Accountants & Advisors

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18 September 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 – exposure draft legislation

Thank you for the opportunity to provide feedback on the exposure draft legislation (the **ED**) implementing the 30 per cent minimum tax on discretionary trusts, released on 3 September 2026. For ease of reference, these proposed rules will be referred to herein as the minimum tax regime or '**MTR**'.

SW is an Australian owned accounting and advisory firm, operating nationally from offices in Brisbane, Melbourne, Perth and Sydney with 48 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.

We previously lodged a detailed submission on the Consultation Paper dealing with the MTR on 31 July 2026.

Whilst we welcome a number of features of the draft relative to previous announcements, we consider that there are still a number of issues and anomalies that require further consideration. Key highlights from the detailed feedback provided in the attached annexure are as follows:

- The fixed trust, eligible company and rollover definitions should focus on actual exercises of power and economic outcomes, not merely theoretical powers.
- MITs, widely held trusts and employee share trusts need to be expressly included in the definition of fixed trust to ensure that these fall outside the MTR.
- The EET regime is a welcome and useful concept but requires greater flexibility and certainty, as outlined in the Annexure.
- Rollover relief should remain available where dutiable property is retained with a trust and remains subject to the MTR.

We would be only too pleased to provide further input or to discuss our submissions in more detail.

Brisbane
Level 15
240 Queen Street
Brisbane QLD 4000
T + 61 7 3085 0888

Melbourne
Level 10
530 Collins Street
Melbourne VIC 3000
T + 61 3 8635 1800

Perth
Level 18
197 St Georges Terrace
Perth WA 6000
T + 61 8 6184 5980

Sydney
Level 7, Aurora Place
88 Phillip Street
Sydney NSW 2000
T + 61 2 8059 6800

If you have any queries, please contact Ian Kearney (03 8635 1914) or Ned Galloway (03 8779 6593).

Yours sincerely

SW Accountants & Advisors Pty Ltd

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ANNEXURE – SUBMISSIONS ON THE EXPOSURE DRAFT LEGISLATION

*Note: references in this annexure to the Income Tax Assessment Act 1936 and the Income Tax Assessment Act 1997 are abbreviated as **ITAA 1936** and **ITAA 1997**, respectively.*

1. Definition of minimum tax trust

1.1 Fixed trust definition

A critical element of the definition of minimum tax trust (**MTT**) is the exclusion of fixed trusts.

We strongly support and welcome the decision to introduce a broader definition of fixed trust for the purposes of the MTR also more generally. In our previous submission challenges with the existing definition of fixed trust in section 272-65 of Schedule 2F of the ITAA 1936 were noted and the strictness of the existing definition in section 272-65 was noted as particularly inappropriate for the new MTR.

Whilst the new proposed definition of fixed trust in the form of the proposed amendment to section 272-65 is appropriately less exacting than the existing definition, we have remaining concerns that are outlined below.

1.1.1 *Fixed trust definition should focus on exercise not existence of powers*

Almost every professionally drafted trust instrument, including registered scheme constitutions, would contain some combination of the following:

- a power to amend the terms of the trust instrument
- a power to issue, redeem, consolidate, split or reclassify interests, sometimes otherwise than at net asset value
- a power to determine whether a receipt or outgoing is on income or capital account, or to define the income of the trust estate
- a power to create classes of interests with different rights
- a power to accumulate income, to make provisions and reserves, or to defer distributions, and
- administrative powers necessary for the efficient operation of the trust.

The above powers are either specifically referred to or implicitly recognised in proposed section 272-65(2) of Schedule 2F to the ITAA 1936 as being inconsistent with the existence of a fixed trust where those powers could be exercised in a way that varied or adversely affected the rights of beneficiaries. The note at the foot of that proposed subsection states '*It follows that the existence of anything contrary to the above suggests that the trust is not a fixed trust.*'

Whether the sorts of powers listed above could be exercised in a manner that might vary existing entitlements or rights or affect the value of interests might not be a straightforward matter for trustees or advisers to determine. What is more fundamental and relevant in a practical sense (and also more readily ascertainable) is not the existence of such a power, but more whether it has been exercised in a way that has resulted in a variation of rights or value of interests.

