants, to valuers, lawyers and the revenue authorities themselves.

Two further themes ran through the responses

- The first is that trusts are not the preserve of the wealthy: members stressed that trusts are used by ordinary families and businesses for asset protection, for income streaming, and as an effective operating structure, and that a body of law relied upon by families, businesses and investors for more than 80 years is being displaced without adequate consideration of the consequences.
- The second is a loss of confidence: because the measure, along with the capital gains tax and negative gearing changes, was not foreshadowed before the Budget, clients who established structures in good faith now feel misled, and some expected their advisers to have anticipated the change. This is eroding trust in the stability of the tax law itself.

2. Case study — a completed restructure

One practitioner has recently completed a trust-to-company restructure for a client and provided the actual costs. The case is instructive because it is a comparatively straightforward example: a trading business with no land transferred, and no licence transfer required because the existing trustee became the trading entity.

Completed restructure — hotel business, Victoria

1. **Legal fees (specialist firm):** $15,000. The practitioner notes a national mid-tier firm quoted approximately $30,000 for the same work.
2. **Accounting fees:** approximately $5,000, being substantial work billed at $300 per hour across a three-week period of meetings and liaison.
3. **Entity establishment:** over $2,000, covering two required companies and the preparation of family trust and interposed entity elections.
4. **Total:** approximately $22,000, excluding the client's own time, and excluding any state duty.
5. **Elapsed time:** approximately one month to complete the legal restructure deed, followed by a further two to three weeks of internal implementation, including notifying staff, re-registering and reconfiguring payroll and bookkeeping systems, and notifying all accounts and suppliers.
6. **Client time:** the client estimated the internal implementation alone consumed more than 60 hours and described the period as traumatic.

Critically, this figure represents a 'favourable' case. No land was transferred. The same client holds a related entity with Victorian land; restructuring that entity is expected to attract Victorian duty of more than $600,000, on top of legal fees.

Two features of this evidence bear on the submission. First, the $22,000 actual cost sits at the upper end of CPA Australia's fixed-cost range estimated in Appendix B ($9,536 to $23,436), corroborating that estimate against a completed transaction. Second, the client time of over 60 hours materially exceeds the 15 to 25 hours assumed in Appendix B, suggesting the owner-time component can widely vary and may be understated in Appendix B.

3. The cost of restructuring — simple and complex cases

Member estimates of cost varied widely. That variation is not inconsistency; it reflects genuinely different scopes of work, and it is important that the range be understood on that basis rather than reduced to a single figure.

The simple case

A South Australian firm costed a straightforward restructure involving establishment of a new entity, re-registration, and valuation of assets:

Component	Indicative cost
New entity and incorporation costs	$500 – $1,500
New TFN, ABN, GST, PAYG withholding and workers compensation registrations	$500 – $750
Valuation of assets	$500 – $750
Elapsed time	2 – 3 weeks

That firm also provided South Australian duty costs on the transfer of assets, which are additional to the professional costs above and rise steeply with value: an asset valued at $50,000 attracts estimated duty of $1,080; at $100,000, $2,580; and at $250,000, $9,330.

The complex case

Where the restructure requires a legally drawn restructure deed, considered advice on rollover eligibility and Division 7A, multiple entities, and elections, the cost is an order of magnitude higher — the completed case above at approximately $22,000, and the same practitioner's estimate of approximately $20,000 per trust across their remaining client base. Where dutiable property is involved, duty exceeds every other cost combined.

A member acting for more than 700 trusts put the professional cost of a typical move from a discretionary trust to a company at $5,000 to $15,000, and higher for asset-rich trusts, covering the preparation of accounts, valuations, the design of the appropriate structure, rollover journals and the establishment of a new accounting system. The same member noted that a properly designed new structure, which involves an operating company owned by a holding company, in turn held by a trust or individuals in combination, to preserve asset protection and income-streaming flexibility, costs around double a typical trust to establish, up to $10,000 including advice.

Stamp duty is decisive where property is involved

Members were consistent that state duty, not professional cost, is what determines whether a restructure proceeds. As a rule of thumb, one member put transfer duty at at least 5 per cent of property value, and identified it as the single key reason clients will not restructure. The position is not uniform across the country: the same member noted that Victoria does not impose duty on the transfer of a business itself, so clients whose trusts hold no real property will largely move to a company, while those holding property must weigh a duty cost that quickly exceeds every other cost of the exercise.

