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Ms Diane Brown

Deputy Secretary, Revenue Group The Treasury

Langton Crescent PARKES ACT 2600

Email: mintaxtrusts@treasury.gov.au

18 September 2026

Dear Diane,

Minimum tax on discretionary trusts exposure draft legislation

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 **Minimum tax on discretionary trusts exposure draft legislation** on behalf of our members and in the broader public interest.

CPA Australia understands the policy objective underpinning the proposed minimum tax: addressing the concern that discretionary trusts can be used to achieve lower rates of tax through income splitting. However, the response should be proportionate and targeted at circumstances where the mischief can actually arise.

The exposure drafts respond to a number of the issues CPA Australia raised with Treasury in July 2026. Most significantly, Treasury has proposed an excluded election trust (EET). The election appears intended to limit costs arising outside the Commonwealth income tax system, particularly potential state and territory stamp duty consequences.

We recognise this as a genuine attempt to give affected family businesses an alternative to restructuring into a company. This is important because restructuring can create costs and disruption well beyond Commonwealth income tax consequences. A new entity may need to reapply for licences and approvals, rewrite insurance policies, renegotiate leases and reopen banking arrangements and covenants. For an operating family business, these are not merely administrative inconveniences.

However, CPA Australia remains of the view that the better and more proportionate response is to reduce the number of trusts that need to engage with the election in the first place. Where the policy concern cannot arise, the trust should be outside the regime. Because the beneficiary credit is not refundable, a beneficiary whose only income is the distribution loses $9,748 a year on anything between $45,000 and $135,000. The provision looks at the rate, not the reason, so it cannot distinguish a genuine income splitting arrangement from a beneficiary who simply has very little income.

In addition, a very large part of the disruption in this package exists because the corporate beneficiary has been made unworkable. If the offset were available to a corporate beneficiary, that income would bear 30 per cent, with associated franking credits not being refundable, a substantial proportion of affected trusts would have no reason to elect and no reason to restructure.

For trusts that do need to make an election, the central problem is that the current drafting does not guarantee that making an EET election will not trigger state or territory stamp duty. The exposure draft requires the trustee, for every year in which the election is in force, to confer present entitlements to fixed shares of both income and capital. Whether those requirements engage the change in beneficial ownership provisions in state and territory duties legislation is an unresolved question.

The exposure draft explanatory material states that stamp duty is "not expected" to arise. However, there is no

provision in the Commonwealth legislation that gives effect to that statement, and no state or territory has, to date, agreed to the position. A trustee relying on the statement in the explanatory material would have no protection if a revenue authority subsequently took a different view and the matter were contested.

That uncertainty should not be left with taxpayers. The EET election may be made once, in the 2028–29 income year, and cannot subsequently be reversed. A family business making an effectively irrevocable decision in response to a Commonwealth tax measure should not have to guess at the consequences under state and territory law.

CPA Australia therefore considers that the states and territories should publicly state their position on the proposed Commonwealth changes and work through the detailed implications with the Commonwealth, so taxpayers have certainty before the election window opens. CPA Australia has written to the states and territories urging that this work be progressed.

If agreement cannot be reached, and some jurisdictions determine that duty is payable even where an EET election is made, restructuring into a company becomes the only practical pathway out of the discretionary trust regime. That pathway is itself available only once, with the restructuring window closing on 30 June 2030. In those circumstances, the Government should make restructuring as simple and low-cost as possible. Restructuring costs, including any associated duty, should be immediately tax deductible, and regulators should be engaged so that licences, approvals and other arrangements can transition without requiring businesses to stop trading.

The three-year roll-over window is narrower than it looks: restructures cluster at 30 June to avoid split accounting periods, so it delivers three year-end windows rather than three years of capacity, and none of the work can begin until the law is settled and the ten outstanding instruments are made. Some businesses will therefore bear the minimum tax not because it was the right answer for them, but because the relief expired before they could reach it.

Finally, the compliance burden of these measures should not be underestimated. The regime reaches small and family businesses that often have limited capacity to absorb additional professional and administrative costs. Importantly, this cost is incurred before the taxpayer knows the answer and regardless of whether the trust ultimately restructures. It is therefore a cost of determining the appropriate response to the new regime, rather than simply a cost of complying with the resulting tax treatment.

The election requires a decision by every affected discretionary trust, not only those that ultimately restructure. CPA Australia has modelled the compliance cost across four tiers, reflecting characteristics observable in ATO data. Nearly 850,000 discretionary trusts will have to decide whether to elect. If the provisions are left unamended, we estimate the cost of professional advice alone will be in the order of $2.0 billion to $2.8 billion - incurred whether or not any of them does.

The policy objective can be achieved without imposing this level of cost and uncertainty. The regime should be narrowed so that trusts where the mischief cannot arise are excluded, allow an offset to be available for a corporate beneficiary, the EET should provide genuine certainty about its consequences, and the states and territories should resolve the duty question before taxpayers are required to make an irrevocable choice. Our detailed submission with recommendations is attached.

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

Yours sincerely,

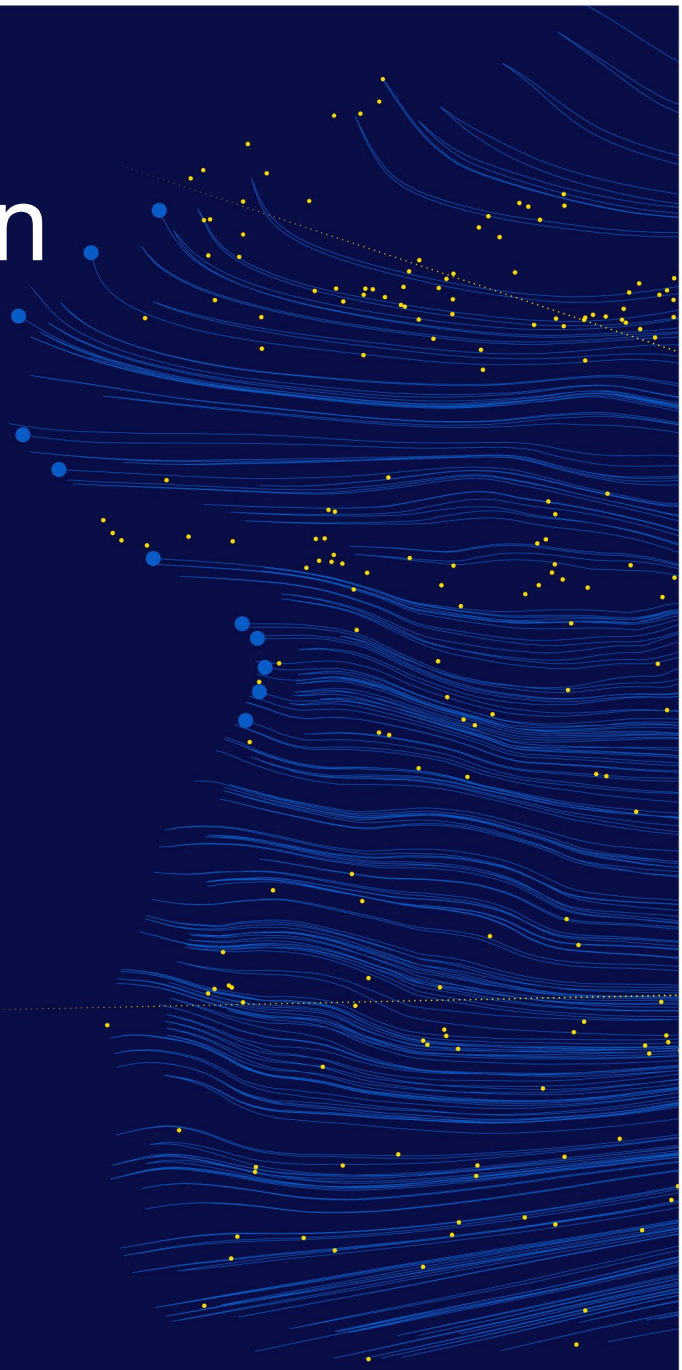
Elinor Kasapidis
Chief of Policy, Standards and External Affairs

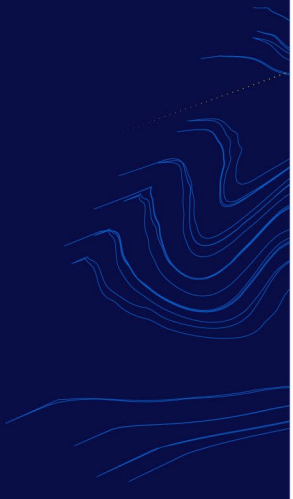
Jenny Wong
Tax Policy Lead

Attachment:
Minimum tax on discretionary trusts – exposure draft legislation, CPA Australia — submission to Treasury
September 2026

Minimum tax on discretionary trusts – exposure draft legislation

CPA Australia - submission to Treasury
September 2026





1. Executive summary

CPA Australia understands the policy objective underpinning the proposed minimum tax: addressing the concern that discretionary trusts can be used to achieve lower rates of tax through income splitting. However, the response should be proportionate and targeted at circumstances where the mischief can actually arise.

The exposure drafts respond to a number of the issues CPA Australia raised with Treasury in July 2026. Most significantly, Treasury has proposed an excluded election trust (EET). The election appears intended to limit costs arising outside the Commonwealth income tax system, particularly potential state and territory stamp duty consequences.

We recognise this as a genuine attempt to give affected family businesses an alternative to restructuring into a company. This is important because restructuring can create costs and disruption well beyond Commonwealth income tax consequences. A new entity may need to reapply for licences and approvals, rewrite insurance policies, renegotiate leases and reopen banking arrangements and covenants. For an operating family business, these are not merely administrative inconveniences.

However, CPA Australia remains of the view that the better and more proportionate response is to reduce the number of trusts that need to engage with the election in the first place. Where the policy concern cannot arise, the trust should be outside the regime. Because the beneficiary credit is not refundable, a beneficiary whose only income is the distribution loses $9,748 a year on anything between $45,000 and $135,000. The provision looks at the rate, not the reason, so it cannot distinguish a genuine income splitting arrangement from a beneficiary who simply has very little income.

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For trusts that do need to make an election, the central problem is that the current drafting does not guarantee that making an EET election will not trigger state or territory stamp duty. The exposure draft requires the trustee, for every year in which the election is in force, to confer present entitlements to fixed shares of both income and capital. Whether those requirements engage the change in beneficial ownership provisions in state and territory duties legislation is an unresolved question.

The exposure draft explanatory material states that stamp duty is “not expected” to arise. However, there is no provision in the Commonwealth legislation that gives effect to that statement, and no state or territory has, to date, agreed to the position. A trustee relying on the statement in the explanatory material would have no protection if a revenue authority subsequently took a different view and the matter were contested.

That uncertainty should not be left with taxpayers**.** The EET election may be made once, in the 2028–29 income year, and cannot subsequently be reversed. A family business making an effectively irrevocable decision in response to a Commonwealth tax measure should not have to guess at the consequences under state and territory law.

CPA Australia therefore considers that the states and territories should publicly state their position on the proposed Commonwealth changes and work through the detailed implications with the Commonwealth, so taxpayers have certainty before the election window opens. CPA Australia has written to the states and territories urging that this work be progressed.

If agreement cannot be reached, and some jurisdictions determine that duty is payable even where an EET election is made, restructuring into a company becomes the only practical pathway out of the discretionary trust regime. That pathway is itself available only once, with the restructuring window closing on 30 June 2030. In those circumstances, the Government should make restructuring as simple and low-cost as possible. Restructuring costs, including any associated duty, should be immediately tax deductible, and regulators should be engaged so that licences, approvals and other arrangements can transition without requiring businesses to stop trading.

