31 July 2026

Assistant Secretary
Individuals and Indirect Tax and Superannuation Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: mintaxtrusts@treasury.gov.au

Dear Assistant Secretary

Submission on Minimum tax on discretionary trusts Consultation Paper 8 July 2026

Thank you for the opportunity to provide feedback on the proposed 30 per cent minimum tax on discretionary trusts, as outlined in the Treasury's *Minimum tax on discretionary trusts – Consultation Paper (8 July 2026)*.

SW is an Australian owned accounting and advisory firm, operating nationally from offices in Brisbane, Melbourne, Perth and Sydney with 45 Partners and over 400 staff. Our client base includes a significant number of private business and investment groups and also public investment structures that operate their commercial activities through trust structures.

As currently proposed, the minimum 30% tax regime for discretionary trusts is a major reform that will have a significant adverse income tax impact on many of the existing business and investment structures of clients. Whilst it is understood and acknowledged that the new measure is intended to be 'revenue positive', we have some significant concerns as to some of the aspects of the proposed new regime.

We have set out on the annexure to this letter our detailed comments and submissions on each of the questions on which submissions were sought.

Our submissions are intended to highlight elements of the proposed regime that would benefit from amendment to ensure that the new regime operates fairly and predictably, whilst ensuring that the objective of maintaining a minimum 30% tax rate on discretionary trust distributions is met. Amongst these are submissions:

- relating to a specific statutory definition of discretionary trust for the purposes of the new measures
- that tax-exempt entities should be carved out from the new minimum withholding regime, and
- that the proposed double taxation of corporate beneficiaries should be removed, with suggestions as to how this might be best practically achieved. This proposal would also present a significant advantage in that it would obviate the need for rollover relief measures that would otherwise present major challenges relating to State transfer duty.

Again, we thank you for the opportunity to provide input into this significant tax measure that is likely to have a major impact on existing business and investment structures. We would be pleased to provide further input or to discuss our submissions with you in more detail, should this be of interest.

In the meantime, if you have any queries on the attached submissions, please contact Ian Kearney (03 8635 1914) or Ned Galloway (03 8779 6593).

Yours sincerely

SW Accountants & Advisors Pty Ltd

ANNEXURE – SUBMISSIONS ON CONSULTATION PAPER

Scope of the minimum tax

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

Given the significant impact that the proposed measures will have on affected taxpayers, the distinction between discretionary trusts and fixed trusts is a critical issue on which clarity is of fundamental importance.

In this regard, our submissions are as follows:

- The current definition of a fixed trust in section 272-65 of Schedule 2F of the Income Tax Assessment Act 1936 (**ITAA 1936**) sets a high statutory bar. It is well recognised that very few trusts would technically satisfy the primary requirements of a fixed trust that mandate the existence of vested and indefeasible interests in all the income and capital of a trust.[1] Apart from Attribution Managed Investment Trusts (**AMITs**), which are afforded deemed fixed trust status under the existing law,[2] other trusts are generally reliant on the favourable exercise of the Commissioner's statutory discretion to treat interests in income and capital that would not otherwise satisfy the 'vested and indefeasible' requirements as being fixed.[3] The Commissioner's Practical Compliance Guidelines on fixed trusts and fixed entitlements (PCG 2016/16) provides some existing safe harbour guidelines on this discretion and when it would be favourably exercised.
- Given the exacting nature of the current statutory definition of a fixed trust, there is a yawning gap between the meaning of this term and what would ordinarily be understood to be the meaning of the term discretionary trust. Whilst the PCG was and is a welcome administrative measure from the Commissioner in relation to the subject of fixed trusts, this PCG is not binding at law on the Commissioner and, even if it were, there still remains a significant aperture between the safe harbour circumstances contemplated by the PCG and trusts that would generally be regarded as discretionary in nature.
- Having regard to the above, it is our strong view that it would be entirely inappropriate for the definition of a discretionary trust to be linked to the existing provisions defining a fixed trust – that is, with the new measures applying to trusts that would fall outside the current definition of a fixed trust. The challenges in satisfying the existing requirements and the heavy reliance on the Commissioner's discretion, in our view, would make such an approach manifestly unsuitable for such an important and far-reaching measure. In addition, the concepts of fixed trust and fixed entitlement in Schedule 2F were developed for the purposes of the trust loss rules and associated integrity measures. Those concepts were clearly not intended to provide a statutory line of demarcation between discretionary and non-discretionary trusts. The use of those provisions as the gateway to the proposed minimum tax regime would therefore represent a significant expansion of their original policy function and would produce a substantial number of 'false positives' – bringing within the new regime trusts that are, in economic substance, fixed business or investment vehicles.
- In our view, there should be a statutory definition of discretionary trust for the purposes of the new rules that targets trusts that where there exists a substantive power allowing a trustee or other controlling party to determine, vary or redirect the ultimate economic enjoyment of trust income or capital between

[1] Refer subsection 272-5(1) of Schedule 2F of the ITAA 1936.
[2] Section 276-55 of the *Income Tax Assessment Act 1997* (**ITAA 1997**).
[3] Subsection 272-5(3) of Schedule 2F of the ITAA 1936.

beneficiaries. Consistent with this principle, a trust should only be regarded as a discretionary trust where a person has a power that can materially alter or vary:

- the identity of persons entitled to income or capital
- the proportion in which beneficiaries may benefit from income or capital, or
- the timing of beneficiaries' enjoyment of income or capital,

in a manner that is not constrained by defined or prescribed economic entitlements.