What this means

The distinction matters for policy design. A restructure that is genuinely limited to establishing an entity and re-registering can be done for a few thousand dollars. A restructure that must be documented and advised to a standard that withstands review, which is what most trading businesses with assets, employees, finance or contracts require, costs somewhere between $9,500 and $23,400, before state duty. The consultation paper appears to contemplate the former; member experience is that the latter is the norm. Where the trust holds real property, duty on the order of five per cent of value overwhelms

the professional cost entirely, and the decision on whether to restructure is influence by the potential duty payable alone.

4. The legacy trust cannot simply be wound up

Members emphasised a consequence the consultation paper does not address: the original discretionary trust frequently cannot be terminated immediately following the restructure. Existing beneficiary entitlements, unpaid present entitlements, beneficiary loan accounts and contingent liabilities, together with trust law considerations on vesting, may prevent an immediate wind-up. Clients therefore maintain both the new structure and the legacy trust for a period, incurring duplicate compliance costs.

This has two implications. The cost of restructuring is not a single one-off amount, as the transitional relief assumes, but a one-off cost followed by a period of duplicated ongoing cost. And the technical issues arising on vesting, the treatment of internally generated goodwill, existing loan accounts, unpaid present entitlements and their Division 7A implications, are matters many advisers servicing small business clients do not encounter regularly.

5. Capacity and timing

Demand will concentrate at year end, not spread across three years

Members advised that in practice clients will seek to implement restructures effective 30 June, to minimise accounting costs, avoid split accounting periods and simplify compliance. Demand is therefore unlikely to be distributed evenly across the three-year transition. A significant proportion of businesses will seek implementation in the weeks around 30 June each year, creating concentrated peaks in demand for accountants, lawyers and valuers at precisely the time those advisers are dealing with year-end compliance obligations. The effective transition window is not three years; it is three short peaks.

The window is being compressed by legislative uncertainty

Members are not able to begin this work. As one practitioner put it, his firm cannot begin assisting clients restructure now because the legislation is not available to give informed advice. Another reported that clients are adopting a wait-and-see position because the legislation has not been confirmed. No adviser can responsibly recommend that a client incur $20,000 of irreversible restructuring cost, and potentially substantial duty, on the basis of an announced but unlegislated measure. Members also raised the prospect of the policy changing before commencement, which further discourages early action.

The practical consequence is that the usable transition period is materially shorter than the period the consultation paper describes. One member advising 320 trusts, of which approximately 180 are expected to require possible restructuring, advised that his firm physically does not have enough time before 30 June 2028 to complete the work even if it began immediately, which it cannot.

The constraint extends beyond accountants

Members stressed that professional capacity does not rest on accountants alone. Restructuring at this scale would require valuations from a limited pool of valuers, legal advice on trust arrangements to ensure deeds are not inadvertently resettled, and responsive support from the ATO and from state

revenue offices, whose own staff would need to come up to speed on a new regime. Several members also observed that the profession is absorbing this alongside anti-money laundering obligations, payday superannuation and the other measures announced in the Federal Budget, with practitioners already reporting 60 to 70 hour working weeks to meet existing workloads.

One member drew a comparison with the introduction of the GST, which was accompanied by substantial government funding, training and a period of administrative forgiveness for genuine errors. No equivalent support has been announced for this measure.

Members described the current environment as a perfect storm: an unusually complex Budget, clients seeking advice on the capital gains tax and negative gearing changes, year-end compliance, and the introduction of anti-money laundering and counter-terrorism financing obligations, all at once. One firm acting for more than 700 trusts, spanning discretionary, fixed, unit, hybrid, testamentary and disability trusts, observed that each type will be treated differently under the changes, so the advice burden multiplies across a diverse client base and the resulting cost increases must be passed on to clients. The member expected that some clients would not restructure at all and would simply pay the tax because the cost of advice and implementation is too high.

6. What clients are expected to do

Members reported that clients are largely waiting on advice, which cannot be given until the legislation and the states' position on duty are known. Beyond that, a consistent pattern emerged in what clients are expected to do once they can act.