The three-year roll-over window is narrower than it looks: restructures cluster at 30 June to avoid split accounting periods, so it delivers three year-end windows rather than three years of capacity, and none of the work can begin until the law is settled and the ten outstanding instruments are made. Some businesses will therefore bear the minimum tax not because it was the right answer for them, but because the relief expired before they could reach it.

Finally, the compliance burden of these measures should not be underestimated. The regime reaches small and family businesses that often have limited capacity to absorb additional professional and administrative costs. Importantly, this cost is incurred before the taxpayer knows the answer and regardless of whether the trust ultimately restructures. It is therefore a cost of determining the appropriate response to the new regime, rather than simply a cost of complying with the resulting tax treatment.

The election requires a decision by every affected discretionary trust, not only those that ultimately restructure. CPA Australia has modelled the compliance cost across four tiers, reflecting characteristics observable in ATO data. Nearly 850,000 discretionary trusts will have to decide whether to elect. If the provisions are left unamended, we estimate the cost of professional advice alone will be in the order of $2.0 billion to $2.8 billion - incurred whether or not any of them does.

The policy objective can be achieved without imposing this level of cost and uncertainty. The regime should be narrowed so that trusts where the mischief cannot arise are excluded, allow an offset to be available for a corporate beneficiary, the EET should provide genuine certainty about its consequences, and the states and territories should resolve the duty question before taxpayers are required to make an irrevocable choice.

2. Part 1 — the excluded election trust

2.1 An alternative path to restructuring

The excluded election trust is the most significant response to consultation in the exposure drafts. Its purpose is recorded in the explanatory memorandum: the election is expected to enable affected trusts to limit costs "that are not direct Commonwealth income tax consequences such as state and territory stamp duties" (EM 1.4).

An election that leaves the trust in place, its assets undisturbed and its deed unamended is, at first glance, the right principle for that problem. The purpose of this Part is to identify the issues that arise under the current drafting of the election. On our reading of the exposure draft, specialist legal analysis and confirmation is required from state revenue authorities before the election commence. The technical characterisation determines whether duty is imposed[1] — and in several jurisdictions the answer is not clear under the current drafting. A trustee facing an unquantified duty exposure may decline to make a EET election, and the proposals will not achieve its policy objective if the trustees it was designed for cannot determine the cost of entering it.

2.2 The consequences of the annual obligation

Subsection 102UYB(2) requires the nomination to specify each beneficiary's share of both the income and the capital of the trust, in equal proportions, totalling 100 per cent. Subsection 102UYD(2) provides that if the trustee decides the election is to be in force for a year of income, the trustee must confer present entitlements to those shares in accordance with the nomination. Paragraph 102UYD(1)(b) extends section 95A to capital, for the purposes of Division 6, so that this is possible.

102UYD(1)(b) and subsection 102UYG(3) are each expressly confined in their operation; subsection 102UYD(2) is not. And the obligation carries no purposive limitation — it is not expressed to operate for the purposes of Division 6, or of the Act.

We also state two matters of settled law, because they narrow the issue. Present entitlement and a vested proprietary interest are distinct concepts. A beneficiary made presently entitled to income does not thereby acquire a proprietary interest in the corpus. And the nomination itself is not an exercise of any power: subsection 102UYB(2) is expressed in terms of beneficiaries to whom the trustee may confer entitlement, and EM 1.21 says expressly that the nomination does not restrict the trustee's discretion. If a power of appointment is exercised, it is exercised annually under subsection 102UYD(2), not on lodgement of the nomination.

In *Sayden Pty Ltd ATF Griffin Property Unit Trust (RD) v Chief Commissioner of State Revenue* [2013] NSWCA 11; (2013) 83 NSWLR 700, the Court of Appeal (Gzell J, Meagher JA and Tobias AJA agreeing) held that where a trust deed specifically provides that the beneficiaries are presently entitled to the income of the trust subject to the trustee's proper expenses, are presently entitled to the capital of the trust, and may require the trustee to wind up the trust and distribute the trust property or its net proceeds, the criteria in section 3A(3B) of the Land Tax Management Act 1956 (NSW) are satisfied, and the beneficiaries are taken to be the owners of an equitable estate in the land.

Two things follow. The first is that a court has treated present entitlement to income and present entitlement to capital, in combination, as legally significant and as capable of producing a proprietary consequence. The second is that in Sayden the proprietary consequence arose by reason of section

[1] See Variations to discretionary trusts | State Revenue Office

3A(3A) of that Act — a State deeming provision — rather than at general law. The case is therefore authority that a statute may attach proprietary consequences to present entitlement to capital. It is not authority that present entitlement to capital is itself a proprietary interest at general law.

The criteria considered in Sayden have three limbs, and the third is a right to require the trustee to wind up the trust and distribute the trust property. Subsection 102UYD(2) supplies the first two and not the third. Whether the absence of the third limb is determinative, or whether a right to call for the interest follows at general law once an interest vests, is a question on which we do not assert an answer. It is part of Question 2 below.

The capital limb

The issue therefore reduces to the capital limb. An annual conferral of present entitlement to a proportionate share of trust capital is a different thing from an entitlement to income — and, on the reasoning in Sayden, capable of carrying different consequences — and it is not obvious to us what work it does.

Subsection 102UYD(2) requires the trustee to confer present entitlements to shares of the income and the capital of the trust in accordance with the nomination. It does not confine the capital limb to a gain, or to an increase in value. On one reading it therefore reaches the whole of the capital of the trust, in every income year the election is in force. Take a trust that acquires an asset for $10 million from after-tax profits and later sells it for $50 million. The provision would require the trustee to confer entitlement not to the $40 million gain but to the entire $50 million, and to do so in that year and in each year afterwards.

Whichever reading is correct, the difficulty arises because the election operates on trust law concepts of income and capital rather than on the tax attributes the measure is directed at. The election should operate on tax attributes: a trustee would make one nomination for the taxable income of the trust, and a separate nomination for the net capital gain of the trust, each specifying beneficiaries and proportions.

That form answers the integrity objection we understand Treasury to have raised in consultation, which is that the characterisation of an amount as income or capital can be manipulated under a trust deed, so that an election confined to income could be defeated by reclassification. That objection is well made against the present drafting, and it is the reason the capital limb exists. It has no application to an election made over taxable income and net capital gains, because those are statutory amounts worked out under the Act. They cannot be reallocated between each other by the terms of a deed.

The form also removes the consequences described below in a single step. A nomination over tax attributes directs the assessment of amounts. It does not direct the trustee to confer entitlement to the capital of the trust, so no question arises about vesting, about duty, or about the availability of trust property to a beneficiary's creditors.

Recommendation 1: Treasury should clarify the purpose of the capital limb of the EET nomination in s 102UYD(2), and reconsider its drafting so that the annual conferral of present entitlement to capital does not give rise to state and territory duty consequences.

Recast the election so that it operates on tax attributes rather than on trust law income and capital: a nomination specifying beneficiaries and proportions for the taxable income of the trust, and a separate nomination for the net capital gain of the trust. In the alternative, confine the annual obligation in subsection 102UYD(2), and the nomination in subsection 102UYB(2), to the income of the trust, addressing accumulation directly if a rule is required.

State and Territory duty

If the annual conferral of present entitlement to capital is an exercise of a power of appointment affecting beneficial interests in trust property, it may constitute a change in beneficial ownership for the purposes of the State and Territory duties Acts. Because the conferral must occur in each year of the election, that consequence would arise not once but recurrently, for the life of the election.

The alternative view is that nothing relevant has changed. The trust remains discretionary; the legislation operates only for income tax purposes; the trustee continues to exercise its discretion each year; the deed is not amended; and there is no conversion to a fixed trust. On that view, the election leaves the trustee free to confer a present entitlement on any beneficiary as before — with a tax consequence attached if it does, but no dutiable event.

We do not express a concluded view on which is correct. Our point is that the question must be resolved before the election commences, and resolved by Treasury and the State/Territories rather than by each trustee. The trusts this regime is aimed at are predominantly small businesses. They will not obtain a duties opinion in each jurisdiction in which they hold property, and they should not have to in order to decide whether to elect.

The same question arises on the way out. Subsection 102UYG(3) provides that on revocation the beneficiaries are taken never to have been presently entitled to the relevant shares. That provision is expressed to operate for the purposes of the Act. Whether the withdrawal of entitlements previously conferred has consequences for the beneficiaries' equitable interests, and therefore for duty, is a further unresolved question.

In addition, the consequence of the assurance being wrong falls entirely on the trustee. The election may be made once, in a single income year, and cannot be remade (paragraphs 102UYB(4)(b) and 102UYB(6)(a)). A trustee who elects in reliance on the tax explainer and is later assessed has no remedy against the assessing authority.

Asset protection

Where a trustee exercises a power of appointment in favour of a discretionary object, that object is ordinarily treated as having a vested interest in the share appointed. A beneficiary with a vested and indefeasible interest may call for their share under the rule in Saunders v Vautier. What a beneficiary may call for, a trustee in bankruptcy may call for: subsection 116(1)(a) of the Bankruptcy Act 1966 vests in the trustee in bankruptcy all property belonging to the bankrupt.

If the annual conferral required by subsection 102UYD(2) has that character, then each nominated beneficiary's share of trust capital becomes available to that beneficiary's personal creditors, and the exposure accumulates because the conferral recurs each year. For a family business held in a discretionary trust with four nominated beneficiaries, the bankruptcy of one beneficiary would reach a quarter of the business. Section 102UYF permits revocation of the election; it does not purport to unwind an appointment already made under the trust instrument, and the Commonwealth could not do so. A revocation made in the face of a creditor would also be exposed under sections 120 and 121 of the Bankruptcy Act.

The same premise carries a family law consequence. A vested interest in trust capital is property of a party for the purposes of section 79 of the Family Law Act 1975, where a discretionary object's expectancy is ordinarily treated as a financial resource. We raise this consequence and propose no remedy for it; the discretionary character of that jurisdiction makes a legislated exclusion inappropriate.

Asset protection is not a stated objective of this measure and we do not ask the Government to enlarge it. We ask only that the measure not remove, as a by-product, a characteristic that affected trusts had before it and that the measure was not designed to affect. A trustee who was protected on

30 June 2028 should not be exposed on 1 July 2028 by reason of taking the option the Government has offered.

A few questions that arise:

- Is the annual conferral of present entitlement to a proportionate share of the capital of the trust under subsection 102UYD(2) intended to vest a proprietary interest in that share at general law? If it is not, what provision of the exposure draft is said to prevent that consequence?
- Is the removal of the asset protection function of an electing discretionary trust, and the consequent availability of a nominated beneficiary's share to that beneficiary's personal creditors, an intended consequence of the measure?
- Have any of the States and Territories been consulted on the duty, land tax and surcharge consequences of the election? Has the Attorney-General's Department been consulted on its consequences under the Bankruptcy Act 1966?

Recommendation 2: We recommend that the Government obtain advice on the general law characterisation question before the Bill is introduced. The questions should be resolved before trustees are asked to make an irrevocable election in reliance on it.

2.3 What Commonwealth drafting cannot address

The following issues remain as a consequence of Commonwealth design choices. We believe these issues should not be left to trustees to determine.