If the definition of fixed trust is failed by the mere existence of any such power, a very large population of trusts that are, in economic substance, entirely fixed will be treated as discretionary by default. The vast majority of single class unit trusts, which for all practical intents and purposes operate as fixed trusts with unitholders having proportionate voting rights and rights to income and capital, would most likely not be regarded as fixed under the new section 272-65 definition, without material changes to their trust instruments. This would still leave a considerable 'false positive' problem that the loosened definition is presumably intended to solve. This outcome would also be inconsistent with the stated policy concern, which is the ability of a trustee to determine from year to year which beneficiaries receive income or capital.

In our view, the focus should be on present economic outcomes. The existence of theoretical powers that are subject to fiduciary constraint and that have not in fact been exercised to reallocate economic benefits between beneficiaries should not result in a trust being treated as discretionary for the purposes of the new measures. As stated in our earlier submission, our view is that 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 should be excluded from the new rules. Unit trust structures, particularly those with a single class of unit, are very common business and collective investment structures. Under the current proposed definition of fixed trust, it is quite unclear whether such trusts, including many trusts that would satisfy the definition of a Managed Investment Trust, would be regarded as fixed or otherwise. If this uncertainty is not resolved, it will be necessary for trustees to consider changes to deed, which will incur costs and may run the risk of triggering duty liabilities in some states as well as the practical challenges of implementation that some instruments might present.

Recommendation: The new definition of fixed trust should be amended to ensure that the mere existence of a power to vary the terms of the trust instrument, to issue or redeem interests otherwise than at market value, or to recharacterise income as capital or capital as income or other similar powers as currently listed in proposed section 272-65(2)(b) of Schedule 2F to the ITAA 1936, is disregarded unless and until the power is exercised in a manner that materially alters or varies defined entitlements. Where such a power is so exercised after the commencement date of the MTR (1 July 2028) such a trust should thenceforth be excluded from the carve-out. We note that this recommended approach would be consistent with safe harbour (6) in Practical Compliance Guideline PCG 2016/16.

1.1.2 *MITs and widely held trusts need to be clearly excluded*

Whilst under the current law it is clear that a trust that elected to be an Attribution Managed Investment trusts (**AMITs**) would be deemed to be fixed,[1]. Despite the comments made in the Treasurers media release[2] on 3 September 2026 and at paragraph 1.22 of the Explanatory Memorandum (**EM**), it is not at all clear that MITs and widely held trusts would be fixed trusts under either the existing definition of fixed trust or the definition proposed in the ED. Indeed, the fact that a special rule was seen as appropriate and created for AMITs serves to highlight that MITs and widely held trusts would not, under the existing law, qualify as fixed trusts.

To be afforded fixed trust status under the existing law, MITs and widely held trusts will invariably be reliant on the exercise of the Commissioner's discretion to treat an interest in a trust that is not technically vested and indefeasible as vested and indefeasible.[3] We note that the Commissioner's Practical Compliance Guide, PCG 2016/16 provides guidelines designed to permit taxpayers to self-assess the Commissioner's discretion within certain specified safe harbour parameters.

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[1] Section 276-55 of the ITAA 1997 deems members of an AMIT to have interests that are vested and indefeasible in the AMIT, which will ensure that the trust is a fixed trust for the purposes of section 272-65 of Schedule 2F of the ITAA 1936.
[2] Refer to The Honorable Dr Jim Chalmers media release titled *Exposure draft legislation – Minimum tax on discretionary trusts* – dated 3 September 2026.
[3] Subsection 272-5(3) of Schedule 2F to the ITAA 1936.

The comments in paragraph 1.22 of the EM presumably indicate the intention that MITs and ‘widely held trusts’ be excluded from the new MTR. In this regard we fully support and agree with this intention. Such trusts are invariably collective investment vehicles and, in addition to the ordinary fiduciary constraints that apply to trusts, are generally restrained by regulations in the *Corporations Act 2001* applicable to managed investment schemes and/or commercial imperatives due to their widely held nature that protect the interests of members.