Businesses whose trusts hold no real property will largely move to a company, particularly in states such as Victoria that do not impose duty on the transfer of a business. Businesses whose trusts hold property face a harder choice: retain the trust and pay the minimum tax, or sell the property to fund or avoid the restructure. Members expect a number to simply pay the tax because restructuring is too expensive, and others to sell or close their business.

One consequence of the latter warrants the Government's attention. A significant proportion of property held in discretionary trusts is residential rental property. Where the duty cost of restructuring forces a sale, that housing may be lost from the rental market. Members also observed that commercial rental property is comparatively unattractive to hold in a discretionary trust once the minimum tax applies, so the measure may prompt disposals of commercial as well as residential property. These are second-order effects of the measure that the consultation paper does not consider, and that run counter to other stated housing and investment objectives.

7. Occupational licensing and re-registration

A change of operating entity requires re-registration or re-approval across a wide range of regulated occupations, with members citing liquor, real estate, tax agent, livestock, poisons, electrical, plumbing, building, medical and dental licensing among others. This is not merely an administrative cost. Re-registration places a compliant, operating business into a bureaucratic process that determines whether it may continue to operate, and members described the attendant stress as significant and routinely underestimated.

Members practising near state borders raised a related point: the Australian operating environment already requires businesses to navigate differing state regimes, and a federal measure that pushes

businesses through state duty and licensing systems compounds that burden unevenly depending on where a business happens to be located.

8. Execution risk

The implementation phase carries risk that falls outside the professional fee estimates. Businesses must update leases, licences, supplier agreements, customer contracts, employment agreements, insurance policies, bank accounts and accounting or ERP systems. Small business owners have limited administrative resources and may overlook critical matters during the transition. Members specifically identified the risk that a failure to transfer insurance policies, licences or contractual arrangements correctly could result in uninsured losses, compliance breaches or contractual disputes, consequences materially more serious than the cost of the restructure itself.

9. Specific design issues identified by members

Primary production exclusion will not reach many farming trusts

Members identified a gap in the announced exclusion for primary production income. Many farm property trusts will not satisfy the primary production definition because they derive income from agistment, which is not primary production, or from leasing land to a related operating entity. These structures were commonly established for asset protection rather than tax reasons. On the exclusion as announced, they would be caught by the minimum tax and forced to consider restructuring, notwithstanding that they form part of a genuine farming enterprise. Some are also negatively geared, which further complicates any restructure. We recommend the primary production exclusion be defined to reach trusts forming part of a primary production enterprise, rather than by reference to the character of the income the trust itself derives.

Rollover has valuable applications beyond active business

Not all member feedback was critical. One member identified two circumstances in which the proposed rollover would produce genuinely useful outcomes, and encouraged that it not be confined to trusts carrying on a business:

- A discretionary trust holding a property used as the principal place of residence of a beneficiary. Under current law, transferring that property to the beneficiary triggers CGT. The rollover would allow the trustee to vest the trust and pass the CGT consequence to the beneficiary, arising only if and when they later sell.
- A trust holding substantial listed shares with significant unrealised gains where, following the death of the parents, five sibling beneficiaries wish to separate their interests. An *in specie* transfer under the rollover would allow separation without triggering an immediate CGT event, transferring the liability to each beneficiary on eventual sale.

These are succession and separation cases rather than business restructures, and they suggest the rollover would do useful work if its availability is not limited to trusts carrying on a business. State duty would remain an obstacle in both examples.

Retrospective effect on structures established in good faith

Members raised a fairness concern that goes to the integrity of the tax system rather than to any single provision. Discretionary trusts have been a legitimate and widely used structure for more than 80 years, and there was no indication before the Budget that they would be a target of reform. Advisers established trusts for clients in good faith, on the reasonable understanding that this was settled ground. Those clients now feel misled, and the position is compounded by the capital gains tax and negative gearing changes, which were also largely not foreshadowed. Members reported that the cumulative effect is a loss of client confidence in the stability of the tax law, and in some cases an expectation that advisers should somehow have anticipated the change. While transitional rules cannot restore certainty already lost, the strength of this reaction is itself relevant to how the measure should be introduced, and reinforces the case for generous transitional treatment and for grandfathering arrangements entered into before announcement.