- Conversely, a trust should not be regarded as a discretionary trust merely because it contains administrative powers commonly found in commercial trust deeds, including powers to amend the trust deed, appoint or remove trustees, undertake trust reorganisations, issue additional interests on arm's length terms, determine whether receipts are income or capital, or take actions necessary for efficient trust administration. In our view, the focus of the definition should be on present economic outcomes rather than theoretical legal powers. A trust should not be regarded as discretionary for the purposes of the new measures merely because there exists a theoretical possibility that a trustee could alter beneficiaries' entitlements through amendment powers that are subject to fiduciary constraints and, in practice, unlikely to be exercised to reallocate or vary economic benefits between different beneficiaries. A legislative test that focused on the mere existence of legal powers, irrespective of whether those powers affect current economic entitlements or have ever been exercised, would risk treating virtually all modern trust structures as discretionary trusts. Such an outcome is considered inconsistent with the stated policy objective
- It is appreciated and acknowledged that setting a precise statutory definition of discretionary trust may present some drafting challenges. To assist in providing the necessary clarity to a principal-based definition of discretionary trust along the lines above, we would suggest a number of specific exclusions from the definition and submit that the following should be excluded from the proposed measures:
    - Both managed investment trusts[4] (**MITs**) and Attribution MITs (**AMITs**) (which will presumably be excluded on the basis that they are deemed to be fixed under the existing law) should be expressly excluded from the new measures. There are specific tax rules in existence for both MITs and AMITs to support a regime designed or large-scale collective investment and also to foster inbound investment. Such trusts are also subject to either direct or indirect regulation under the *Corporations Act 2001* and, in our view, it would be quite inappropriate for such trusts to be subject to the new regime intended to apply to discretionary trusts.
    - More broadly, other trusts where beneficiaries of the trust hold economic rights to income and capital of the trust determined by reference to the trust interest and the interests in income and capital and are not capable of being materially altered, reallocated or redirected between beneficiaries through the exercise of a discretion (whether by the trustee or another person). In this regard, we submit that theoretical powers that the trustee may have under the trust instrument to:
        - vary the terms of the trust instrument
        - issue or redeem new interests in the trust at other than market value, or
        - exercise a recharacterisation power in the deed (that is, a power to recharacterise income as capital and vice versa),

[4] As defined in section 275-10 of the ITAA 1997.

should be treated as of no effect in determining whether this carve-out applies, unless and until those powers are exercised. If those powers have been exercised after 1 July 2028 in a manner that has materially undermined or varied the defined entitlements, the provisions should exclude the trust from this carve out.

On the basis of the above, most unit trusts, being trusts where the unitholders each have defined proportions in all the income and capital of the trust for all practical intents and purposes would and, we submit, should be excluded from the new rules. Where a unit trust had discretionary elements associated with unit classes, for example, such a trust should be treated as having a material discretionary element. An example of such a trust is a hybrid unit trust where classes of units existed and the trustee has a discretion as to the allocation of income or capital between classes of units, either unilaterally or with unitholders sanction.

However, the existence of different classes of interests should not, of itself, result in a trust being characterised as discretionary provided the rights attaching to each class are objectively ascertainable and operate according to the terms of the trust instrument rather than the annual exercise of a discretion. An example of a fixed trust with differing income and capital rights would be a testamentary trust where there are life interest and remainder interest. We see no policy rationale for treating *inter vivos* trusts differently and where there is fixed income and capital rights, albeit to different beneficiaries, the trust should be capable of being treated as fixed under the proposed rules.

This general concept would of course be relevant to the proposed rollover relief measures involving the 'fixing' of existing discretionary trusts – the terms of these trusts could be varied (without necessarily a conversion into a unit trust) such that beneficiaries were granted interests in income and/or capital that were, for practical intents and purposes, fixed.

- The consultation paper appears to refer to the main policy concern as being circumstances where the trustee can determine from year to year which beneficiaries receive income or capital. It is submitted that the definitional approach and exclusions referred to above are well aligned with this policy objective. In our view, it would make little sense for the new regime to be applied to trusts that are, for commercial and practical intents and purposes, fixed in nature. This is particularly so, given the penal nature of certain elements of the proposed regime – for example, the proposal that:
    - company beneficiaries would not be entitled to the benefit of non-refundable tax offsets from discretionary trusts, which means that such company beneficiaries would essentially suffer two layers of tax and bear an effective tax rate on such income of 60%, and
    - trustee beneficiaries would not be able to pass on the benefit of the non-refundable tax offset from discretionary trust distributions to their own beneficiaries, which would mean that such distributions would also suffer two layers of income tax.