In order for MITs and widely held trusts to be confident that they are not subject to the new MTR, in all but a small minority of cases, it would be necessary that the constitution of each trust be reviewed and amended to remove any powers that might be regarded as offensive to the proposed definition of fixed trust in section 272-65. At best, this creates significant and avoidable costs for trusts that are clearly not intended to be subject to the new rules. For trusts regulated under the *Corporations Act 2001*, there are also potential challenges in making amendments to trust constitutions that, in some circumstances, will necessitate special resolutions of members. Amendments to deeds in accordance with existing powers are unlikely to cause income tax or CGT issues, but the same cannot be confidently said in relation to State duty.

For all these reasons, we would urge the Government to include a specific limb in the new definition of fixed trust in section 272-65 to ensure that MITs and widely held trusts are in fact treated as fixed trusts.

Recommendation: The definition of fixed trust should be drafted to make it clear that existing managed fund trusts, including MITs and widely held trusts, are treated as fixed and do not need to amend their trust deeds or constitutions to qualify. At the very least, it is recommended that there be a statutorily binding safe harbour along the lines of PCG 2016/16 independent of the exercise of any discretion on the part of the Commissioner.

1.1.3 *Employee share trusts*

The EM similarly notes at paragraph 1.22 that employee share trusts will also not be MTTs due to the operation of the law. In our view, this is by no means clear. We agree that employee share trusts should be excluded from the proposed MTR but consider that the law needs to be amended to make this clear.

Recommendation: Whilst a case could be made for a broader exclusion, we recommend that the definition of fixed trust be amended to specifically include employee share trusts, as that term is defined in subsection 130-85(4) of the ITAA 1997.

1.1.4 *Ambiguity and lack of certainty – legislative instruments should be prospective*

Whilst the concerns relating to ambiguity and lack of certainty would be significantly addressed by implementing the measures recommended above, we consider that it is worth emphasising the importance of clarity on such an important concept for the new regime.

There has always been contention around the concept of a fixed trust and statutory reform in relation to this definition is most welcome. The current reform process is an ideal opportunity to provide much needed clarity to this concept, particularly given its significantly increased relevance as a founding concept of the MTR. We are concerned that the existing proposed definition does not provide this clarity. The result of this will be confusion and uncertainty as to whether particular trusts are subject to the new rules or not and result in significant compliance costs for taxpayers seeking to determine whether the MTR applies to them and also will consume significant ATO resources. Whilst it is appreciated that it will not be possible for a prescriptive statutory definition to cover all possible permutations and combinations, the more clarity provided, the less severe these problems will be.

In this regard, we have some concern as to the provision in proposed subsection 272-65(4) that empowers the Minister to issue a legislative instrument, the effect of which could be to rule in or out of the definition particular types of trusts. Whilst we understand the motivation for such a provision, the potential for retrospective exclusion of a trust from fixed trust status is a concern. The ability on the part of the Minister to unilaterally determine that a trust is non-fixed could create unexpected liabilities for the trustee of a trust after transactions and distributions have occurred. If such a provision is to be retained, our view is that the Minister should only be permitted to determine the relevant matters on a prospective basis.

Recommendation: If proposed subsection 272-65(4) of Schedule 2F to the ITAA 1936 is to be retained, it is recommended that the effect of any legislative instrument issued under that subsection by the Minister be expressly limited to ensure that any determination by the Minister in this regard can only have prospective effect.

2. Calculation of minimum tax income

2.1 Distributions to registered charities and DGRs

We welcome the exclusion from minimum tax income (**MTI**) for distributions to registered charities, tax exempt entities and deductible gift recipients, as referred to earlier. One issue that we believe worthy of further consideration is how trustees of MTTs will be able to determine the relevant beneficiary's tax status at the time of the distribution. In practice, representations would presumably be made by the relevant beneficiary as to their tax status and the trustee would look to validate this by looking up the Australian Business Register and/or the ACNC Register for charities and DGRs.

For tax exempt entities, there is no independent method of verification. As such, the most relevant form of verification would be the disclosure in the not-for-profits accounts. As the accounts are not necessarily publicly available, MTTs will have to rely upon the accounts provided. Not all not-for-profits accounts will be audited, so reliance may have to be placed on representations made in unaudited accounts.