- The potential change in beneficial ownership concerns in the States and Territories on whether the election could result in a change in equitable interests.
- Pre-election amendments. Paragraph 102UYB(3)(a) and section 102UYC anchor eligibility to the position at 1 July 2028, so deed variations and changes to company constitutions and share rights must be made beforehand. Those instruments are potentially dutiable on their own terms in some jurisdictions.
- The discrete trust acquisition and surrender regime in the Duties Act 2008 (WA), which has its own concepts of taker in default and its own valuation rules.
- Corporate trustee duty — section 67 of the Duties Act 2008 (WA) and the Queensland analogue — which is triggered by an arrangement that results or may result in a change in any beneficial interest, vested or contingent.
- Landholder duty, including indirect interests, which must be analysed at every level of a structure.
- Resettlement characterisation under each duties Act.
- Land tax and surcharge characterisation, including foreign purchaser and absentee owner surcharges.
- The consequences under section 79 of the Family Law Act 1975 described at 2.2.

Recommendation 3. Seek coordinated positions from the States and Territories on the duty, land tax and surcharge treatment of the election — in the first instance by public guidance from each revenue authority, and by legislative amendment where guidance cannot resolve the position —, and publish those positions before commencement.

2.4 If the nomination structure cannot be addressed

If Treasury concludes that no drafting of a forward nomination avoids the consequences described at 2.2, an alternative is available: exclude a trust from the minimum tax by reference to its actual distributions in an income year, tested after the event against a stated pattern, with no forward nomination, no compelled conferral and no one-shot irrevocable election. That approach removes the architecture that generates the problem. We recognise it is a redesign rather than an amendment.

3. Part 2 — the election's other design issues

3.1 A single, unrepeatable election in a single income year

Paragraph 102UYB(4)(b) permits the election to be made only during the first income year commencing on or after 1 July 2028, which for most trusts closes on 30 June 2029. Paragraph 102UYB(6)(a) prevents a further election once one has been revoked. Paragraph 102UYB(6)(b) prevents an election where a roll-over applies to the assets of the trust, and EM 1.16 confirms this operates regardless of whether the roll-over is completed.

A trustee therefore has a single opportunity, in a single year, to make a decision that binds the trust indefinitely, in circumstances where the composition of the family will change and the trust's income will vary. We can identify no policy reason for a window this narrow.

Recommendation 4. Extend the period in which an EET election may be made to at least three income years, and permit a trustee whose election has been revoked to make a further election.

There is a related timing defect. Subsection 102UYB(5) requires the Commissioner to be notified of the election and the nomination by the earlier of the due date for lodgment of the trust's return and the date the return is actually lodged. Making the earlier of the two dates the deadline serves no purpose we can identify, and it produces a severe outcome from an administrative oversight: the trustee will by then have conferred entitlements on the footing that the election is in force, and if the notification is late the election is ineffective and the whole of the trust's net income is potentially subject to the minimum 30 percent tax (and potentially assessed at the top marginal rate plus Medicare levy). A trustee not on a registered agent's lodgment program has materially less time again.

Recommendation 5. Amend subsection 102UYB(5) so that notification of an EET election and nomination is required by the later of the due date for lodgment and the date of lodgment of the trust's return, and confer on the Commissioner a discretion to extend that period.

3.2 Automatic revocation, and the absence of any relieving discretion

Subsection 102UYF(2) revokes an election automatically in a range of circumstances outside the trustee's control. Paragraph 102UYF(2)(d) is the clearest: the election is revoked where a shareholder of a nominated company ceases to hold a share for any reason other than death or a family law order. A sale, a redemption, a transfer, or a bankruptcy trustee taking the share all revoke it. The trustee may not know the share has changed hands.

Under section 102UYG, present entitlements are deemed never to have existed, the trustee is assessed on the whole of the net income of the trust, and subsection 102UYG(4)(a) disapplies

subsections 99A(2) to (3A), removing the discretion otherwise available to the Commissioner. The trust is a minimum tax trust in all later years and the election cannot be remade. There is no remission power, no proportionality mechanism and no Commissioner's discretion anywhere in Division 6F. Example 1.19 illustrates it.

The tax law already contains the mechanism that is missing here. Section 109RB permits the Commissioner to disregard the operation of Division 7A, or to frank a deemed dividend, where the relevant circumstance arose because of an honest mistake or inadvertent omission, having regard to the circumstances and to whether anyone benefited. Division 7A and the electable regime present the same problem: a severe and automatic consequence that can be triggered by an administrative slip. A similar provision should be inserted in the election provisions.

The consequence itself should also be reconsidered. As drafted, a departure from the nomination revokes the election, deems the year's present entitlements never to have existed, and assesses the trustee on the whole of the net income of the trust at the top marginal rate. That response is not calibrated to the breach. The same outcome follows whether the departure is a deliberate circumvention of the regime or an administrative oversight — a resolution made a day late, or a nomination that fails on a technicality the trustee did not detect until the return was prepared.

There is also a practical point about precision. Subsection 102UYD(2) requires entitlements to be conferred in accordance with the nomination, and paragraph 102UYF(2)(a) revokes the election if they are not. Trust income is frequently not finally determined until well after year end, and a trustee resolving on percentages may be unable to distribute in exactly the nominated proportions. There is no tolerance in the drafting. A rounding difference, or an adjustment following an amended assessment, appears sufficient to revoke.

Recommendation 6. Introduce a Commissioner's discretion to disregard an automatic revocation under subsection 102UYF(2) where the revocation arises from an event outside the trustee's control or where revocation would produce a disproportionate outcome

The discretion should be drafted on the model of section 109RB, extending to a revocation arising from an honest mistake or inadvertent omission.

Recommendation 7. Provide a materiality threshold, so that a variance between the entitlements conferred and the proportions specified in the EET nomination does not revoke the election unless the variance exceeds a stated tolerance.

3.3 The nomination cannot follow the family

Section 102UYE permits variation in two circumstances only: the death of a specified individual beneficiary, and a relationship breakdown between two specified beneficiaries. Paragraph 102UYE(4)(a) requires the order to involve two individuals who are both specified, so the separation of a specified beneficiary from a spouse who is not specified does not permit variation.

A nomination made in 2028–29 is fixed against the family as it stood on 1 July 2028, for the life of the trust. It cannot accommodate:

- children or grandchildren born or adopted after 1 July 2028, who cannot be specified at all because paragraph 102UYB(3)(a) requires the entity to have been capable of benefiting on that date;
- the incapacity or bankruptcy of a specified beneficiary;
- a relationship breakdown involving a specified beneficiary and a person who is not specified;
- a specified beneficiary ceasing to be an Australian resident; or

- estrangement, or any other change in family circumstances.

The exclusion of after-born descendants is the most difficult to justify. A trust established for a family would be unable to benefit the next generation of that family, permanently, because of the date on which an election was made.

Recommendation 8. Expand section 102UYE to permit variation of a nomination on the birth or adoption of a lineal descendant, the incapacity or bankruptcy of a specified beneficiary, a relationship breakdown involving a specified beneficiary and a person who is not a specified beneficiary, and a change in a specified beneficiary's residency.

3.4 The eligible company requirement

Section 102UYC requires a nominated company to have no material discretionary elements affecting members' rights. EM 1.87 to the roll-over states that a company with alphabet shares, where directors may choose the class on which dividends are paid, would ordinarily have a material discretionary element. Most private companies used as beneficiaries of family trusts have discretionary dividend powers and many have multiple share classes. A trustee wishing to nominate such a company must have its constitution and share rights amended before 1 July 2028 — raising value shifting, CGT events D1 and H2, and in some jurisdictions duty. The company must also have existed and been an object of the trust on that date.

The difficulty is that section 102UYC disqualifies a company by reference to what its directors may do, rather than what they have done. Most private company constitutions confer a general power to issue shares, and that power is capable of affecting the interests of existing members. On the drafting as it stands, a company is ineligible even though the power may never be exercised.

To address this an approach is to move the test from eligibility to revocation. Let the company qualify, and add to the automatic revocation events in paragraph 102UYF(2)(c) the case where the company exercises a power so as to significantly affect the value of the rights or interests of its members. The behaviour Treasury is concerned about still has a consequence, and it has that consequence when it occurs. What is avoided is the cost of amending existing constitutions, and the impossibility, after 1 July 2028, of incorporating a company that complies.

Recommendation 9. Amend section 102UYC so that a company is not disqualified merely because a power is capable of being exercised so as to affect members' rights or interests, and instead add to the automatic revocation events in paragraph 102UYF(2)(c) the exercise of such a power so as to significantly affect the value of those rights or interests. In the alternative, provide a transitional period during which a company may amend its constitution and share rights to satisfy section 102UYC without adverse income tax or duty consequences.

3.5 The interaction with Schedule 2F

The measure adds a third election regime to a trust that may already be operating under two. A trust with a family trust election in force must confine distributions to the family group or bear family trust distribution tax. If it also makes an EET election, it must confer entitlements in accordance with the nomination or lose the election. The two regimes have different boundaries, different trigger events and different consequences, and the exposure draft does not work through the interaction.

Where a nomination specifies members of a spouse's family and the relationship subsequently breaks down, those beneficiaries may fall outside the family group of the continuing spouse. The trustee then chooses between conferring entitlements in accordance with the nomination and incurring family trust

distribution tax, or departing from the nomination and losing the election. Neither section 102UYE nor Schedule 2F provides a way to realign the two.

Family trust elections exist principally to support the trust loss provisions in Divisions 266 and 267 and the rules governing entitlement to franking credits, and a minimum rate of tax on trust income does not address either. The accumulation of three overlapping regimes, each with its own election, its own penalty and its own boundaries, is a reason to review whether the Schedule 2F machinery remains fit for purpose, and that the interactions must be resolved before commencement in any event.

Recommendation 10. Resolve the interaction between an EET election and a family trust election, including by permitting variation of an EET nomination, or revocation of a family trust election, where a nominated beneficiary ceases to be a member of the relevant family group. Separately, review whether the election machinery in Schedule 2F remains appropriate alongside the minimum tax.

4. Part 3 — roll-over relief

4.1 General comments

If the duty question remains unresolved, then roll-over is the only way out of a discretionary trust.

It is also available once. The transitional relief period runs from 1 July 2027 to 30 June 2030 and there is no provision for extension. A trustee who does not complete a restructure in those three years has no further opportunity, and by then the election window will have closed as well. The roll-over is a single, non-renewable transitional measure carrying the entire burden of moving a large number of businesses out of one structure and into another.

A measure of that kind should be designed for take-up. It should be simple to apply, forgiving of circumstances the taxpayer cannot control, and as less costly as the Commonwealth can make it. A four year clawback attaches to a concept that is not yet defined. A trust without a family trust election has no continuity pathway at all, because the determination that would supply one does not exist. The choice, once made, cannot be revoked. Losses are extinguished, franking history is lost, and the costs of the exercise are capital expenditure that the taxpayer recovers slowly or not at all.

In addition, the three-year transitional relief period is shorter in practice than it appears based on our members feedback. Two features compress it.

First, restructures will concentrate around 30 June. A transfer part-way through an income year produces split accounting periods, two sets of accounts, apportioned income and a materially more expensive and error-prone year, so advisers will schedule around year end wherever the commercial circumstances permit. The relief period opening on 1 July 2027 and closing on 30 June 2030 therefore delivers not three years of capacity but three year-end windows, into which a substantial proportion of the work will be pushed.