Rollover legislation is likely to be complex, and complexity is itself a cost

Members anticipate that the rollover legislation will be complex, and that the complexity will make the advice and implementation more costly rather than less. A rollover that is difficult to apply with confidence will require more professional time, carry more risk of error, and be available in practice to fewer businesses, the opposite of what transitional relief is intended to achieve. Simplicity in the rollover design is therefore not merely desirable; it is a determinant of whether the relief works at all.

A transitional safe harbour is needed

Given the volume of work, its concentration at year end, and the number of advisers who will be dealing with these issues for the first time, CPA Australia recommends a transitional safe harbour from penalties for genuine errors made in implementing a restructure or in applying the new regime during its first years of operation. There is precedent in the administrative approach taken on the introduction of the GST.

10. Member views on alternatives to restructuring

Several members proposed alternatives that would avoid physical restructuring altogether. One firm proposed an election, modelled on the family trust election, under which a trustee would specify fixed percentage entitlements and the trust would be treated as a fixed trust for income tax purposes, with any deviation from the elected entitlements taxed to the trustee at the top marginal rate, an approach parallel to the family trust distributions tax. That member considered this materially simpler to implement from a commercial perspective than physical restructuring.

Another member proposed taxing trusts as if they were companies, with franking credits flowing to beneficiaries, on the basis that this would remove the need to navigate state duty and licensing regimes entirely, reduce the pressure that gives rise to Division 7A loans, and neutralise the tax rationale for establishing a trust so that trusts could be used for their asset protection qualities alone.

Members also emphasised that discretionary trusts are established principally for asset protection, and that a fixed unit trust held by individuals does not deliver equivalent protection. Any elective model that requires beneficiaries to hold fixed interests must therefore be assessed for its effect on the asset protection that motivated the structure in the first place.

11. The impact on affected businesses

Members provided illustrations of the effect on typical clients. For a husband-and-wife business earning $100,000 of profit with both spouses working in the business, distributing $50,000 to each currently produces total tax of approximately $12,500. A 30 per cent minimum tax on the same $100,000 produces $30,000, with the credits available to the beneficiaries being non-refundable, leaving the family materially worse off and, on members' assessment, effectively compelled to restructure at a cost of $15,000 to $20,000 that many cannot afford.

We note that a business in this position may be able to reduce the impact by paying salaries to the working spouses, as the original Budget Tax Explainer - Minimum tax on discretionary trusts observes. That response is not costless: salaries must be set before the year's profit is known, attract superannuation guarantee at 12 per cent together with workers compensation and, where applicable, payroll tax obligations, and cannot extend to the return on capital employed in the business. The wage channel mitigates but does not answer the position of a genuine owner-operated business.

Appendix D - Elective fixed trust model: retention of profits of a business

If the elective fixed trust model is developed, a further design question follows immediately: how does an active business operating within an elected trust retain profits for working capital and reinvestment at a sustainable rate? This is not a marginal issue — the need to retain profit is one of the main commercial reasons businesses would otherwise restructure into a company, and if the elective model cannot accommodate it, take-up will be limited to passive structures and the model will not achieve its purpose.

Two approaches have been suggested to CPA Australia in discussions with Treasury, and we set them out below:

Approach 1 — a corporate beneficiary created on transition. The elective fixed trust would be paired with a corporate beneficiary established at the election date, to which retained profits are distributed and taxed at the corporate rate. This delivers retention at a company-equivalent rate, but adds a second entity to establish and administer, a second layer of compliance for a small business audience, and recreates the trust-to-corporate-beneficiary unpaid present entitlement interface; the most contested issue in the current system, and the subject of the announced but unenacted 2018–19 Budget measure.

This approach would nonetheless attract broad take-up if four design features were included:

- **Preserve accumulated CGT discount on transition.** Where the nominated fixed beneficiary is a company, accrued discount capital gains would otherwise be lost. The model should allow the discount component to be attributed to nominated individuals at the election date and crystallised when the asset is later dealt with, or alternatively allow the corporate beneficiary the discount for transitional gains. The position where different entities hold gains and losses on the same asset would need to be resolved, as it must be for the rollover generally.
- **Permit, but never compel, tax consolidation.** The elected trust should be able to join a consolidated group headed by the nominated corporate beneficiary (which should sit within the family group), with consequential family trust election relief on entry. This preserves the profit and loss grouping that diversified trust groups currently achieve by distribution, and removes the Division 7A interface between the trust and the corporate beneficiary altogether.
- **Allow another trust to be nominated** as the fixed beneficiary, enabling grouping without consolidation.
- **Allow the corporate beneficiary to be owned by a non-electing discretionary trust.** This presents no policy risk, since refundable franking credits cannot pass through that trust.