Recommendation: Trustees of MTTs should be protected where they have relied in good faith on the Australian Business Register, the ACNC register or accounts provided, including where endorsement is subsequently revoked with retrospective effect.

2.2 Primary production income exclusion

We also welcome the primary production exclusion in the definition of MTI in proposed paragraph 101AE(1)(a) of the ITAA 1936. However, the practical scope of this exclusion may fall short for common rural ownership structures. Where farming land is held by one trust and leased to a related operating entity, the rent derived by the land-owning trust is not primary production income as defined, notwithstanding that the group as a whole is carrying on a primary production business. The land-owning trust would therefore be fully within the MTR. This will affect structures that are relatively common for asset-protection and succession-planning purposes

Recommendation: Extend the proposed exclusion to income derived by a trust from the use of land or assets by a related entity carrying on a primary production business.

2.3 Testamentary trusts

Notwithstanding our previous submissions to the contrary, proposed subsection 101AD(1) of the ITAA 1936 limits the MTI exclusion concerning testamentary trusts to circumstances where the testamentary trust can only benefit individuals and income tax-exempt entities'. Our concern with this proposal remains that taxpayers 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 access this exemption.

Recommendation:

That subsection 101AD(1) be amended so that income derived by testamentary trusts that come into existence on or after 1 July 2028 be excluded from MTI provided that distributions of income and capital are only in fact made to individual beneficiaries or exempt entities.

3. Excluded Election Trust (EET) regime

In principle, we fully support the logic underpinning the proposal to introduce a basis on which discretionary trusts can ostensibly operate as fixed trusts without the need to restructure as such with resultant duty costs, where dutiable property is held by the trust. This objective of the EET regime is expressly noted in the Explanatory Memorandum to the relevant ED legislation.[4] In order for the new rules to be both fair and workable, it is critical that options be available for trusts to become, for practical purposes, fixed without triggering duty costs.

3.1 *Challenges with the EET regime*

Whilst we applaud the logic underpinning and concept of the EET regime, see some challenges with this in practice:

- Notwithstanding the best efforts to design a regime that would enable trusts to bypass the new MTR without triggering duty, there remains some uncertainty as to whether electing into the EET regime could still trigger duty. Some duty commentators have expressed concern that making an EET, as the regime is currently framed in the ED, might present a risk of duty in some states. State duty laws are complex, and each revenue authority may adopt its own interpretation and administrative practice. Whilst it would make sense that a purely elective regime which does not involve a change to the terms of the deed or any changes to beneficiary rights or entitlements should not result in the imposition of duty, it remains to be seen whether all states and their respective revenue authorities agree. Unless certainty can be provided that duty will not apply, which will presumably require confirmation by the various states, any lingering uncertainty will significantly undermine the utility of this proposed component of the new MTR.

- There may also be some reluctance on the part of trustees to make an election under the EET regime on the basis that it may leave them exposed to a claim by an aggrieved discretionary object. In this regard, we note the Victorian Court of Appeals decision in *Owies v JJE Nominees Pty Ltd*[5] which highlighted some of the challenges faced by trustees of discretionary trusts in relation to the annual exercise of its discretion. Whilst these challenges and risks of claim exist under the current law, with the exercise of the trustee's discretion, making a formal election under the EET regime and nominating beneficiaries with specified proportions (notwithstanding that trusts may well remain fully discretionary) may be seen as adding a further layer of risk in this regard.

Noting the above challenges, we consider it important to ensure that the alternative restructuring mechanism, in the form of rollover relief, is widely available. To a large extent, the need for a separate EET regime is necessitated by the rigidity of the proposed rules relating to rollover relief and the currently proposed requirements that could significantly restrict the utility of this measure where dutiable property is held by the trust. We have provided

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[4] At paragraph 1.4.
[5] [2022] VSCA 142

comments and feedback on the rollover relief measures proposed at section 4 below but have also set out below our specific comments and recommendations on the proposed EET regime immediately following.