  If the above elements of the proposed new regime are to be proceeded with (and we note our submissions on these issues under Question 3, below), these outcomes would clearly be unduly harsh and inappropriate for trusts where beneficiary interests in trust income and capital are, for practical purposes, locked in. In our view, this underlines the critical importance of ensuring that the new measures are only imposed on trusts where there is a material and real practical discretionary element involved.

- In relation to testamentary trusts, we note that the current proposal for testamentary trusts established on or after 1 July 2028 is that these trusts will only be exempt from the new measures where the trust '*can only benefit individuals and income tax-exempt entities*'. Our main concern with this proposal is a practical one. Testamentary trusts are relatively commonplace amongst medium and high wealth taxpayers to fulfil a range of family, commercial and asset protection objectives. The terms of a typical testamentary trust (which would generally be appended to the relevant will) would be similar to a standard discretionary trust and contemplate both individual beneficiaries and other types of beneficiaries to provide maximum flexibility for the relevant family. The new proposal would seem to require that every taxpayer with an existing will that has a standard testamentary trust would need to revise the terms of that will and accompanying terms in order to be exempt from the new measures. With respect, this does not seem to be good policy – it would be imposing an unnecessary and inappropriate administrative and cost burden on those that have undertaken careful estate planning measures based on the existing law. If the policy objective is to limit the carve-out to testamentary trusts established on or after 1 July 2028 where there are only individual and income tax-exempt entities as beneficiaries, we submit that a better approach would be for the new regime to only apply to such testamentary trusts where the trustee has in fact made a distribution to persons outside the permitted range of beneficiaries. Where a distribution was made to a person or persons other than an individual or income tax-exempt entity, this would then result in the testamentary trust entering the new regime. Trustees would be able to make an informed choice at the relevant time. This approach would obviate the need for many existing wills to be updated to narrow down the range of permitted beneficiaries to seek to conform to the proposed rules.

2. What is the appropriate minimum tax treatment for income tax-exempt entities?

The proposal set out on the consultative document is for distributions from discretionary trusts to tax-exempt entities to be subject to the 30% withholding which would be a non-refundable offset. The non-refundable nature of the amount withheld would mean that that entities exempt from income tax, which includes public charitable organisations and prescribed ancillary funds would effectively bear tax on income distributed from discretionary trusts. If implemented, this proposal would have a severely detrimental impact on philanthropic organisations – all other things being equal, it would result in a 30% reduction in amounts available from this source for such organisations. With respect, we see no sensible policy basis for a proposal that, in economic effect, results in income tax being borne by entities that have appropriately qualified for income tax exempt status. Our submission is that either:

- offsets relating to the proposed new regime should be refundable for beneficiaries that are exempt from income tax, or
- there should be a carve-out from the 30% withholding tax for distributions made to income tax exempt entities.

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

Corporate beneficiaries

Many small to medium businesses have been established based upon the prevailing tax rules that have existed for many years with a discretionary trust operating the business and distributing to a corporate beneficiary.

The fact that a corporate beneficiary cannot obtain any credit for the tax paid by the discretionary trusts imposes a 60% tax rate on income and if this income is then distributed to an individual shareholder the overall tax rate will be 69.7%. This is an overly punitive regime and does not appear to be justified by any policy objective.

In our view, corporate beneficiaries of discretionary trusts should receive a non-refundable offset just like any other taxpayer. This would ensure that existing discretionary trust / corporate beneficiary structures have the same after tax outcome as a simple corporate entity that directly conducted the business or investment activity undertaken by the discretionary trust.

The removal of this penal element of the proposed regime would also effectively obviate the need for any restructuring of existing businesses. The need for rollover relief measures, which would inevitably add a layer of considerable complexity to the proposed new rules and also present some significant challenges to be workable (see our submissions on these in response to your Question 4), is driven largely by the penal impact of these measures on company beneficiaries of discretionary trusts.

In relation to this aspect of the proposed new regime, the consultation paper states as follows:

> *Allowing companies access to an offset for the tax payable by the trustee (with no other restrictions) would allow the corporate beneficiary to convert the benefit of the minimum tax offset into refundable franking credits, which could then be passed on and refunded to non-corporate shareholders that are also trust beneficiaries.*

With respect, this does not make much sense, given that the proposed measures also include a proposal to allow discretionary trusts to restructure with rollover relief into a company, which would be a position to declare franked dividends with refundable offsets attached.

Practical solution

Our submission is that:

- corporate beneficiaries of discretionary trusts should be allowed a non-refundable tax offset like any other beneficiary
- a recording mechanism be established to track the non-refundable offset so that such offsets could be applied to a dividend declared by the company as an alternative to franking. Such offsets could be applied in respect of dividends declared by the company that would flow through to shareholders as a non-refundable offset, rather than a refundable franking credit. By analogy, it is noted that the franking rules previously catered for different classes of franking credits, so maintaining a separate record of non-refundable tax offsets would be conceptually similar.

In our view, this:

- would represent a more equitable policy approach, whist ensuring that the objective of imposing a minimum 30% tax rate is maintained, and
- should effectively eliminate the need for, and complexities associated with, rollover relief provisions.

Further detail in relation to this proposal is provided below in response to Question 8.

