

Ref: AMK:lg

18 September 2026

The Treasury
Langton Cres
PARKES ACT 2600

By Email: mintaxtrusts@treasury.gov.au

Dear Sir / Madam

A. MINIMUM TAX ON DISCRETIONARY TRUSTS - EXPOSURE DRAFT LEGISLATION

1. Thank you for the opportunity to provide comments on the exposure draft legislation relating to the minimum tax on discretionary trusts including the temporary roll-over relief and new electable regime.
2. Pitcher Partners specialises in advising taxpayers in what is commonly referred to as the middle market. Accordingly, we service many taxpayers that are impacted by these reforms.
3. We highlight that for the purposes of Division 30 of the *Tax Agent Services Act 2009* and, in particular, the amendments to the Code of Conduct by the *Tax Agent Services (Code of Professional Conduct) Determination 2024* ("**Determination**"), all of the comments made in this submission are directly relevant to us as a firm and our clients. While this may result in a conflict of interest for the purposes of section 20 of the Determination, we highlight that we have tried to ensure that our comments and suggestions in this submission are balanced and consistent with the policy, principles and intention of the rules as we understand them.

B. OVERVIEW OF THIS SUBMISSION

4. This submission does not question the underlying Government policy objective of ensuring that discretionary trust income is subject to a minimum rate of tax of 30 per cent. However, we remain extremely concerned with the operation of the proposed regime and the significant adverse consequences it will have for existing trust groups.
5. In our view, the principal issue is not the introduction of a 30 per cent minimum tax. Rather, it is the interaction of the regime with the treatment of corporate beneficiaries

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and the absence of meaningful transitional relief for existing trust groups with accumulated tax losses. These features will have particularly harsh consequences for taxpayers with existing trust structures and accumulated tax attributes. The proposals effectively penalise historical ownership decisions that were made in accordance with the law, leaving many existing taxpayers in a materially worse economic position than a taxpayer commencing an identical business or investment structure after the introduction of the regime.

6. The Exposure Draft seeks to address these concerns through the introduction of the Excluded Election Trust (**EET**) regime and transitional roll-over relief. However, neither alternative provides a practical solution for many taxpayers. Both involve significant legal, commercial and compliance costs and may expose trustees to material fiduciary and trust law risks. In many cases, taxpayers will be required to choose between undertaking a costly restructure or making an election that effectively fixes future economic interests between beneficiaries.
7. We are concerned that the current proposals force taxpayers into complex restructuring decisions that are unrelated to the Government's stated policy objective. In particular, the proposals may require trustees to alter longstanding ownership structures, crystallise economic outcomes between beneficiaries and incur significant transaction costs simply to preserve outcomes that already exist within the same economic family group.
8. Importantly, we believe many of these outcomes are unnecessary and can be avoided through more targeted measures. In our view, the Government's policy objectives can be achieved without requiring widespread restructures or irrevocable elections. We propose an alternative approach that would preserve the minimum tax framework, allow appropriate recognition of minimum tax paid where distributions pass through corporate beneficiaries and provide targeted transitional relief for existing family trust groups with genuine pre-existing tax losses. We believe this approach would better align with the policy objectives of the regime while potentially increasing overall revenue collections.
9. Our submission focuses on the following key issues:
 - 9.1. The proposed regime creates significant economic disadvantages for existing trust groups, primarily because of the punitive treatment of corporate beneficiaries and the absence of meaningful transitional relief for trusts with accumulated tax losses.
 - 9.2. The EET and roll-over alternatives are costly, complex and may expose trustees to significant fiduciary, trust law, duty and compliance risks and expose their advisers to significant professional risk in implementing any restructure or recommending and managing any EET election.

- 9.3. A simpler and more targeted alternative could achieve the Government's policy objectives without requiring restructures or EET elections while potentially increasing overall revenue.
 - 9.4. Transitional relief should be provided for existing family trust elected groups with genuine pre-existing tax losses, particularly where assets cannot practically be restructured because of stamp duty, financing or commercial constraints.
 - 9.5. The proposed fixed trust gateway should be reconsidered and refocused on identifying genuinely discretionary trusts that present income-splitting concerns.
 - 9.6. The roll-over provisions should be expanded to permit trust-owned transferee companies and better accommodate existing commercial structures.
10. We believe these changes would more effectively target the policy objective of addressing income splitting through discretionary trusts while reducing compliance costs, avoiding unnecessary restructures and preserving legitimate commercial arrangements established in good faith under the existing law.
11. Appendix A outlines further detail on the above core issues. We are also in the process of compiling a technical issues report that we are looking to submit to you next week, which will comprise Appendix B.