3.2 Variation of the EET election

We strongly support the proposition that there should be circumstances under which an election under the EET should be varied, which is contemplated in the ED in proposed subsections 102UYE(2) and (3) of the ITAA 1936. It is also appreciated that there needs to be strict limits imposed on the ability to vary an EET election to maintain the integrity of the EET regime. However, we submit that the circumstances in which variations may be made should be expanded beyond the very limited circumstances currently provided for. The circumstances currently contemplated are limited to death, in which case only a new individual beneficiaries of the deceased's estate can be nominated (subject to further conditions) and those that arise in the case of a relationship breakdown.

Recommendation: It is submitted that the circumstances in which an EET election can be varied should be expanded to cover:

- relationship breakdown circumstances where only one of the parties is nominated as beneficiary in an EET. Proposed subsection 102UYE(4) as currently drafted requires that both parties be nominated in the election
- circumstances where a previously nominated individual beneficiary becomes:
  - bankrupt
  - subject to a legal disability, or
  - otherwise incapacitated either physically or mentally (with appropriate integrity measures to ensure that this variation only caters for genuine situations), and
- the death of a beneficiary so that a beneficiary of the deceased estate other than an individual – that is an eligible company (as defined in proposed section 102UYC, subject to the recommendations noted below) or a trust can also be nominated in terms of a variation triggered by death. We see no logical or policy reason for limiting the variation on death to individuals, given that the primary EET election caters for the nomination of eligible companies and trusts, and
- another event prescribed by regulation.

Other comment for consideration: One further issue we thought it would be appropriate to raise in this context is where a class of beneficiary is excluded by the terms of the deed and circumstances change such that a beneficiary nominated under an EET election ceases to be eligible as a beneficiary. A common example of this would be circumstances where a beneficiary of a trust changes residence and moves overseas. Because of State laws relating to duty and land tax, it is not at all uncommon for trust deeds to have foreign persons excluded as beneficiaries. Where an individual is a nominated beneficiary and moves residence overseas to live, this would generally mean that such an individual becomes disqualified as a discretionary object. In our view a case can be made for permitting a variation in these circumstances.

3.3 Definition of eligible company

3.3.1 *Unexercised discretionary powers should not disqualify*

Similar to the concerns flagged in relation to the proposed definition of fixed trust, we also have similar concerns in relation to the definition of eligible company in proposed section 102UYC. We submit that the standards set by proposed subsection 102UYC(2) are sufficiently high that the vast majority of company constitutions would require amendment in order to for such companies to qualify as eligible companies. Most existing company constitutions can be varied with a special resolution of members and many other powers can typically be exercised with the sanction of a special resolution. Setting such a high benchmark for qualification will impose a significant cost on taxpayers, which we consider unnecessary and inappropriate. Similar to comments made in relation to fixed trusts, the existence of unexercised powers should not result in a company being ineligible as a beneficiary of an EET. As an example, companies with a single class of share on issue should be expected to qualify as an eligible corporation, regardless of what unexercised powers might exist in the constitution to do certain things that are referred to in proposed paragraph 102UYC(2)(b) of the ITAA 1936.

Recommendation: The definition of eligible company should be amended to ensure that the mere existence of powers to vary the constitution, to issue or redeem rights or interests otherwise than at market value to recharacterise income as capital or capital as income or other matters currently listed in proposed paragraph 102UYC(2)(b), is to be disregarded unless and until the power is exercised in a manner that materially alters or varies defined entitlements. Where such a power is so exercised after the commencement date of the MTR (1 July 2028) such a company should thenceforth be excluded from the carve-out.

3.3.2 *Legislative instruments – should be prospective*

Similar to the comments made in relation to the proposed definition of fixed trust, we also have some concern as to the provision in proposed subsection 102UYC(4) that empowers the Minister to issue a legislative instrument, the effect of which could be to rule in or out of the definition particular types of trusts. Whilst we understand the motivation for such a provision, the granting of what appears to be an unfettered power in this regard to unilaterally determine whether a trust is fixed or (of more concern) not on a retrospective as well as prospective basis is not something that we consider to be appropriate. If such a provision is to be retained, our view is that the Minister should only be permitted to determine the relevant matters on a prospective basis

Recommendation: If proposed subsection 102UYC(4) of Division 6F to the ITAA 1936 is to be retained, it is recommended that the effect of any legislative instrument issued under that subsection by the Minister be expressly limited to ensure that any determination by the Minister in this regard can only have prospective effect.