Trustee beneficiaries

We have referred to the proposal that trustee beneficiaries of a discretionary trust are not able to pass on the benefit of any non-refundable offset to its own beneficiaries. With respect, we see no compelling policy justification for this proposal. Whilst, to some extent, the harshness of this proposal would be attenuated by ensuring that the new measures did not apply to trusts that were, for practical purposes, fixed in nature, this would not resolve the issue entirely. We are aware of some large family groups where there are historical restrictions with certain discretionary trust deeds that necessitate distributions to certain family members being made via another discretionary trust. In short, the current proposal would mean that such distributions would be taxed twice – at the originating trust level and then at the beneficiary level. It is difficult to see any reasonable policy justification for a double-taxing outcome in these circumstances. In our view, trustee beneficiaries should have the ability to pass on the benefit of the non-refundable offset.

Roll-over relief

4. Are the proposed rollover relief arrangements appropriate?

If, contrary to our suggestions raised in response to preceding Question 3, the regime is to be implemented with penal tax effects on company beneficiaries of discretionary trusts, the proposed rollover relief measures will assume major importance.

Many long-standing business and investment structures involving discretionary trusts and company beneficiaries established in compliance with prevailing tax laws will be significantly impacted by the proposed measures would suffer income tax at penal rates. In these circumstances, it is imperative that taxpayers be afforded an appropriate opportunity to restructure having regard to the new proposed regime for discretionary trusts.

There is relatively limited detail set out in the consultative paper as to the proposed measures, but our comments on the detail that has been made available are set out below:

- Whilst rollover relief from an income tax perspective is important and welcomed, one of the major impediments to undertaking such a restructure is the potential impact of State duties on restructures. For discretionary trusts that hold material dutiable property, unless the relevant State legislation also contains exemptions that mirror the rollover relief provisions made available to discretionary trusts, it is likely that any restructure would trigger a duty cost of up to 6.5% (depending on the State or the market value of the property). Dutiable property in each State would include real property situated in that State, but (depending on the State) can also include goodwill, intellectual property, business debts, motor vehicles and chattels.
- Many business and investment operations conducted through discretionary trusts hold Australian real property or other property that could be subject to transfer duty in the relevant State. The restructure of such trusts into fixed trusts or companies in accordance with the proposed rollover measures contemplated with the trust reforms would, in the absence of specially introduced State concessions, likely trigger the impost of *ad valorem* duty on the transfer of such property. Without States providing corresponding duty relief, such business and investment structures will be unable to restructure without incurring a substantial economic cost. The consultative paper does not deal with this issue.
- Unless the Federal Government is able to ensure that the various State jurisdictions enact aligned concessions, the proposed requirement that all assets of a discretionary trust be transferred to the new structure to obtain rollover relief presents a major and, we submit unnecessary, restriction that would significantly undermine the utility of these critically important measures. If the Federal Government is not able to ensure corresponding measures are able to be introduced in State duty legislation, our submission is that the rollover relief rules should not require all assets of a discretionary trust be transferred into a fixed trust or company in order to be eligible for relief. Given that any assets remaining within a discretionary trust will be subject to more adverse tax consequences under the new regime, we see no compelling policy reason why one of the requirements for rollover relief should be that all assets of the trust be restructured. At the very least, if the Federal Government is unable to ensure that State duty legislation is amended to ensure a corresponding concession, we submit that discretionary trusts should be permitted to avail themselves of the proposed rollover where essentially all assets other than dutiable property is restructured into a fixed trust or company that satisfies the relevant requirement. This will greatly assist in ensuring that the rollover relief measures are widely available and fit for purpose (as opposed to the alternative).

  Another alternative, if matching duty concessions are not able to be obtained in each State, would be for an income tax offset to be provided for any duty cost paid in relation to restructures eligible for rollover relief.
- Another challenge with the proposed rollover measures conceptually is that in order to avail oneself of these measures it would potentially involve a loss of asset protection with this being one of the major attractions of a discretionary trust structure. The rollover relief measures would require existing activities undertaken within a discretionary trust structure to be transferred to a non-discretionary trust or company in which (unlike a discretionary trust) there are ownership interests. Depending on the ‘fine print’ associated with the rollover relief measures, this loss of protection may be a significant impediment to restructuring assets out of an existing discretionary trust.

- The consultative paper also refers to the need for integrity measures in relation to the rollover relief rules. We note the comments made in the consultative paper as follows:

    There are a number of circumstances where relief would be denied. This could include where there are changes in the membership of the transferee company within a certain period, other than equity injections from, or sales to, genuine third parties.

  We have some concern as to the potential limitations that might be placed on rollover relief measures, in the event that these are implemented, and would urge Treasury to resist the temptation to implement heavy handed integrity measures that undermine broad availability of these measures. We note that transactions involving changes in memberships of such fixed trusts and company structures subsequent to rollover relief being obtained would themselves be subject to various existing tax and integrity measures, including:

    - the prospect of CGT events applying in relation to dealings in membership interests, including CGT event K8 (which relates to the value shifting rules in Division 725 of the ITAA 1997)
    - in relation to company structures specifically:
        - the dividend stripping rules in section 177E of the ITAA 1936
        - the general anti-avoidance rule for franking credit benefits in section 177EA of the ITAA 1936, and
    - the general anti avoidance rules in Part IVA of the ITAA 1936, which may have a role to play if rollover relief is obtained and subsequent transactions are then undertaken with related parties that are inconsistent with the conditions for rollover relief.