Second, that work cannot begin now. The exposure drafts are not law, ten of the legislative instruments they rely on have not been made, and both explanatory memoranda foreshadow further integrity rules in later tranches. No adviser can responsibly recommend an irreversible restructure, or an irrevocable election, against provisions that may still change. Every month between now and enactment is a month removed from a window that is already narrower than the dates suggest — and the profession does not have the surge capacity to absorb that compression. The practical consequence is that some will not restructure at all, will not elect, and will default into the minimum tax by inaction. Those businesses will bear the minimum tax not because it was the right answer for them, but because the relief expired before they could reach it.

4.2 Immediate tax deduction for restructuring costs

The roll-over addresses income tax. It does not address the consequences of a change of legal entity outside the tax system. A change of entity generally terminates rather than transfers. Occupational and industry licences, building, liquor, transport, real estate, labour hire, financial services, ordinarily require a fresh application by the new entity rather than a transfer of the existing authorisation. Workers compensation policies are re-written and claims history may not carry across. Leases require landlord consent, which is a commercial opportunity for the landlord. Franchise agreements, government panel appointments, grandfathered arrangements, and banking covenants and personal guarantees written against the trust must each be renegotiated.

Those costs is presently not deductible upfront when incurred. Professional fees, valuations, re-licensing and re-establishment costs associated with a restructure are capital in nature. To the extent they are deductible at all, they are deductible over five years under section 40-880, and only where the business is carried on for a taxable purpose. Transfer duty on land is generally not deductible; it is added to the cost base of the asset and recovered, if ever, on a disposal that may be decades away or may never occur.

The result is that a family that responds to the measure in the way the Government intends bears the whole of the cost in the year of the restructure and recovers a fraction of it over the following five years. A large proportion of restructuring costs will be duty, which is not recoverable at all through the income tax system.

CPA Australia raised in its earlier consultation response that the costs of restructuring in response to this measure should be immediately deductible. We repeat that recommendation here. The Commonwealth cannot compel the States to provide duty relief. It can determine how the cost of the restructure is treated for income tax purposes, and in doing so it can reduce the net cost to an affected business by something approaching the marginal rate. For a measure whose success depends on businesses actually moving, that lever should be considered.

Immediate relief should extend to duty, not only to professional fees. Duty is the main component of the cost, and excluding it would leave the great majority of the burden untouched. It should be confined to costs incurred in connection with a restructure to which Subdivision 126-C applies, within the transitional relief period, so that it cannot be accessed by restructures undertaken for other reasons.

If an immediate deduction is not acceptable, a shorter write-off period, or an election to spread the deduction over a period the taxpayer chooses, could be an alternative. What should not remain is the present position, in which the largest single cost of the exercise, duty on the transfer of the business premises, attracts no income tax recognition at all at the time it is paid.

Recommendation 11. Make expenditure incurred in connection with a restructure to which Subdivision 126-C applies, including State and Territory duty, professional fees, valuation costs and costs of re-licensing and re-establishment, immediately deductible in the income year in which it is incurred. If an immediate deduction is not acceptable, provide a shorter write-off period than five years, or an election to spread the deduction, and in either case ensure that duty on the transfer of assets is brought within the deduction rather than added to the cost base.

4.3 Mutual exclusivity of rollover and EET

Subsection 126-431(3) prevents a trustee from choosing the roll-over where an EET election has been made. Paragraph 102UYB(6)(b) prevents an election where a roll-over applies to the assets of the trust, whether or not it is completed. The election window closes on 30 June 2029; the transitional relief period runs to 30 June 2030.

A trustee who chooses the roll-over and does not complete it — because the all-assets requirement is not met, or a continuity requirement fails, or the four-year clawback in subsection 126-430(5) is triggered — has by then lost the ability to elect, faces amended assessments under subsection 126-430(9), and remains a minimum tax trust indefinitely. The same follows for a farming family using the partial restructure: because a roll-over applies to the assets of the trust, no election can be made for the retained trust (EM 1.33).

Recommendation 12. Remove the mutual exclusivity in paragraph 102UYB(6)(b) and subsection 126-431(3), or at minimum permit a trustee whose restructure does not complete to make an EET election.

4.4 All-or-nothing relief and a single transferee

Subsection 126-430(3) denies the roll-over for every asset if all required assets are not transferred within the transitional relief period, and EM 1.20 confirms there cannot be more than one transferee. A trust holding two unrelated operating businesses and an investment portfolio must place all of them in one entity. The rule also produces a disproportionate outcome where a single asset cannot be transferred for reasons outside the trustee's control, such as a lease the counterparty will not consent to assign; the exclusion in paragraph 126-430(4)(a) may not extend to an asset that is capable of transfer but for which consent is withheld.

The single transferee rule has a further consequence. Under section 126-475, where a transferred asset was a replacement asset under an earlier small business roll-over in Subdivision 152-E, the transferee is treated as having made the earlier choice, so CGT events J2, J5 and J6 can happen to it. The transferee may not satisfy the active asset or significant individual conditions that the original choice assumed, and because all assets must move to one entity, the structure that satisfied them may no longer exist. The transferee inherits a contingent liability it cannot always avoid.

Three further consequences follow from the all-or-nothing rule include:

- The relief may be chosen only once in relation to a minimum tax trust. Subsection 126-431(4) provides that the transferor cannot make more than one choice, and subsection 126-431(2) provides that the choice cannot be revoked. A trustee whose first restructure fails therefore cannot begin again, even where time remains in the transitional period and even where the failure arose from a matter the trustee could not control.

- Completion is tested against a fixed end date rather than against a reasonable period from the first transfer. A restructure commenced in good faith in early 2030 and delayed by a landlord's consent, a regulator's processing time or a counterparty's refusal to assign fails in its entirety on 30 June 2030, however close to complete it is.

- There is no relieving power anywhere in Subdivision 126-C. Where the requirement is not met, subsection 126-430(9) permits the Commissioner to amend assessments to reverse the relief on every asset transferred, and to do so up to four years after notice of the relevant assessment. There is no discretion to preserve the relief, and no mechanism by which a substantially complete restructure can be saved.

The combined effect is that a trustee who transfers the great majority of the assets of the trust, and is refused consent in respect of one lease, loses the relief on all of them and faces amended assessments on the whole restructure. That is a disproportionate response to a failure the trustee did not cause and could not prevent, and it is a reason a cautious adviser will counsel against beginning a restructure at all where any asset requires a third party's consent.

Recommendation 13. Permit more than one transferee under Subdivision 126-C, and permit partial relief where the all-assets requirement is not satisfied for reasons outside the trustee's control.

Recommendation 14. Replace the all-assets requirement in subsection 126-430(3) with a requirement to transfer substantially all of the assets of the minimum tax trust, disregarding any asset that cannot be transferred for reasons outside the trustee's control, including where a consent required for the transfer is withheld.

Recommendation 15. Test completion of the restructure over a period of at least 12 months, and preferably 24 months, from the first transfer, rather than by reference to the end of the transitional relief period. The transfers themselves would continue to be required to occur within the transitional relief period; what would change is that a restructure is not defeated merely because the period expires shortly after it begins. Permit a trustee to make more than one choice under section 126-431 in relation to the same trust.

Recommendation 16. Confer on the Commissioner a discretion to treat the requirements of Subdivision 126-C as satisfied where a restructure is substantially complete and the failure to complete arises from circumstances outside the trustee's control. The discretion should be drafted on the model of section 109RB, consistently with Recommendation 6.

The simplest restructure available to a small business may also be unavailable. The exposure draft materials describe the object of the roll-over as supporting restructures into entities with more fixed and transparent economic outcomes. For a standard structure — a trading company owned by a discretionary trust, with the trust distributing to two individuals — the most fixed and transparent outcome is for those two individuals to hold the shares directly.

Subsection 126-430(1) permits one transferee, and EM 1.20 confirms there cannot be more than one. Paragraph 126-440(1)(b) contemplates an individual transferee, so a transfer to a single individual is available. A transfer to two individuals as tenants in common is not, because there would be two transferees. A transfer to them jointly may be available if they are a partnership, but subsection 126-445(c) refers to a general law partnership, and the explanatory materials describe a general law partnership as one in which the partners carry on a business together. Two individuals holding shares jointly are not ordinarily in business together.

So a family may restructure into a newly incorporated company owned equally by the two of them, or into a unit trust, or may elect and retain the discretionary trust. What it appears unable to do is take the shares out of the trust and hold them directly. That is the simplest structure available to it, it is the one the explanatory materials describe as the objective, and we can identify no integrity reason for excluding it where the transferees were beneficiaries and members of the family group before the transfer.

Recommendation 17. Permit a transfer under Subdivision 126-C to two or more individuals, whether as joint tenants, tenants in common or partners, where each of them satisfies the continuity requirements in section 126-440, and confirm that a partnership for this purpose is not confined to a general law partnership carrying on a business.

Recommendation 18. Provide that CGT events J2, J5 and J6 do not happen where the event arises solely because of a restructure to which Subdivision 126-C applies.

4.5 The continuity pathway and the clawback

Subsection 126-440(2) provides that for a trust that is not a family trust, the continuity requirements are those determined by the Minister, and subsection 126-440(4) provides that if no determination is in force, subsection (2) does not apply. No determination has been made. A discretionary trust without a

family trust election therefore has, at present, no available continuity pathway and no access to the roll-over. The transitional relief period opens on 1 July 2027.

Subsection 126-430(5) denies the roll-over if material discretionary elements affect members' rights in the transferee at any time until the end of the fourth income year after the last required transfer. With the amendment power in subsection 126-430(9), a restructure completed in 2029–30 remains open until 2033–34 or later, on a concept that is not yet the subject of any determination.

The scope of the clawback is also unclear in a way that matters to the most common form of restructure. Subsections 126-430(5) and (6) deny the roll-over where there are material discretionary elements affecting the rights or interests of members of the transferee. It is not apparent whether that is directed only at the rights attaching to the interests in the transferee, or whether it looks through to the nature of the members themselves. If a transferee is a company with a single class of shares, and those shares are held by a discretionary trust, the interests in the transferee are not discretionary but the holder is. On the second reading the roll-over would be unavailable, and a very large proportion of intended restructures would fail — in many cases only on an amended assessment years later, once the clawback period has run.

The continuity requirement raises a related and more fundamental question. Paragraph 126-440(1)(a) requires every individual who has a direct or indirect interest in the transferee just after the transaction to have been, just before it, a beneficiary under the family trust and a member of the family group. Where the shares in the transferee are held by a discretionary trust, it is arguable that no individual has an interest in the transferee at all, in which case the condition is either incapable of being satisfied or is satisfied vacuously. That is the question presently before the courts in relation to Division 149, and it should not be left to be resolved that way here.

The answer matters commercially as well as technically. If a discretionary trust may hold the transferee, a group may restructure into a corporate structure it already owns. If it may not, a group cannot consolidate its trusts into an existing company held through a trust, which is the ordinary configuration. We also note an apparent inconsistency between the two regimes: we understand Treasury to have confirmed in consultation that a company nominated under an EET election may be held by a discretionary trust. If that is right, the position under the roll-over should be the same, or the difference should be explained. [CONFIRM the Treasury statement before lodgement.]

Recommendation 19. Confirm that the continuity requirements in section 126-440 are satisfied where the interests in the transferee are held by a trust, provided the individuals who may benefit under that trust were beneficiaries and members of the family group before the transaction, and align the position under Subdivision 126-C with that applying to a nominated company under an EET election.

Recommendation 20. Make the determination under subsection 126-440(3) before the transitional relief period opens on 1 July 2027, and in the meantime state publicly what the continuity requirements for trusts without a family trust election are intended to be. Until the determination is made, those trusts have no access to the roll-over.