3.4 Extension of the ability to make an EET

Notwithstanding the challenges noted in relation EETs, we consider it to be a very useful concept in that it enables a trust to be notionally fixed without losing the asset protection advantages offered by a discretionary trust structure. One of the major advantages of a discretionary trust is that it does not have ownership interests in it, which offers a greater degree of asset protection for assets held within it. We submit that this is something that should not be limited in availability to trusts in existence at 1 July 2028. Put another way, taxpayers that establish structures on or after 1 July 2028 should not be denied the benefit of having a trust subject to the EET regime but offers asset protection advantages.

Whilst we understand the policy logic underpinning this proposed limitation (those establishing structures established on or after that date will do so with the benefit of existing law and presumably administrative guidance available), we consider that there will be sufficient safeguards with the EET regime that extending its availability will not undermine the integrity of the MTR. The EET regime produces a voluntary fixed trust compliance process which, if not complied with, results in the application of the MTR.

We therefore submit that this regime should be made available to trusts established on or after 1 July 2028 or, at the very least, to make it available for the full transitional period offered for the proposed rollover relief measure under proposed Subdivision 126-C of the ITAA 1997 – that is, for trusts established until 30 June 2030. By this time the law and administrative practice relating to the new MTR will be more fully understood.

Recommendation: The EET regime should be made available to trusts established on or after 1 July 2028 or, at the very least, until 30 June 2030, consistent with the transitional rollover relief period.

3.5 Distributions of corpus other than capital gains should not be restricted by the EET

We consider that the practical requirement under the EET regime that all income and capital distributions need to be made in the nominated proportions to nominated beneficiaries under the EET election should be limited to income and 'capital gains' (within the meaning of that term in the ITAA 1997). The EET is a tax construct and the relevant metrics that determine how net income of a trust is assessed to beneficiaries under the existing law are essentially the income of a trust estate and capital gains. We do not consider that a distribution of corpus of a trust that is not a capital gain should be limited by the EET election.

Recommendation: Automatic revocation of an EET election under proposed subsection 102UYF of the ITAA 1936 should not be triggered if trust corpus other than capital gains is distributed other than in the proportions and to the persons specified in the EET.

3.6 Automatic revocation of EET election

3.6.1 *Income to which no beneficiary is presently entitled*

Under the EET rules as currently proposed, where any net income is assessable to the trustee under section 99A of the ITAA 1936, an EET election in force for an EET would automatically be revoked. Proposed subsection 102UYF(2) of the ITAA 1936 makes this clear. There may be compelling non-tax reasons why the trustee of a discretionary trust may not wish to make distributions to one or more nominated beneficiaries in one or more years. There may be personal or commercial circumstances that make a distribution to nominated beneficiaries commercially or legally imprudent – for example, individual beneficiaries may have entered bankruptcy or have developed an addiction (e.g. drug or gambling) or mental health issue that would make such a distribution inappropriate. Alternatively, it may simply be determined by the trustee that it is desired to build up trust corpus to fund future investment or commercial activity or to enable debt to be serviced/repaid.

In any event, we see no reasonable policy or logical basis that a decision on the part of the trustee to accumulate income on the part of the trustee should result in the automatic revocation of an EET election given that:

- the rate of tax on net income assessed to the trustee under section 99A is already at the top marginal rate of tax, and

- a decision to not distribute income or capital gains has not conferred any benefit on a beneficiary outside the persons specified in the election (or in different proportions).

Recommendation: We submit that changes should be made to proposed paragraphs 102UYF(2)(a) and 102UYD(2) of the ITAA 1936 to ensure that the accumulation of income and/or capital gains with the result that the trustee is assessed under section 99A does not result in the automatic revocation of an EET election otherwise in force. It is suggested that amounts retained in the trust that have given rise to a section 99A assessment be notionally treated as having been distributed to the nominated beneficiaries in the nominated proportions.