  If targeted integrity measures are introduced in relation to the rollover relief rules, we consider they should be limited to circumstances where there is a related party dealing within a relatively short time frame of the rollover restructure that would, if the subsequent measures were on foot as part of the restructure, result in the relevant conditions for rollover relief not being satisfied.

5. Are existing integrity rules sufficient to address arrangements that substantially preserve discretionary economic outcomes through alternative legal structures?

Yes

6. Is it appropriate that the rollover is designed to prevent FTDT from applying where a discretionary trust with an existing family trust election and/or interposed entity election(s) transfers property to an entity that is not a member of the family group?

Yes. The difficulties associated with the FTDT regime are a separate subject in themselves but, for the purposes of the new rules, it is clearly very important that any rollover relief measures offered do not trigger FTDT.

7. Are there any other matters that should be considered in finalising the design of the rollover relief?

As we discussed above, the rollover relief measures should be subject to a uniform exemption from the State governments in relation to duty. In the absence of the Commonwealth ensuring that all State governments will provide a uniform exemption from duty, the Commonwealth should either:

- enact Commonwealth legislation which overrides duty imposed by the States or
- provide an income tax offset for duty that has been paid.

We would recommend that the proposed measures are not limited to rollover obtained under the revised small business restructure rollover. It is noted that the existing rollovers or actions taken by trustees to fix a trust would effectively mean that the proposed legislation is unlikely to apply. For example, the trustee of a discretionary trust could vest the income and capital rights in certain individuals meaning that the minimum tax would not apply. However, vesting of interest in the income and capital of beneficiaries could have duty implications depending on the particular State.

8. Are there other approaches that could reduce the need for upfront restructuring? What practical or legal considerations would arise in implementing these approaches, including their interaction with trust law and trustees' obligations?

As noted above in response to Question, 3, we consider that implementing a system that allowed a non-refundable tax offset for company beneficiaries would effectively eliminate the need for complex and challenging rollover provisions.

Corporate beneficiaries – an alternative to denying the minimum tax offset

We do not support the proposed treatment of corporate beneficiaries of discretionary trusts. Under the proposal set out in the consultation paper, a company that is presently entitled to trust income would be assessed on the full amount of that income at the corporate rate, but denied any credit for the minimum tax already paid by the trustee on the same income. The same amount of income would therefore be taxed twice – once at 30% in the hands of the trustee, and again at the corporate rate in the hands of the company – with no mechanism to relieve the overlap. This is not a "minimum" tax outcome; it is a penal one, and would fall hardest on long-standing family and small business structures that adopted a discretionary trust with a corporate beneficiary in good faith under the law as it has stood for many years.

We acknowledge the integrity concern articulated in the consultation paper, namely:

> *Not allowing companies to access the minimum tax offset is the simplest mechanism to prevent the minimum tax being undermined by interposing a company between the trust and the ultimate beneficiary, without changing the imputation system.*

We accept that allowing corporate beneficiaries an unrestricted offset could permit the trustee-level tax to be converted into refundable franking credits and ultimately refunded to non-corporate shareholders, thereby undermining the proposed 30% floor. Our submission is that this outcome can be prevented without resort to double taxation, and that a more proportionate (less penal) mechanism is available. The other considerable advantage of this proposal is that it would likely obviate the need for rollover relief for restructures for existing discretionary trusts.

A 'restricted franking account' mechanism

We propose that the law provide for a new, separate franking account (a 'restricted franking account') for a corporate beneficiary. Where a trustee has paid minimum tax on taxable income to which the company is presently entitled, the restricted franking account of that company would be credited with the amount of minimum tax so paid and referable to that income. The mechanism would have two effects:

- *Relief against the company's own liability.* The company beneficiary would be entitled to a non-refundable tax offset, equal to the balance credited to its restricted franking account, which would be applied against its own income tax liability. This removes the double-taxation outcome and aligns the after-tax position of an existing trust and corporate beneficiary structure with that of a company deriving the income directly, so that taxpayers are not compelled to restructure to ensure that the penal double taxing outcome does not arise. We have noted our comments on the challenges associated with proposed rollover relief measures (including, most notably, duty issues) above, in response to Question 4. Consistent with the treatment of individual and trustee beneficiaries, the offset would be non-refundable.

- *Restricted franking of onward dividends*. The company would be permitted to frank a distribution out of the restricted franking account (a 'restricted franked dividend'). A restricted franking credit would be creditable against a shareholder's income tax liability, but would not be refundable and would therefore only give rise to an offset to the extent that tax was payable at a rate of 30% or more. In this way the credit can never be refunded to a lower-rate or nil-rate shareholder, and can never reduce the effective rate on the underlying trust income below 30%.