Operational and legal questions would also need to be settled, including:

- whether the election requires amendment of the deed
- the consequence of distributing to a beneficiary other than the nominated one (we assume assessment to the trustee at the top rate as a final tax, with only actual distributions to nominated beneficiaries passing through untaxed)
- the effect on the trust's asset protection qualities, and whether the election is itself a breach of trust; and
- the mechanics of election, which should be made in writing and registered with the ATO, so that non-conforming distributions can be identified on lodgement and successor advisers have certainty as to which elections have been made.

Approach 2 — a 25 or 30 per cent trustee rate on retained income within the elected trust. The simpler alternative is to allow income retained within the elected fixed trust to be taxed at the trustee level at 25 or 30 per cent, rather than the default top marginal rate plus Medicare levy (47 per cent). This achieves the same economic outcome as the corporate beneficiary; retention at a company-equivalent rate, with one entity instead of two, no unpaid present entitlements, and no Division 7A interface. From a complexity viewpoint, this approach would be preferred to the transitional corporate beneficiary structure.

Importantly, confining the 30 per cent retention rate to elected fixed trusts substantially addresses the integrity concerns that would attach to a general reduction in the trustee rate:

- **Entitlements in a fixed trust are vested and indefeasible.** Retained income is attributable to known, fixed interests; it cannot be redirected between beneficiaries year to year. The concern that a lower trustee rate creates a discretionary accumulation shelter does not arise in the same way, because the trust has given up its discretion as the price of entry.
- **The election is irrevocable.** A trust cannot elect in for the retention rate and out for the flexibility. The concession is available only to structures that have permanently accepted fixed, transparent economic outcomes, which is precisely the transition the Government's own rollover policy says it wants to encourage.
- **The scope is bounded.** The rate applies only within the elected population, not to every discretionary trust that simply chooses never to distribute. It is a feature of the transition pathway, not a general change to trust taxation.

Two integrity elements would still need to be designed, being:

- **Integration on ultimate distribution.** Retained amounts taxed at 30 per cent should carry a credit or tracking mechanism so that further tax at the recipient's marginal rate (less the credit) applies when those amounts are ultimately distributed, this being the trust-level equivalent of dividend imputation. As entitlements in the elected trust are fixed, attributing retained amounts and credits to interest holders is considerably more traceable than it would be in a discretionary context.
- **Extraction by loan.** Rules would be needed to prevent retained amounts being accessed informally through loans or payments from the trust to beneficiaries or their associates, a trust-level analogue to Division 7A, applying within the elected population. Member feedback to CPA Australia supports the view that a coherent, symmetric rule of this kind, designed for the elective model from the outset, would be preferable even to the pre-*Bendel* arrangement, under which Division 7A applied only through the narrow and contested corporate-beneficiary UPE route, the very route the High Court has now closed.

We acknowledge this remains a genuine design exercise. But it is a bounded one, the machinery only needs to operate within an elected, fixed-entitlement structure, and it is materially simpler than either the transitional corporate beneficiary alternative or a general reform of trust retention taxation. It also captures the principal merit of the corporate-style models canvassed by some stakeholders (integration of retained and distributed income) without requiring a deemed corporate characterisation, an issue we address further below.

For completeness, CPA Australia does **not** recommend a general reduction of the default trustee rate on undistributed income across all discretionary trusts. Outside the elected population, a 25 per cent or 30 per cent accumulation rate without fixed entitlements or integration machinery would allow indefinite accumulation at a rate below most personal marginal rates and would work against the objectives of this reform. The recommendation above is deliberately confined to the elective model.

Within the elective fixed trust model, Treasury should consider the option of developing a 25 or 30 per cent trustee rate on retained income in preference to a transitional corporate beneficiary structure, paired with:

a) a credit or tracking mechanism imposing top-up taxation when retained amounts are ultimately distributed, and
b) rules governing loans and payments of retained amounts to beneficiaries and their associates.

The default trustee rate outside the elective model should remain unchanged.

Contact

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