3.6.2 *Will the application of section 100A result in automatic revocation of the EET election?*

We are not clear what the consequences might be in the event that section 100A of the ITAA 1936 is applied in relation to a reimbursement agreement involving a trust that has made an EET election. Where section 100A applies, tax under section 99A would generally be imposed upon the trustee on the basis that the relevant beneficiary is deemed not to be, and to never have been, presently entitled to that income. The implications of this application for the EET regime are not clear. Whilst the application of section 100A means that any present entitlement would be disregarded for the purposes of the ITAA 1936, provided that the relevant distributions have been made in compliance with the EET, there will have been no actual conferral of income or capital outside the scope of that election. Given that section 100A is an important integrity measure that the Commissioner has put an increased focus on in recent years, we consider that this should be clarified.

It is also unclear more generally how the operation of section 100A would interact with the minimum tax rules more generally and assume that this will be made clear in future tranches of proposed law.

Recommendation: Application of section 100A should not, of itself, revoke an EET election. Revocation should occur only if income or capital was in fact conferred on a person, or in proportions, inconsistent with the nomination. It is recommended that this be made clear in proposed subsection 102UYF(2) of the ITAA 1936.

3.6.3 *Distributions to registered charities and DGRs*

We welcome the exclusion of distributions to registered charities and DGRs from the definition of minimum tax income (**MTI**), pursuant to proposed paragraph 101AE(1)(d) of the ITAA 1936. For similar policy reasons, our submission is that where a trust that has made an EET election and makes a distribution to registered charities and DGRs that satisfy similar requirements in circumstances where the registered charity and/or DGR is not a nominated beneficiary under the EET election, this action should not trigger an automatic revocation of the election. Our reading of the ED is that automatic revocation would be triggered by such action.

Recommendation: Amendments should be made to proposed subsection 102UYF to ensure that donations or distributions to registered charities and DGRs that satisfy the requirements of proposed paragraph 101AE(1)(d) other than in compliance with the EET election do not result in automatic revocation of that election.

4. Rollover relief

4.1 Asset transfer requirements

4.1.1 *Dutiable property should not be required to be transferred*

We have previously submitted that the requirement that all assets of a trust be transferred should be removed, or at least relaxed, so that a trust may access the rollover where all assets other than dutiable property are transferred. We note that some limited exceptions have been provided for in proposed subsection 126-430(4) of the ITAA 1997.

Our strong view, particularly having regard to the challenges noted with the proposed EET regime, is that rollover relief should not be precluded in circumstances where a discretionary trust holds an interest in dutiable property under relevant state revenue laws.

Noting that a trust cannot both opt for rollover relief and make an EET election, the taxable income generated by any assets remaining within the discretionary trust will be subject to the minimum tax imposed by MTR regime. On this basis, we see no logical, policy or integrity basis on which a duty cost should be imposed on affected trusts in order to obtain rollover relief.

Recommendation: That the existing carve-outs in proposed subsection 126-430(4) of the ITAA 1997 be expanded to include any property the transfer of which would give rise to material duty, landholder duty, foreign purchaser duty or equivalent State or Territory tax consequences.

4.1.2 *Retention of primary production assets*

We note and welcome the inclusion of the carve-out for primary production assets in proposed paragraph 126-430(4)(b) of the ITAA 1997. It is unclear from the wording of this provision whether this carve-out might be intended to apply to circumstances where primary production assets are held by a trust and leased or rented to another entity that conducts the primary production business. As this is not an uncommon scenario, we would welcome further clarification of this point.

Recommendation: Clarification be provided as to whether the exception in proposed paragraph 126-430(4)(b) of the ITAA 1997 is limited in application to where the holder of the asset directly uses it in carrying on a primary production business or whether the requirement is only that an entity (not necessarily the holder of the asset) use it in carrying on a primary production business.

4.2 Rules relating to the transferee and retention of discretionary outcomes

The circumstances set out in proposed subsection 126-430(6) are broadly a replication of the conditions set out in proposed subsection 102UYC(2) of the ITAA 1936 for an eligible company for the purposes of the EET regime. Our comments on the latter provision are broadly the same as our comments on the former provision and our comments on the proposed fixed trust definition – essentially, we consider that any discretionary powers that theoretically are exercisable but remain unexercised during the period prescribed by proposed subsection 126-430(5) of the ITAA 1997 should be disregarded in determining whether discretionary elements are retained. As the existence of such powers will be very common in trust deeds and company constitutions, the fact that the mere existence of such powers could disqualify a transferee creates significant uncertainty in relation to this important measure and will impose an avoidable and material cost on taxpayers seeking to access it.