Recommendation 21. Amend subsections 126-430(5) and (6) so that the material discretionary elements test applies only to the rights or interests attaching to membership of the transferee, and not to the nature of the entities holding those interests. Confirm expressly, in the provision or in the explanatory memorandum, that the roll-over is available where the transferee is a company with a single class of shares and those shares are held by a discretionary trust.

4.6 Restructuring and loss of tax attributes

Tax attributes could be lost as a result of a completed roll-over. These include:

Losses. EM 1.30 confirms that a carried-forward tax loss is an asset not capable of transfer and so is excluded from the all-assets requirement. But no provision transfers it to the transferee. The trust is

emptied of every income-producing asset, retains its revenue losses and net capital losses, and can never use them. Subdivision 328-G has the same limitation, but restructures under that Subdivision are voluntary. These are being induced by a Commonwealth measure, and a taxpayer who responds to that inducement forfeits losses that would otherwise have been recouped against future income of the same business, carried on by the same people.

The family trust election. Section 126-451 relieves family trust distribution tax on the transfer itself. Nothing addresses the election afterwards. A family trust election cannot generally be revoked, and the roll-over expressly does not require the trust to vest or be wound up. The result is a trust holding little more than the settled sum, with a family trust election in force and a family group defined by reference to it, so that distributions by any interposed entity within that group remain exposed to family trust distribution tax at the top marginal rate plus Medicare levy. Whether the transferee company falls within the group will depend on its shareholding.

Franking. A trust has no franking account and a transferee company begins with a nil balance. Tax paid at the trust level on profits later represented by the transferred assets — including tax paid under section 101AA in 2028–29 and 2029–30 — carries no credit into the company. When those funds are distributed to the same family as dividends they are unfranked. We accept this is structural rather than a drafting error, but it is a real cost of the path the measure encourages and it is not disclosed anywhere in the exposure draft materials.

Recommendation 22. Clarify whether the extinguishment of a minimum tax trust's revenue and capital losses on a completed roll-over under Subdivision 126-C is an intended consequence of the measure.

Recommendation 23. Permit the transfer to the transferee of revenue losses and net capital losses of the minimum tax trust where the continuity requirements in section 126-440 are satisfied.

Recommendation 24. Permit revocation of a family trust election, and of any interposed entity election, where a roll-over under Subdivision 126-C has been completed in relation to the trust.

Recommendation 25. Credit tax paid by a trustee under section 101AA, and other tax paid at the trust level in respect of income later represented by the transferred assets, to the franking account of the transferee on completion of a roll-over under Subdivision 126-C.

4.7 Two defects in the mechanics

The membership interest cost base fails where a business is geared. Under paragraph 126-465(1)(d), the first element of the cost base of the new membership interests is the sum of the roll-over costs of the transferred assets, less any liabilities the transferee undertakes to discharge, divided by the number of interests. Take an ordinary operating business with $400,000 of roll-over cost across depreciated plant, stock and goodwill, and $600,000 of bank debt assumed by the transferee. The formula returns negative $200,000. The provision does not say what happens then. On a later disposal of the shares the taxpayer would face a gain computed on a nil or negative base, which converts the deferral the roll-over is meant to provide into an acceleration of tax on value that does not exist. Most operating businesses are geared, so this is not an uncommon scenario.

The capital loss rule has no end date. Section 126-470 disregards a capital loss on any direct or indirect membership interest in the transferor or transferee, arising at any time after the transaction, except to the extent the entity can demonstrate the loss is attributable to another matter. There is no time limit. Fifteen years after a restructure, a taxpayer selling shares at a loss would bear the onus of proving the loss is unrelated to a 2029 transaction, against records they are under no obligation to have kept and a counterfactual that cannot be reconstructed. We assume the provision is aimed at duplicated losses arising at the time of the restructure, which a four-year period would capture.

Recommendation 26. Amend subsection 126-465(1) so that the first element of the cost base of a membership interest cannot be less than nil, and provide for the treatment of any excess of assumed liabilities over the roll-over cost of the transferred assets.

Recommendation 27. Confine section 126-470 to capital losses arising within four years after the last transfer required to satisfy the all-assets requirement, and place the onus on the Commissioner outside that period.

5. Part 4 — the minimum tax

5.1 Low-income beneficiaries taxed more heavily than wage earners

The explainer states that the measure will deliver a fairer tax system "by better aligning the tax rate on trust income with tax rates paid by workers." The drafting does not achieve it.

Section 101AF gives a beneficiary an offset equal to 30 per cent of the beneficiary's assessable amount, and the note to subsection 101AF(2) states that the offset is not refundable. Where the beneficiary's own liability is less than 30 per cent of the amount, the excess is lost and the beneficiary bears an effective rate of 30 per cent.

Where the beneficiary's own liability on the amount is 30 per cent or more, the offset is fully absorbed.

Appendix A sets out a band-by-band model of that outcome, built from ATO Taxation Statistics 2023–24 Trusts Tables 2A and 4 and applying the resident rates legislated for 2028–29, including the 14 per cent second bracket. Three observations arise from this.

First, above a distribution of approximately$45,000 and up to approximately $135,000, the amount of offset lost is flat at $9,748. That figure is the value of the tax-free threshold and the second bracket, which the trust-level imposition denies. It does not depend on any assumption about how many beneficiaries a trust has, or how income is allocated between them.

Second, calibrating the model to the Government's revenue estimate for the measure implies that the amount is collected from approximately130,000 to 145,000 beneficiaries, each losing on average between $5,400 and $6,700 a year. That result is stable across every beneficiaries-per-trust scenario tested.

Third, the gap widens rather than narrows over time. As personal rates are reduced, the distance between what a wage earner pays and what a beneficiary on the same income bears through a minimum tax trust increases. This aspect will need to be considered should there be future reforms to the personal tax income tax thresholds. The 30 per cent floor is a fixed nominal rate sitting beneath a personal rate scale that moves, so every future reduction in personal rates widens the over-taxation automatically and without any decision being taken.

We accept that a floor binding at low marginal rates is, in general terms, the purpose of a minimum tax. The difficulty is that the measure has no means of distinguishing between the two populations it captures. A beneficiary's marginal rate is low either because income has been allocated to them in order to reduce the tax paid by an economic group, or because that beneficiary genuinely has little income. The first is the mischief. The second is not. Section 101AF does not distinguish them, because it operates on the beneficiary's rate and not on the reason for it. An adult child in full-time study, a retired beneficiary with no other income, a beneficiary receiving a modest income stream — each is treated identically to a beneficiary who is part of a splitting arrangement, and each bears the full 30 per cent. In those cases the measure removes no advantage. It imposes a penalty, and the penalty is the entire source of the revenue.

A beneficiary with other income absorbs the offset in full and is unaffected; a beneficiary with little or no other income is restored to their own rate. Under the current draft, no inquiry into purpose is required.

Recommendation 28. Better target the beneficiary credit and align the minimum rate with future personal tax changes to ensure the gap between the 30% minimum tax and future marginal tax rates is not widened.

5.2 Income distributed to a corporate beneficiary

Where a minimum tax trust makes a corporate beneficiary presently entitled to a share of income, the trustee is assessed under section 101AA at 30 per cent; the company is separately assessed under section 97; paragraph 101AF(1)(d) denies the company any offset; and the trustee's liability is not company tax, gives rise to no franking credit, and cannot be passed to shareholders. On the face of the drafting, $100 of trust income allocated to a corporate beneficiary bears $30 at the trust level and a further $30 in the company, with no credit at either point.

The explainer describes the opposite outcome as the intended one under the election: a trust may nominate an eligible company, "with this income taxed only as income of the company in future."

The denial is not confined to companies. On our reading it also applies to a company that receives a distribution as a partner in a partnership. Where the chain is minimum tax trust, then minimum tax trust, then individual, the offset appears to pass through. We cannot identify the principle that distinguishes the two.

Taken together, the offset survives a chain of minimum tax trusts, but is cut off by a company, and by a partnership with a corporate partner. Each of those interruptions produces double taxation of the same income.

In addition, a very large part of the disruption in this package exists because the corporate beneficiary has been made unworkable. If the offset were available to a corporate beneficiary, that income would bear 30 per cent, associated franking credits would be prevented from being refunded, and a substantial proportion of affected trusts would have no reason to elect and no reason to restructure.

Recommendation 29. We ask Treasury to reconsider this policy relating to corporate beneficiaries.

5.3 A de minimis exclusion

A de minimis threshold would be a reliable protection available to a small trust, because a trust outside the regime need not engage with the election at all.

We propose a threshold of say $50,000 of net income for an income year, indexed. The reasoning is that a trust distributing less than that amount across two or more beneficiaries cannot generate a splitting benefit of a size that justifies the compliance cost of the regime, still less the cost of an irrevocable election. The figure should be tested against ATO Taxation Statistics distributions data before it is settled, and it requires an integrity rule preventing its multiplication across related trusts.

Recommendation 30. Introduce a de minimis exclusion of (eg $50,000 of net income for an income year) indexed, with an integrity rule preventing its multiplication across related trusts.

5.3A Distributions between trusts, and losses within a group

The measure applies to a distribution from one trust to another. Family and business groups commonly operate several trusts, established in good faith under the law as it stood, and distribute between them so that income is applied against losses where those losses sit. Under the drafting, a distribution to a trust with carried-forward losses is minimum tax income of the distributing trust, so the group pays 30 per cent for the use of its own losses.

We have not been able to identify a statement of policy that supports this outcome. The measure is directed at the allocation of income to beneficiaries taxed at low marginal rates. A distribution to a trust with losses is not that. It produces no rate advantage; it produces the recoupment of a loss the group has already borne and that the law otherwise permits it to recoup. If the concern is that losses might be acquired or trafficked, the trust loss provisions in Schedule 2F already address it, and they do so by reference to control and continuity rather than by a flat imposition.

Recommendation 31. Exclude from minimum tax income a share of the net income of a trust estate to which another trust within the same family group or wholly-owned group is presently entitled, to the extent that the receiving trust applies the amount against carried-forward losses, or provide an equivalent mechanism so that a group is not taxed on the recoupment of its own losses.

5.4 Charitable trusts

The explainer states that charitable trusts will be excluded. Subsection 101AB(1) does not list them. While a charitable trust that is an exempt entity is unlikely to have net income on which section 101AA could operate, the provision should say what the explainer says it says.

From an efficiency of government and national productivity perspective, we submit that distributions to tax-exempt entities, as defined in Division 50, should be excluded from the minimum tax. Government departments are not focused on tax administration and they should also have certainty that they will receive distribution tax free (without deduction of the minimum tax) for efficiency and to avoid errors and delays in seeking refunds of tax deducted by the trustee.

Recommendation 32. Include charitable trusts in the list of excluded trusts in subsection 101AB(1), so that the exclusion announced in the explainer is given effect in the primary legislation rather than depending on the trust's exempt status or a future legislative instrument.

We submit that distributions to tax-exempt entities, as defined in Division 50, should be excluded from the minimum tax.

5.5 Capital gains, the discount, and Subdivision 115-C

Minimum tax income is defined by reference to the net income of the trust estate, which includes the trust's net capital gain. A discounted capital gain therefore appears to sit within minimum tax income and to bear 30 per cent at the trustee level.

Two consequences follow, and we raise them as questions because the interaction between Division 6E, the substituted section 102UW and Subdivision 115-C is not straightforward and we have not been able to resolve it from the exposure draft alone.

- The attribution machinery in Subdivision 115-C, and section 115-215 in particular, operates on the footing that a beneficiary is assessed on a share of the trust's capital gain and takes its character. Where the trustee is assessed under section 101AA instead, it is unclear whether a beneficiary retains the ability to apply their own capital losses and their own discount position to that gain. If they do not, capital losses held personally by beneficiaries are stranded.