In our view, the integrity of the regime would be preserved on both limbs. Because a restricted franking credit is non-refundable and is quarantined from the ordinary franking account, it cannot be converted into a refundable credit or cycled back to non-corporate shareholders to defeat the minimum 30% tax rate – the precise mischief identified in the consultation paper. At the same time, the 30% minimum effective rate is maintained on every dollar of in-scope trust income, whether it is ultimately retained in the company or distributed to shareholders. The mechanism therefore achieves the Government's stated policy objective – a genuine 30% floor that cannot be undermined by interposing a company – while avoiding the arbitrary and punitive double taxation that the current proposal would impose, and it does so through a discrete restricted account rather than any alteration to the operation of the general imputation system.

Example – $100,000 of trust income allocated to a corporate beneficiary

Assume a discretionary trust derives $100,000 of in-scope taxable income and the trustee makes Company A presently entitled to that income. The corporate tax rate is assumed to be 30%.

Treasury's proposed approach (offset denied)

Item	Amount
Trust taxable income allocated to Company A	$100,000
Minimum tax paid by trustee (30%)	$30,000
Company assessed on trust income (30%)	$30,000
Credit to company for trustee minimum tax	Nil
Company tax payable	$30,000
Total tax at trust and company level	**$60,000**
Effective rate before any distribution	**60%**

The $100,000 bears $60,000 of tax before any distribution to shareholders – an effective rate of 60%. Company A holds only $30,000 of ordinary franking credits (referable to its own payment) despite $60,000 of tax having been borne on the income, so a subsequent distribution to shareholders triggers further tax and can push the total effective rate well beyond 60%.

Proposed restricted franking account approach

Item	Amount
Trust taxable income allocated to Company A	$100,000
Minimum tax paid by trustee (30%)	$30,000
Company assessed on trust income (30%)	$30,000
Restricted franking account credited	$30,000
Non-refundable offset against company tax	$30,000
Company tax payable	Nil
Total tax at trust and company level	**$30,000**
Effective rate before any distribution	**30%**

The income bears a single layer of tax of $30,000 at the trust and company level – an effective rate of exactly 30%, consistent with the policy floor. Company A holds $30,000 in its restricted franking account and $70,000 of after-tax cash. On distributing a fully (restricted) franked dividend of $70,000 cash plus a $30,000 restricted franking credit (grossed-up to $100,000), the shareholder outcomes are as follows:

Shareholder marginal rate	Tax on grossed-up $100,000	Restricted credit applied	Total system tax
47% (top marginal)	$47,000	$30,000	$47,000 (47%)
30%	$30,000	$30,000	$30,000 (30% floor)
Below 30% (e.g. 19%)	Own marginal rate	Nil (unavailable)	Min. 30% retained

In every case, the income bears tax of at least 30%, the restricted credit is never refunded, and a shareholder taxed below 30% obtains no benefit from the credit. The outcome for a top-rate shareholder ($47,000, or 47%) is identical to that which would arise had the income been earned directly – neither advantaged nor penalised – whereas Treasury's current approach produces a minimum of $60,000 of tax on the same income. The proposed mechanism therefore delivers the Government's intended 30% floor and integrity outcome without the punitive double taxation inherent in denying the offset outright.

Treatment of excess franking credits

9. Having regard to tax system integrity, compliance costs and administrative simplicity, should excess franking credits be refundable to the trustee? Why or why not?

In our view, excess franking credits (being the excess of any franking credits attributable to income received by a discretionary trust in any given year over the trusts 30% tax payable obligation for that year) should be refundable to the trustee. We consider that the refund model:

- would be much simpler than the alternative carry forward model (see comments following on Question 10), and
- makes more sense from both a policy and timing perspective than the carry-forward model, in that the benefit of the franking credit refunds would appropriately arise in relation to the year that the franked distribution that gave rise to the excess. The excess could be applied as distributable income for the benefit of the beneficiary that received the distribution, as opposed to being applied against a later year's tax liability that may relate to a distribution to a different beneficiary.

10. What compliance costs or tracing requirements may arise under a carry-forward model? Could existing integrity rules adequately address these matters?

In our view, a carry-forward model would be inferior to the refund model for the reasons outlined in response to Question 9. In addition, we consider that the carry-forward model would introduce complexity and additional compliance costs to record and track such carry-forward credits. Such complexity is unwarranted, given our view that the carry-forward model is inferior from a policy perspective.

11. Are there any other matters that should be considered when finalising the treatment of excess franking credits?

The only other issue that comes to mind in relation to the refund model is the need, for the avoidance of doubt, to ensure that any receipt of franking credits by the relevant trust does not technically give rise to assessable income. Franking credits on a franked distribution will have already been included in assessable income, and so the receipt of any excess franking credits should not give rise to additional assessable income to the trust.

Collection mechanism and compliance issues

12. What additional safeguards, administrative modifications, or beneficiary notification requirements should be considered to support the effective operation and collection of the minimum tax, particularly for arrangements involving corporate trustees?

Alignment of lodgement dates

We recommend that there is an alignment of due dates for all income tax returns for trusts and individuals. Currently, an individual may lodge their income tax return on either:

- 31 October
- 31 March or
- 15 May.

However, a trust may be required to lodge their income tax return on either:

- 31 October
- 31 January
- 28 February
- 31 March
- 15 May.