Recommendation: The proposed rules relating to the retention of discretionary elements in proposed subsections 126-430(5) and (6) should be amended to ensure that the mere existence of discretionary powers in relation to the transferee entity does not preclude rollover relief under proposed Subdivision 126-C of the ITAA 1997.

5. Tax offsets

5.1 FITOs

Whilst the ED makes it clear how franking offsets are intended to be treated, it is unclear to us from the ED how other tax offsets that currently flow through to beneficiaries will be treated for trusts that are MTTs – the most common example of such tax offsets are foreign income tax offsets (**FITOs**). Will such offsets continue to flow through to beneficiaries of MTTs? It is assumed that the answer to this question is yes but given the fundamental change that the new MTR is implementing it would be helpful if guidance on this issue could be provided in the EM to the relevant legislation.

Recommendation: It is requested that confirmation be provided as to how offsets other than franking offsets are intended to be dealt with under the MTR.

5.2 Corporate beneficiaries and double tax

Whilst we imagine that our comments on this component are unlikely to be any more successful than our previous submissions on the subject (given proposed paragraph 101AF(1)(d) of the ITAA 1936), this proposal is sufficiently harsh and inequitable that we feel duty bound to reiterate them. The proposal to double tax income distributed to company beneficiaries by a discretionary trust is unduly harsh. It is fully appreciated that popularity is not the metric by which good tax reform is to be judged, but the imposition of an effective tax rate on such income of 60% (which increases to 69% on distributions to shareholders on the top marginal rate of tax) is sufficiently draconian that it risks undermining community acceptance of the broader reforms. Our earlier submissions (and submissions from other stakeholders) suggested alternative approaches to ensure that the integrity of the proposed MTR was maintained without the imposition of double tax. We respectfully urge the Government to reconsider this issue and encourage further dialogue with stakeholders and the tax profession on this issue.

Recommendation: That the elements of the proposal that result in the imposition of double tax on discretionary trust distributions to company beneficiaries be reconsidered and alternative solutions be considered and adopted.

6. Sundry other matters

Refund of excess franking credits to trustees

We welcome the adoption of the refund model in preference to a carry-forward model, consistent with our earlier submission. We can see that there are further administrative and practical matters required to be dealt with in this regard, and presume that these will be dealt with in further legislative tranches.

Removal of double taxation – minimum tax offset availability through chains of trusts

We welcome the change that has been introduced to ensure that distributions that pass through multiple layers of MTTs are not denied offsets for the minimum tax, consistent with our earlier submission.

Other administrative and procedural matters

The ED is understood to contain only the core components of the MTR, with administrative and integrity arrangements to follow in later tranches. A number of comments were raised on certain practical and procedural issues in our earlier submission, and it is assumed that these matters will be covered in later instalments. However, for completeness, we note that submissions we have made in this regard include the following:

- amendments to section 170 of the ITAA 1936 to ensure that the general statutory amendment periods apply to the minimum tax payable by trustees, rather than relying on the administrative approach in PS LA 2015/2.
- the prospect of an ‘unders and overs’ mechanism modelled on Subdivision 276-F of the ITAA 1997, to avoid the need to amend the returns of the trustee and every beneficiary to correct a single trust-level error
- return lodgement timing issues to ensure beneficiaries of MTTs are able to lodge after trust returns are due
- suggestions as to joint and several liability to give the trustee of a MTT statutory authority to apply funds payable to a beneficiary towards payment of the minimum trust tax
- recommendations that MTTs not be subject to the PAYG collection system.

Whilst we welcome the changes put forward by Treasury that have adopted some of the feedback from the initial consultation, we are concerned that the consultation period of only 11 working days is considered too short for stakeholders to fully consider legislative reforms of this scope and depth. Accordingly, we have reviewed the Exposure Draft (ED) as thoroughly as the allotted timeframe has permitted and have provided our detailed comments in response. However, we recommend that more time be allotted for any future consultation on these important changes.