Recommendation 33. Exclude from minimum tax income a net capital gain of the trust estate to the extent that it is attributed to a beneficiary under Subdivision 115-C, or confirm that the attribution and the beneficiary's access to their own capital losses and discount position are preserved.

5.6 Deceased estates, and testing status at a single point in time

Paragraph 101AB(1)(c) excludes "the trust estate of a deceased person" without qualification as to time. Read literally, an estate that remains in administration is outside the minimum tax indefinitely, and the integrity rules in section 101AD do not reach it because they address testamentary trusts rather than estates. Read by reference to the Commissioner's ordinary practice on the period of administration, an estate enters the minimum tax on a date the provision does not identify. Executors need to know which.

Separately, paragraph 101AA(b) tests whether the trust is a minimum tax trust "at the end of the year of income". A trust that is discretionary for eleven months and ceases to be so on 29 June is not a minimum tax trust for that year; a trust that becomes one on 30 June is. There is no apportionment. We expect this to be a target of the integrity rules foreshadowed in the explanatory memoranda, and it would be better addressed in the primary law.

5.7 Drafting corrections

Paragraph 101AG(1)(d) defines an amount as "the common amount". Subsections 101AG(2) and (3), and note 3 to subsection (1), refer instead to "the common income", which is not defined. If the same amount is intended, the terms should be conformed. If a different amount is intended, the second should be defined.

Recommendation 34. Conform the references in subsections 101AG(2) and (3) and in note 3 to subsection 101AG(1) to the defined term "common amount", or define the term "common income" if a different amount is intended.

6. Part 5 — the new definition of "fixed trust"

Item 13 of Schedule 1 repeals and substitutes section 272-65 of Schedule 2F. Item 19 repeals the definition in subsection 995-1(1) and points it at the new provision. The redefinition applies across the income tax law, to all income years starting on or after 1 July 2028, with no grandfathering and no transitional provision. It was not the subject of the July 2026 consultation paper.

"Fixed trust" is a defined term relied on throughout the tax law - in the trust loss measures in Divisions 266 and 267 of Schedule 2F; the qualified person rules governing entitlement to franking credits; the streaming provisions in Division 6E and Subdivisions 115-C and 207-B; managed investment trust eligibility for trusts that are not attribution managed investment trusts; CGT events E4 and E10.

6.1 What the definition does not tell a trustee

The difficulty is that a defined test is being replaced by a non-exhaustive list of matters that "suggest" an outcome, further modifiable in both directions by legislative instrument under subsection 272-65(4). Subparagraph 272-65(2)(b)(iv) is of particular concern: a power to classify receipts as income or capital is close to universal in unit trust deeds, and it is unclear what degree of such a power is fatal.

Four further features of the test are worth drawing out, because each of them converts a question a trustee could once answer from the deed into a question of judgment.

- "Material" is not defined. Subsection (1)(b) turns on the absence of material discretionary elements, and neither the provision nor the explanatory memorandum says what makes an element material. The same objection applies to "significantly" in paragraph (2)(b).
- Limb (1)(b) is wider than limb (1)(a). Paragraph (a) speaks of fixed entitlements; paragraph (b) extends to entitlements or rights. Whether that is a deliberate widening or a codification of how the existing test has been administered is not explained.
- The test is failed by what a power is capable of doing, not by what has been done. Paragraph (2)(b) is directed at whether powers can be exercised to significantly vary entitlements or affect value. Modern trust constitutions contain a wide range of powers directed at administrative matters, drafted without this test in contemplation.
- Paragraph (2)(a) is demanding, and paragraph (2)(c) does not reflect market practice. The former requires clearly defined, specific and enforceable rights to the income, the capital and the governance of the trust, permitting rules only where none of them are discretionary. The latter contemplates a power to vary exercisable only with the consent of all beneficiaries or in a way that cannot adversely affect them; many current constitutions permit variation without unitholder consent where the variation is not adverse.

The explanatory materials indicate that residual and administrative powers, and powers to admit new members or issue new units, should not prevent a trust from being fixed where they cannot be used to significantly vary existing entitlements or significantly affect the value of existing interests, and that minor or consequential impacts are not of themselves a problem. That is a sensible position and it will resolve a number of cases. It does not answer the difficulties above, because the word doing the work in it carries the same uncertainty as the word it is explaining.

6.2 Delegated legislation

Subsection 272-65(4)(b) permits the Minister to determine matters that mean there are one or more material discretionary elements, and subsection (3) provides that where such a matter applies, it operates despite subsection (2). A trust may therefore satisfy every indicator in the list and still not be a fixed trust. That is not a safe harbour. It is a provisional one, withdrawable by instrument, and it is not a basis on which a trustee can make a decision or an auditor can sign.

Exemptions of this consequence are not ordinarily left to delegated legislation. Whether a trust is inside or outside a taxing regime, and whether it may recoup losses or pass franking credits, belongs in the primary law. We recommend that the instrument-making power be confined to determinations that are beneficial to taxpayers, and that the override in subsection (3) be removed.

6.3 Does the new definition reduce reliance on the Commissioner's discretion?

The existing test has been unsatisfactory for a long time. A Treasury discussion paper in 2012 recognised that very few trusts could satisfy it without the exercise of the Commissioner's discretion.

The response was not to fix the law. Outside the attribution managed investment trust regime, the sector was left to rely on the discretion in subsection 272-5(3) and, from 2016, on the safe harbours in PCG 2016/16.

The explanatory memorandum states that the new definition draws on the Commissioner's existing guidance and safe harbours. It stops short of enacting them. The consequence is that the certainty the safe harbours provide administratively is not carried into the statute, and a trustee who wants certainty is in much the same position as before — except that the concepts they must now apply are new, and there is no accumulated practice on them.

The exposure draft materials do not say what is to happen to subsection 272-5(3) or to PCG 2016/16. Both should be addressed before commencement. If the discretion survives, the interaction should be stated. If the Practical Compliance Guideline is to be withdrawn or replaced, the sector needs to know in time to act.

6.4 The test reaches trusts that cannot split income at all

The measure is directed at the allocation of income to beneficiaries taxed at low marginal rates. A large part of the population exposed to the new definition cannot do that.

In a unit trust with a single class of units — by a considerable margin the most common structure in the property and funds sectors — trust law income is distributed to unitholders in proportion to their unitholdings, and under the proportionate approach in *Commissioner of Taxation v Bamford* [2010] HCA 10; 240 CLR 481 taxable income is allocated on the same basis. Definitions of income differ across deeds, and many contain discretions as to the classification of receipts or the treatment of capital gains. In a trust of this kind none of that alters the outcome: each unitholder is assessed on their proportionate share. There is no capacity to stream, to split or to shelter.

It follows that a trust of this kind may fail the new definition, and become a minimum tax trust taxed at 30 per cent at the trustee level, by reason of deed provisions that cannot affect the allocation of income to anyone. That outcome is not what the measure is for. It can be addressed at no cost by an example in the explanatory memorandum confirming that a single class unit trust distributing proportionately is a fixed trust.

6.5 Carve-outs that belong in the primary law

The exposure draft materials indicate that widely held trusts, managed investment trusts, attribution managed investment trusts, corporate collective investment vehicles, bare trusts, employee share trusts, worker entitlement funds and exempt entities such as charitable trusts are expected to fall outside the regime, either because they are fixed trusts or by the operation of other rules. Attribution managed investment trusts are dealt with expressly, by section 276-55. The others are not named anywhere in the drafting. They are expected to navigate the general test, and the difficulties in 6.1 to 6.3 apply to them in full — most acutely to multi-class and more complex structures.

We recommend that the following be dealt with expressly in the primary law rather than left to the general test or to a future instrument.

- Structured finance and insolvency-remote vehicles. A definition already exists in the primary law, at section 820-39, and can be picked up directly. There is no policy reason for these vehicles to be within the regime and no reason for the question to be left open.
- Managed investment trusts that are not attribution managed investment trusts. These are already subject to widely-held and closely-held restrictions, so there is no prospect of a family income-splitting trust reconstituting itself as a managed investment trust to escape the measure. A precise carve-out costs the revenue nothing.

- Listed trusts, which presently rely on an administrative safe harbour rather than on the law.
- Bare trusts, employee share trusts, worker entitlement funds and corporate collective investment vehicles, each of which the explanatory materials contemplate falling outside the regime.
- Trusts used in professional and commercial contexts that allocate by reference to defined and objective criteria, such as performance measures. These are not discretionary in the sense the measure is directed at, but may fail the test as drafted.
- Foreign trusts without a sufficient economic connection to Australia, and trusts whose trustees have statutory functions under an Australian law. The explanatory materials contemplate that these may be excluded by determination under subsection 101AB(2). They should be excluded by the Act.

6.6 The consequences of failing, and of not knowing

Sayden also illustrates a fragility of this definition. The Court found the relevant criteria satisfied because, at the relevant date, the only asset of the fund was the interest in the land, and observed that the position might be different if the fund later held other assets while the deed remained in its existing form. Fixed characterisation may therefore change from year to year, on an unchanged deed, with the composition of the trust's assets. Under the exposure draft the consequence of such a change is that the trust becomes a minimum tax trust, tested at a single point in time under paragraph 101AA(b), without the trustee having done anything at all.

A unit trust that ceases to be a fixed trust becomes a minimum tax trust, assessed at 30 per cent at the trustee level, with no offset available to any corporate unitholder. Property syndicates, joint venture trusts and unlisted investment trusts could be exposed.

6.7 Revisit gateway test

The structural difficulty with this Part is that the measure brings every trust within scope and then requires each of them to establish that it is a fixed trust in order to get out. On ATO Taxation Statistics 2023–24, approximately 145,000 trusts other than discretionary trusts must now satisfy a test that is not defined, that is expressed as a list of matters which merely suggest an outcome, and which a ministerial determination can override. A trust that gets the answer wrong bears 30 per cent on the whole of its taxable income for every year still within the amendment period.

The alternative is to define what the measure is actually directed at. Income splitting requires related parties: a trust under the control of a family group, under which the trustee may exercise a discretion to distribute income among family members in differing proportions. That is a description a practitioner can apply to a deed, and it identifies the target directly rather than by exclusion. Unrelated parties dealing at arm's length do not agree to redirect income between themselves for tax advantage, and a test framed around family control and discretionary allocation among family members would not reach them.

Framing the gateway that way would remove the need for most of the carve-outs discussed at 6.5. Employee share trusts, managed investment trusts, structured finance vehicles, listed trusts, bare trusts and corporate collective investment vehicles would not be in scope in the first place and would not need to be legislated out of it. It would also remove the pressure on the new definition of fixed trust, which could then be left alone, and it would resolve the interaction problems at 6.6 without further amendment.

We recognise that this is a change to the architecture rather than to the drafting. The consequences of the present approach fall on a population the measure was never directed at, and because the carve-out list at 6.5 will never be complete. Every carve-out added is an acknowledgement that the gateway is drawn too widely.

Recommendation 35. Reframe the gateway so that the minimum tax applies to trusts identified by the characteristics the measure targets — broadly, a trust under the control of a family group in which the trustee may exercise a discretion to distribute income among family members in differing proportions — rather than to all trusts other than those able to establish that they are fixed trusts. If that approach is adopted, item 13 is not required.

Recommendation 36. Remove item 13 of Schedule 1 from this measure and consult separately on any redefinition of "fixed trust" for the purposes of the income tax law as a whole.