From a practical perspective, it seems inconceivable (and also quite impractical) that an individual might be required to lodge a tax return prior to the trustee of the trust lodging their tax return and paying the minimum tax to the Commissioner. We would recommend that new lodgement dates are considered such that:

- Trust tax return is required to be lodged 1 month prior to individual tax returns – say 15 April and
- Individual tax returns are required to be lodged one month after – say 15 May.

We believe this should be sufficient time for the ATO to process all trust tax returns and automatically include the tax offset in the pre-fill information.

Joint and several liability of trustee and beneficiary

A significant practical difficulty arises from the proposal that the minimum tax be imposed as a liability of the trustee. Where a trustee makes a beneficiary presently entitled to trust income, that beneficiary acquires a vested and indefeasible interest in the income to which they have been made entitled. At the same time, the trustee is left with the obligation to remit the 30% minimum tax, which we understand is to be imposed on the trustee. The most obvious and practical means by which the trustee would fund that tax is to withhold the relevant amount from the income of the beneficiary who has been made presently entitled. However, unless the trust deed contains an appropriate clause specifically permitting the trustee to be indemnified by the beneficiary for the tax that the trust is liable to pay, the trustee would be placed in an invidious position; it would need to either fund the tax out of trust corpus (or borrowings) or, alternatively, withhold from the beneficiary's entitlement and thereby risk acting in breach of the terms of the trust and the trustee's fiduciary duties. Whilst many deeds may empower the trustee to withhold the relevant tax from the beneficiary, this may not always be the case.

Accordingly, we recommend that the collection mechanism be drafted such that both the trustee and the beneficiary are made jointly and severally liable for the minimum tax referable to the income to which the beneficiary has been made presently entitled. Framing the liability in this way would mean that the trustee's withholding of trust income to pay the tax would properly be regarded as the trustee applying funds on behalf of the beneficiary in satisfaction of a liability of the beneficiary, rather than as a diminution of the beneficiary's vested and indefeasible entitlement in breach of trust. This approach would provide trustees with the necessary statutory authority to fund the tax from the relevant income without the need to rely on an indemnity clause in the trust deed (which many existing deeds will not contain) and would avoid the need for widespread deed amendments before 1 July 2028. It would also ensure that the economic burden of the tax falls, as a matter of substance, on the beneficiary who has been made presently entitled to the income, consistent with the underlying policy of the measure.

13. What notification arrangements would be most effective for trustees and beneficiaries to give effect to the minimum tax in a way that minimises compliance costs?

As we mentioned above, so long as the trust tax return is lodged by the trustee prior to the lodgement due date of the individual income tax return, there should be no additional lodgement obligations for the trustee or the beneficiary.

The information regarding the minimum tax should be provided as a single additional disclosure in the beneficiary details to the trust tax return. It would seem appropriate that there is a requirement that the trustee provides the beneficiary with a copy of the beneficiary details at the same time as lodging the income tax return, solely for the purposes of checking that the Commissioner has processed the information correctly.

14. Are the complementary collection mechanisms for trustees and corporate trustees proportionate to support the effective collection of the minimum tax?

We do not believe that the minimum tax should be subject to Pay As You Go withholding or any other intermediate collection mechanisms by the Commissioner. It is only appropriate for the Commissioner to collect revenue once a trust tax return is lodged given our comments above regarding distributions to income tax exempt entities and the inherent flexibility contained in a discretionary trust.

15. Are there any other matters that should be considered in the design of the collection mechanisms?

Currently, the rules in section 170 of the ITAA 1936 regrading amendment periods do not apply to trusts as trusts generally don't receive a Notice of Assessment from the Commissioner. The Commissioner generally administers amendment periods for trusts similar to other entities, although this is a concessionary administrative approach outlined in *Practice Statement Law Administration 2015/2: Time Limits for trustee assessments*, rather than being based on specific legislative provisions. We recommend that an amendment is made to section 170 of the ITAA 1936 to ensure that the general statutory amendment periods apply to the 30% minimum tax to be paid by trustees of discretionary trusts.

We would also recommend that all trusts have the ability to either:

- amend a lodged tax return, with the Commissioner automatically applying amendments to the beneficiary's income tax returns or
- introduce an unders / overs regime similar to that which exists under Subdivision 276-F for AMITs.

We can envisage that it would be administratively burdensome for trustees, beneficiaries and the Commissioner to process and align any amendments to income tax returns. The ability to have an under / over system where the correct income tax can be paid in a later income year for errors in the trust tax return would obviate the need to amend and credit income tax paid for numerous beneficiaries. For example, if a trust distributed equally to 8 beneficiaries and there was an overstatement of minimum tax by $10,000 at the trustee level, there would need to be lodgement of 9 tax returns to credit $10,000. The cost of preparing 9 amended tax returns could exceed the benefits returned to the beneficiaries.

High Court decision in the Bendel case

16. What, if any, consequential interactions arise between the minimum tax on discretionary trusts and the revised 2018-19 Budget measure?