Recommendation 37. If item 13 proceeds, provide transitional protection so that a trust treated as a fixed trust immediately before 1 July 2028 continues to be so treated, and make all legislative instruments under subsection 272-65(4) before the application date.

7. Part 6 — Use of legislative instruments

The exposure drafts contain ten legislative instrument-making powers: subsection 101AB(2); paragraphs 101AE(2)(a) and (b); paragraphs 272-65(4)(a) and (b); paragraphs 126-430(8)(a) and (b); subsection 126-440(3); and paragraphs 102UYC(4)(a) and (b). None has been exercised. Both explanatory memoranda foreshadow further targeted integrity rules in later tranches (roll-over EM 1.99; electable regime EM 1.69).

Six provisions of the exposure drafts confer ten separate determination powers. There are none in the Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026.

Four of the ten are adverse to taxpayers: paragraph 101AE(2)(b), which sets the cap on exempt entity distributions, and paragraphs 272-65(4)(b), 126-430(8)(b) and 102UYC(4)(b), each of which permits the Minister to determine that material discretionary elements exist notwithstanding that the statutory indicators are satisfied. A power of that kind is different in character from a power to grant relief, and it is why the fixed trust test, the roll-over clawback and the eligible company requirement cannot be used for planning: satisfying the law as enacted does not settle the question. We note that the roll-over explanatory memorandum justifies the power in subsection 126-440(3) on the footing that it is wholly beneficial to affected entities and therefore appropriate for delegated legislation. That is the correct principle. Paragraph 126-430(8)(b), two provisions earlier, departs from it.

The decisions required of trustees are irreversible. The roll-over choice cannot be revoked. The election can be made once and never remade. Both must be made before the instruments that determine their operation exist. Advisers must give advice on the roll-over from July 2027 without knowing the continuity requirements for non-family trusts, the matters that constitute material discretionary elements, or the exempt entity distribution cap.

Recommendation 38. Confine the instrument-making powers in subsections 272-65(4), 126-430(8) and 102UYC(4) to determinations that are beneficial to taxpayers, and remove the overrides in subsections 272-65(3), 126-430(7) and 102UYC(3) under which a determination displaces the statutory indicators.

Recommendation 39. Make all legislative instruments contemplated by the exposure drafts and settle any further integrity rules foreshadowed in the explanatory memoranda, before the first date on which an irreversible choice must be made.

8. Compliance cost

The explainer states that more than 95 per cent of individual tax filers and more than 90 per cent of small businesses will not be affected "in any given year", and that of approximately 350,000 small businesses operating through discretionary trusts, around 140,000 are not expected to pay additional tax or need to restructure in any given year.

Those figures measure the population that pays additional tax. They do not measure the population that must act. Because an EET election may be made only in the 2028–29 income year and never again, declining to elect is itself an irreversible decision taken by inaction. The relevant population is therefore every discretionary trust in existence on 1 July 2028, not only those that pay more tax or that restructure.

On ATO Taxation Statistics 2023–24, 848,561 discretionary trusts lodged returns: 44,046 with a main source from service and management, 305,806 from trading, and 498,709 from investment. The exposure draft explainer refers to approximately 350,000 small businesses operating through a discretionary trust, and the ATO data is consistent with that — 326,776 discretionary trusts reported total business income. The difference is approximately 520,000 discretionary trusts that hold investments rather than operate a business. Each of those trustees must also decide. The population that must take advice is therefore in the order of two and a half times the population the explainer describes.

The advice required is more demanding than estimates for measures of this kind usually assume. The trust deed must be examined in every case, to determine whether the trustee can make the election at all, whether it can confer present entitlements to capital in the proportions the nomination requires, and whether a taker in default is affected. The question is not answerable under Commonwealth law alone, because whether the election attracts duty is a question under the law of each relevant State or Territory. On the drafting as it stands it cannot presently be answered with certainty. And because the decision is irreversible, the standard of documentation is higher than for an ordinary annual decision, and in a material proportion of cases written legal advice or a private ruling will be sought before the election is made.

CPA Australia has modelled the cost across four tiers, reflecting characteristics observable in the ATO data. The model is set out in full at Appendix B. It produces approximately 7.9 million hours of professional advice. At the professional rates underlying our restructuring estimate that is in the order of $2.0 billion to $2.8 billion; applying the Regulatory Burden Measurement default labour cost instead, which is materially below the rates businesses will be charged, the figure is in the order of $700 million. We provide both because they answer different questions: the first is what affected businesses will pay, and the second is the methodologically comparable measure. Neither figure includes any restructuring cost, any State or Territory duty, or any cost of implementing whichever course is chosen. It is the cost of resolving the question.

Two further costs are not captured by either estimate. The first is duplication: members report that the original trust frequently cannot be wound up when a restructure completes, because existing entitlements, unpaid present entitlements and beneficiary loan accounts prevent it, so the business operates the new structure and the legacy trust in parallel. The roll-over does not require the trust to vest or be wound up, and in practice many will not be.

The second is recurring. A trust that elects must be reviewed each year to confirm that the entitlements conferred match the nomination exactly, that no nominated company has ceased to be an eligible company, and that no shareholder of a nominated company has ceased to hold a share — an event the trustee may not observe. Even at one to two hours a year, across the electing population that is an addition to the compliance base rather than a transitional cost.

Finally, the estimate is sensitive to the ultimate decision of government. The greater part of analysis in Appendix B arises because the duty position is unresolved.

Appendix A - Non-refundable beneficiary credit and beneficiaries taxed below 30 per cent

1. Purpose

This appendix addresses a single design feature: the treatment of the beneficiary credit as non-refundable. Our concern is not with the rate, the commencement date or the policy objective, but with the fact that the credit mechanism collects tax from beneficiaries whose own marginal rate is below 30 per cent and does not return it. The quantum is material and the population affected is not the population the measure is directed at.

We accept that a floor binding at low marginal rates is, in general terms, the purpose of a minimum tax. The difficulty is that the measure has no means of distinguishing between the two populations it captures. A beneficiary's marginal rate is low either because income has been allocated to them in order to reduce the tax paid by an economic group, or because that beneficiary genuinely has little income. The first is the mischief. The second is not. Section 101AF does not distinguish them, because it operates on the beneficiary's rate and not on the reason for it. An adult child in full-time study, a retired beneficiary with no other income, a beneficiary receiving a modest income stream — each is treated identically to a beneficiary who is part of a splitting arrangement, and each bears the full 30 per cent. In those cases the measure removes no advantage. It imposes a penalty, and the penalty is the entire source of the revenue.

The modelling below is drawn entirely from published ATO data and is reproduced in the accompanying workbook so that Treasury can vary every assumption.

2. Summary of findings

- The measure has no revenue source other than beneficiaries taxed below 30 per cent. Where a beneficiary's own rate is at or above 30 per cent the credit clears in full and no revenue arises. Every dollar the measure raises is therefore tax collected above the recipient's own liability, and none of it is refundable.
- Calibrated to the published revenue estimate of $900 million per annum, the measure collects an average of approximately$6,200 to $6,900 a year from between 130,000 and 145,000 beneficiaries. The result is stable across every assumption tested about the number of beneficiaries per trust.
- For a beneficiary with no other income, the amount collected above their own liability is flat at $9,748 across distributions between approximately$45,000 and $135,000, and does not reach nil until a distribution of approximately $229,000.
- On the central case, the entire amount is collected from discretionary trusts with net Australian income below $200,000 — approximately 465,000 trusts — and nothing at all from the approximately 143,000 largest. Trusts with net Australian income of $500,000 or more hold 71.2 per cent of all trust income and generate no revenue under the measure.

3. The mechanism

Under the exposure draft the trustee is liable for tax at 30 per cent on the trust's net income, and the beneficiary receives a credit for that tax which is applied against the beneficiary's own liability on the distribution. Where the credit exceeds that liability, the excess is not refunded.

Two features of the individual rate scale are displaced at trust level. The tax-free threshold of $18,200 does not apply, and neither does the 14 per cent rate applying to income between $18,201 and $45,000 from 1 July 2027. The trustee pays 30 per cent from the first dollar.

The consequence is that the credit only clears where the beneficiary's own liability on the distribution reaches 30 per cent of it. Where the distribution stacks on other income, that occurs once the beneficiary's other income exceeds $45,000. Where the distribution is the beneficiary's principal income, it does not occur until the distribution approaches $229,000, because the denied threshold and denied 14 per cent bracket must first be recovered.

Across the range from approximately$45,000 to $135,000, the amount collected above the beneficiary's own liability is constant:

$18,200 × 30% + $26,800 × (30% − 14%) = $9,748

That figure is simply the value of the tax-free threshold and the second bracket, denied at trust level and not restored to the beneficiary.

4. The revenue identity

It follows from the mechanism, without any modelling, that the measure has no revenue source other than beneficiaries taxed below 30 per cent. Where the beneficiary is at or above that rate the credit is fully absorbed and the Commonwealth collects nothing it would not otherwise have collected. Revenue arises only, and precisely, to the extent that a beneficiary's own liability falls short of 30 per cent of the distribution.

The $900 million annual estimate is therefore not a figure to which a distributional analysis can be applied. On our modelling, a substantial part of it is tax collected from people whose own rate is below 30 per cent and not returned to them. We are unable to establish from published material how much of the estimate is attributable to behavioural response, to corporate beneficiaries denied the offset by paragraph 101AF(1)(d), or to income presently assessed to trustees under section 99A. To that extent the calibration below should be read as indicative.

CPA Australia notes the contrast with the imputation system. Franking credits were made refundable from 1 July 2000 precisely because a non-refundable entity-level credit over-taxes recipients whose marginal rate sits below the entity rate. The design proposed here reintroduces that defect at a 30 per cent entity rate.

There are two qualifications. The revenue identity above is a proposition about the mechanism: the measure collects nothing from a beneficiary whose own liability reaches 30 per cent of the distribution. It does not, without more, establish that the whole of the published estimate is over-collection from low-rate beneficiaries, because the estimate may also reflect behavioural response, revenue from corporate beneficiaries denied the offset, and the position of income presently assessed under section 99A. Second, section 12AB of the Income Tax Rates Act 1986, as proposed, operates as a top-up rather than a flat impost, so the flat 30 per cent applied in the model may overstate collection where tax is otherwise payable by the trustee.

5. Method and data

The model applies the proposed 30 per cent trust-level rate to the average net Australian income of trusts in each ATO income band, and compares it with the tax the beneficiary or beneficiaries would pay on the same amount at 2028-29 resident rates. The discretionary trust population is isolated using the ATO's own trust-type classification rather than any proxy.

Source data is set out below.

Table A.1 Source data, ATO Taxation Statistics 2023-24

Net Australian income range	Trusts (no.)	Net Australian income ($)	Average per trust ($)
$1 – 9,999	134,223	$505,499,158	$3,766
$10,000 – 19,999	70,208	$1,033,249,880	$14,717
$20,000 – 49,999	132,978	$4,461,611,495	$33,552
$50,000 – 99,999	123,109	$8,926,707,842	$72,511
$100,000 – 199,999	121,895	$17,433,040,035	$143,017
$200,000 – 499,999	108,114	$33,527,118,962	$310,109
$500,000 or more	70,843	$162,760,043,763	$2,297,475

Source: ATO, Taxation Statistics 2023-24, Trusts Table 2A. Loss and nil bands excluded.

Trusts of discretionary type — main source from trading, investment or service management — number 848,561 of 1,062,162 trusts, or 79.9 per cent (Trusts Table 4). That share is applied to each income band.

6. Results

Table A.2 sets out the position where the trust distributes to a single beneficiary whose only income is the distribution.

Table A.2 Tax collected above the beneficiary's own liability, by income band

Net Australian income range	Discretionary trusts	Trust-level tax at 30%	Beneficiary's own tax	Excess per trust	Aggregate excess
$1 – 9,999	107,231	$1,130	nil	$1,130	$121.2m
$10,000 – 19,999	56,089	$4,415	nil	$4,415	$247.6m

$20,000 – 49,999	106,236	$10,065	$2,149	$7,916	$841.1m
$50,000 – 99,999	98,352	$21,753	$12,005	$9,748	$958.7m
$100,000 – 199,999	97,382	$42,905	$33,718	$9,187	$894.6m
$200,000 – 499,999	86,372	$93,033	$105,151	nil	nil
$500,000 or more	56,596	$689,243	$999,466	nil	nil
Total	**608,258**				$3,063.5m

The aggregate in the final column is the maximum 'over-collection', being the amount that would arise if every distribution were made to a beneficiary with no other income. The published revenue estimate implies that a proportion of distributions reach such beneficiaries; calibrating to that estimate gives the population and the average loss.

Table A.3 Calibration to the published revenue estimate of $900 million

Beneficiaries per trust	Maximum over-collection	Implied share reaching beneficiaries below 30%	Beneficiaries affected	Average annual loss
One	$3,063.5m	29.4%	136,709	$6,583
Two	$6,421.1m	14.0%	130,448	$6,899
Three	$8,705.7m	10.3%	144,323	$6,236

The population and the average loss are materially unchanged across the three scenarios. The finding does not depend on any assumption about how many beneficiaries a trust distributes to.

Incidence

On the single-beneficiary case, no revenue arises from trusts in the two largest income bands, because beneficiaries receiving distributions of that size are already taxed above 30 per cent. The whole of the amount is collected from the approximately 465,000 discretionary trusts with net Australian income below $200,000. Trusts with net Australian income of $500,000 or more hold 71.2 per cent (and trusts with net Australian income of $200,000 hold 86 percent) of all trust net income and contribute nothing.

CPA Australia respectfully submits that this is the inverse of the distribution the measure was designed to achieve, and that it arises from the credit mechanism rather than from the rate.

7. Limitations

- The income base is net Australian income. Net capital gains and foreign income are excluded, so the figures understate the income exposed to the measure.
- Discretionary trusts are assumed to be distributed across the income bands in the same proportion as all trusts. Public and fixed unit trusts skew heavily to the largest band, so this assumption understates the discretionary share in the smaller bands where the effect is concentrated.
- Distributions are assumed to be divided equally between beneficiaries, and the Medicare levy is excluded from both sides of the comparison. Thresholds are assumed unindexed to 2028-29.

The calibration in Table A.3 assumes that the whole of the published revenue estimate is over-collection from beneficiaries taxed below 30 per cent. If the estimate includes behavioural response, or revenue from corporate beneficiaries, the implied population and average loss will be lower than shown.

The model excludes the nil and loss income bands, so it covers 608,334 of the 848,561 discretionary trusts identified in Appendix B. The difference is trusts reporting no net Australian income, which bear no minimum tax in the relevant year but must still decide whether to elect.

- The modelling assumes the credit is non-refundable and cannot be applied against the Medicare levy. If the latter is confirmed, each figure in this appendix understates the burden by two per cent of the distribution.

Appendix B - Compliance cost of the excluded election trust decision

Note. The population figures are taken directly from ATO Taxation Statistics 2023–24 and are not estimates. The tier allocations and the hours per tier are CPA Australia's own, derived from characteristics observable in that data and from member experience. The methodology is set out in full so that the estimate can be tested.

1. Purpose

This appendix estimates the cost of professional advice that the excluded election trust (EET) will require of affected trustees. It does not estimate the cost of restructuring, which CPA Australia has costed separately, nor any State or Territory duty.

The estimate is presented because the compliance cost of this measure has been assessed by reference to the businesses that will pay additional tax. The EET requires a decision from a materially larger population, and that decision must be taken once, in a single income year, on a question that cannot presently be answered.

2. The affected population

An EET election may be made only during the first income year commencing on or after 1 July 2028, and cannot be remade once revoked (paragraphs 102UYB(4)(b) and 102UYB(6)(a)). Declining to elect is therefore not a decision that can be deferred. It is an irreversible choice, taken by inaction, with consequences for every later income year.

It follows that every trustee of a discretionary trust in existence on 1 July 2028 must form a view, including trustees of trusts that will pay no additional tax in any given year.

Table 1 — Trusts by type, 2023–24

Trust type	Number
Discretionary — service and management income	44,046
Discretionary — trading income	305,806
Discretionary — investment income	498,709
Total discretionary trusts	**848,561**
Hybrid trusts	7,873
Fixed unit trusts	111,880
Other fixed trusts	20,557
Public unit trusts (listed and unlisted)	3,910
Cash management unit trusts	740

Deceased estates	48,537
Testamentary trusts	13,608

Source: ATO Taxation Statistics 2023–24, Trusts Table 4.

The exposure draft explainer states that approximately 350,000 small businesses operate through a discretionary trust. The ATO data is consistent with that figure: 326,776 discretionary trusts reported total business income in 2023–24. The remaining approximately 520,000 discretionary trusts hold investments rather than operate a business. They are not businesses, and they do not appear in the explainer's estimates, but each of their trustees must decide whether to elect.

The population that must take advice is approximately 848,561 trusts, in the order of two and a half times the population described in the exposure draft materials.

3. Demand for advice

Four features distinguish this advice from an ordinary annual tax decision. Only the first is common to routine work.

1. The trust deed must be examined in every case. The trustee must establish whether the deed permits the election to be made, whether it permits present entitlements to capital to be conferred in fixed proportions, and whether a taker in default is affected. This is a cost on every trust, not only on complex ones.
2. The question spans two bodies of law. Whether the election attracts duty is a question under the law of each relevant State or Territory. For a group holding land in more than one jurisdiction it is several such questions, and most accounting practices will refer it.
3. On the drafting as it stands, the question cannot be answered with confidence. Senior practitioners have taken opposing published positions since the exposure drafts were released. An adviser asked whether electing is safe must advise with substantial qualification, decline, or seek a private ruling from the Commissioner or a State revenue office.
4. The decision is irreversible. The standard of documentation and verification is correspondingly higher, and in a material proportion of cases written legal advice will be obtained before the election is made.

4. The tiered model

The ATO data does not report the presence of a corporate beneficiary or of land directly. The tiers below use observable proxies: total business income (326,776 discretionary trusts), net capital gain (83,339), franking credits (208,610), and the entity size distribution in Trusts Table 5, in which 64.0 per cent of all trusts report nil or a loss, 32.3 per cent are micro, 3.2 per cent are small and 0.6 per cent are medium or larger.

Table 2 — Tiers, hours and aggregate

Tier	Characteristics	Trusts	Hours	Total hours
1	Dormant or negligible income; no assets of substance	250,000	2–3	625,000
2	Simple investment or micro operating trust; individual beneficiaries only; no land	320,000	5–8	2,080,000

3	Operating business, or a corporate beneficiary, or land in one jurisdiction, or a family trust election in force, or a non-resident beneficiary	230,000	12–20	3,680,000
4	Land across jurisdictions, interposed entities, multiple corporate beneficiaries, or a private ruling sought	48,561	25–40	1,554,000
	Total	**848,561**		**approximately 7,939,000**

Hours are midpoints of the stated ranges. Tier totals may not sum exactly due to rounding.

The tier populations are illustrative allocations rather than derived figures. They sum to the discretionary trust population and are informed by the proxies above, but the boundaries between Tiers 1, 2 and 3 are a judgement. An alternative construction, in which each boundary traces to a published figure — Tier 1 as discretionary trusts reporting no net income (112,259), Tier 4 as those reporting a net capital gain (83,339), and Tier 3 as those reporting business income net of the Tier 4 overlap — produces a higher aggregate, because Tier 4 approximately doubles. We have used the more conservative allocation.

Table 3 — Aggregate cost on two bases

Basis	Aggregate cost
Professional rates	**$2.0bn – $2.8bn**
Regulatory Burden Measurement default labour cost	approximately $700m

Both bases are presented because they answer different questions. The first is what affected businesses will be charged. The second is the measure comparable with Treasury's own costing conventions. The difference between them is not a disagreement about hours; it is a difference in the assumed value of an hour.

For transparency, the professional rate implied by the first basis is approximately $250 to $350 an hour, and the rate implied by the second is approximately $88 an hour.

The cost in Table 3 is incurred before any restructure, and whether or not any trust elects. It is the cost of resolving the question, not of complying with the answer.

5. Costs not captured

Duplication during transition. Members report that the original trust frequently cannot be wound up when a restructure completes. Existing entitlements, unpaid present entitlements and beneficiary loan accounts commonly prevent it, so the business operates the new structure and the legacy trust in parallel, duplicating compliance for as long as that continues. The roll-over does not require the trust to vest or be wound up, and in practice a significant proportion will not be.

Recurring monitoring. A trust that elects must be reviewed each income year to confirm that the entitlements conferred match the nomination exactly, that no nominated company has ceased to be an eligible company, and that no shareholder of a nominated company has ceased to hold a share. The last of these is an event the trustee may not observe. Even at one to two hours a year, across the electing population that is a standing addition to the compliance base rather than a transitional cost.

Private rulings. Where the duty position is material and unresolved, advisers will seek certainty. A private ruling application to the Commissioner or to a State revenue authority is a Tier 4 cost and is included in that tier, but the administrative cost to the revenue authorities of processing an unquantified volume of such applications is not included anywhere in this estimate.

6. Limitations

- Trusts are not businesses or family groups. A single family group may operate more than one discretionary trust, so the number of trusts overstates the number of distinct decisions, although each trust requires its own deed review.
- The tier allocations are CPA Australia's own. The boundaries are drawn from observable characteristics in the ATO data, but the distribution between tiers is a judgement. A sensitivity analysis moving 10 per cent of Tier 2 into Tier 3 increases the aggregate by approximately 460,000 hours, or about 6 per cent.
- Hours per tier are drawn from member experience rather than from a survey. CPA Australia intends to validate them against member survey data and will provide that evidence when available.
- The professional rate applied is that underlying the restructuring model, which was itself built from published fee guides rather than market quotes.
- The estimate assumes the provisions are enacted substantially as drafted. It is sensitive to the matters in section 7.

7. Sensitivity to the recommendations in this submission

The greater part of the Tier 3 and Tier 4 cost arises from two features of the drafting, both of which are within the Government's control.

- The duty position is unresolved. If it is settled — whether by the drafting change sought at Question 1, or by the process proposed at Recommendation 3 — the second and third features described in section 3 largely fall away, and much of Tier 4 falls back into Tier 2.
- The election cannot be corrected. If the window is extended as proposed at Recommendation 4, the advice is spread across three lodgment cycles rather than compressed into one. That reduces both the aggregate cost and the incidence of error, and it removes the surge capacity problem described at 4.1 of the submission.

A de minimis exclusion, as proposed at Recommendation 30, would remove the whole of Tier 1 and a substantial part of Tier 2 from the regime, since a trust outside the measure need not engage with the election at all. On the tier allocations above, that is in the order of 2.7 million hours.

8. Data sources

- ATO Taxation Statistics 2023–24, Trusts Table 3 (industry), Table 4 (trust type) and Table 5 (size by industry).