To be clear, we note our understanding that the reference in this question to the 'revised 2018-19 Budget measure' is a reference to a proposal referred to in the 2018-19 Budget[5] to ensure that unpaid present entitlements (**UPEs**) within the scope of Division 7A of Part III of the ITAA 1997, notwithstanding that at that time (and until the recent High Court decision in *Bendel*) it was the Australian Taxation Office's view that UPEs were already subject to those rules. It was suggested in the 2018-19 Budget materials that this legislative change would take effect from 1 July 2019, although no visible action has been taken by the various Federal Governments during the seven subsequent years to do so. The commentary on this proposal in the 2018-19 Federal Budget also appeared to indicate a plan to introduce this measure as part of a broader package of reforms to Division 7A that might also include other proposed changes in the *Ten Year Enterprise Tax Plan — targeted amendments to Division 7A* announced in the 2016-17 Budget.

Given that this question is expressly being raised in the context of the *Bendel* decision, we are assuming that the question being raised solely relates to the prospect of UPEs being brought within the scope of Division 7A and not the other 'targeted' Division 7A reforms contemplated in the in the *Ten Year Enterprise Tax Plan — targeted amendments to Division 7A*. To be clear, we had and continue to have, major concerns with some of the elements included in the latter document, not the least of which was the apparent proposal to remove the distributable surplus concept from Division 7A. As we submitted at the time, removing this concept from Division 7A would be completely contrary to the policy objective of Division 7A which is essentially to ensure that profits of private companies accessed by shareholders and associates other that on strict commercial loan terms would be treated as dividends.

In our view, it would not be either necessary or appropriate for legislative changes to be made subsequent to the decision in *Bendel* to bring UPEs within the ambit of Division 7A. The reasons for this view are set out below:

- If the Government proceeds with the proposal to effectively double tax distributions from discretionary trusts to companies, our view is that changes to bring unpaid present entitlements within the scope of Division 7A are unnecessary. The non-refundability of the 30% tax offset on distributions from discretionary

[5] Refer Budget Measures Budget Paper No. 2 2018-19, page 41.

trusts to company beneficiaries will give rise to the imposition of a penal effective tax rate of 60% on distributions from discretionary trusts to such beneficiaries. Whilst there are a range of reasons why discretionary trusts might prefer to distribute their income to a company beneficiary rather than individual beneficiaries other than to access the current corporate tax rate (asset protection being a common reason amongst high wealth groups), this very high effective rate company beneficiaries would suffer under the proposed measures will be a major disincentive for discretionary trusts to distribute to company beneficiaries. It is presumed that this is a deliberate policy objective of the new measures, the result of which is that it is highly unlikely that distributions would be made by a trust to a company beneficiary from 1 July 2028 where the trust is of a discretionary nature.

- For other trusts that are not of a discretionary nature, we consider that a measure to bring UPEs within Division 7A would not be necessary or appropriate as a matter of principle or policy. Where private companies have defined and, in a practical sense, fixed entitlements in a trust, it is submitted that UPEs connected with such interests would lack the essential characteristics of a transaction that should give rise to Division 7A consequences. Unpaid entitlements attributable to and owing in respect of interests held by beneficiaries in a non-discretionary trust should continue to generate income for the benefit of those beneficiaries within the trust proportionate to their interests. In our view, it would be inappropriate for such UPEs to be subject to Division 7A. This view also seems to be largely aligned with what was, until recently, the Commissioner's view in relation to UPEs owing to beneficiaries of unit trusts and other similar trusts – refer former ATO Interpretative Decisions 2012/74 and 2012/62.
- In any event:
  - as noted in his Decision Impact Statement issued in response to the *Bendel* decision (the **DIS**) and also in his other pronouncements on the subject (see, for example, Taxation Ruling TR 2022/4 and Practical Compliance Guideline PCG 2022/2), the Commissioner has indicated that UPEs outstanding for anything beyond a relatively short period (based on the Commissioner's guidelines in the PCG cited, beyond 2 years) will be potentially subject to the operation of section 100A. The risk of this provision applying (which would mean that the relevant distribution is assessable to the trustee of the distributing trust at maximum personal rates under section 99A of the ITAA 1936) will serve as a significant practical deterrent for taxpayers that might otherwise be tempted to leave UPEs owing from discretionary trusts to company beneficiaries on foot for extended periods of time, and
  - as confirmed by the Commissioner in the DIS, the integrity of Division 7A remains supported by the operation of Subdivision EA of Division 7A, which applies to certain transactions entered into by trusts with UPEs on foot with private company beneficiaries.

  Our view is that, notwithstanding the *Bendel* decision, the above measures provide adequate practical and technical protection to the revenue in respect of UPEs owed to corporate beneficiaries in the period leading up to the introduction of the new regime.

Based on the above, we therefore submit that it is not necessary nor appropriate to resurrect and implement a measure referred to in the Federal Budget over seven years ago to deal with UPEs owing to corporate beneficiaries. The new regime, if enacted as proposed, is likely to mean that discretionary trust will cease to make distributions to corporate beneficiaries from 1 July 2028. In the period prior to the introduction date, our view is that the existing measures on foot adequately protect the revenue.

17. Are there any other issues or implications as a result of the High Court's decision in Bendel that should be considered as part of the design and implementation of the revised 2018-19 Budget measure?

Our comments on this question have already been covered in our response to Question 16 – please refer above.