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If you would like to discuss any aspect of this submission, please contact either Leo Gouzenfiter on (03) 8612 9674 or me on (03) 8610 5170.

Yours sincerely



A M KOKKINOS
Executive Director

APPENDIX A – CORE ISSUES

C. THE NEW MEASURES FORCE A RESTRUCTURE FOR MANY GROUPS

12. The proposed minimum tax regime creates a significant disincentive for existing trust groups to continue operating through trust structures. However, that disincentive is not principally driven by the introduction of a 30 per cent minimum tax itself. Rather, it is driven by two outcomes that appear to go significantly beyond the stated policy objective of imposing a minimum rate of tax on discretionary trust income.

Core issue 1: Punitive tax on corporate beneficiaries

13. The first is the treatment of distributions to corporate beneficiaries. Under the current proposal, a corporate beneficiary is denied the benefit of the minimum tax offset. As a result, trust income distributed through a company may be taxed at multiple levels, producing an effective tax rate approaching 70 per cent. This outcome does not appear to be a policy objective in its own right. Rather, it arises as a consequence of Treasury's decision to deny corporate beneficiaries access to the minimum tax offset in order to prevent the conversion of that offset into refundable franking credits. Accordingly, taxpayers are encouraged to restructure into corporate or fixed trust arrangements, not to avoid a 30 per cent minimum tax, but to avoid a significantly higher effective tax burden.

Core issue 2: No transitional relief for grouped trusts

14. The second is the absence of meaningful transitional relief for existing trust groups with genuine, pre-existing tax losses. This is unprecedented. When the tax consolidation regime removed tax loss grouping, transitional loss donation and value injection rules preserved the ability for corporate groups to utilise existing losses as a transitional measure. No equivalent relief is proposed for middle-market trust groups. Instead, distributions to loss-bearing trusts within an existing family trust elected group may trigger minimum tax and cause genuine tax losses to be used or wasted, even though no value leaves the economic group. For land-rich groups unable to restructure because of prohibitive duty costs, this outcome is unavoidable. The inability to make good losses, will genuinely leave loss trusts in deficiency giving rise to high risks of insolvency and business failures. Without transitional rules, this has the potential to have a significant impact on medium sized businesses in Australia.

D. ALTERNATIVE PATHWAYS ARE COSTLY AND RISKY FOR TAXPAYERS

15. The Exposure Draft attempts to address some of the adverse consequences of the minimum tax regime by providing two alternatives. The first is a restructure under the

proposed transitional roll-over relief in Subdivision 126-C. The second is an Excluded Election Trust (EET) election, under which a discretionary trust effectively nominates fixed beneficiaries and fixed proportions of income and capital in exchange for being excluded from the minimum tax regime.

16. While these measures are intended to provide taxpayers with alternatives to the minimum tax, neither option adequately addresses the practical difficulties faced by many existing trust groups.

Significant cost and risk of restructuring

17. A restructure may remove certain Commonwealth income tax consequences, but it does not eliminate stamp duty, legal costs, financing issues, regulatory constraints or trust law considerations. In addition, a restructure necessarily determines which beneficiaries will ultimately receive the economic benefit of the trust assets. Following *Owies v JJE Nominees Pty Ltd [2022] VSCA 142*, trustees must carefully consider the interests of all beneficiaries when making decisions that preferentially benefit one class of beneficiaries over another. Consequently, a restructure itself may expose trustees to fiduciary risks where the transaction effectively locks in outcomes for some beneficiaries while prejudicing others.

Similar risks under an EET election regime

18. The EET regime raises many of the same concerns. While it may provide a mechanism to avoid the punitive treatment of corporate beneficiaries, it effectively requires trustees to make long-term decisions regarding the allocation of trust income and capital between beneficiaries. In doing so, it may create trust law risks, potential duty consequences and ongoing compliance obligations. Rather than eliminating the need for restructuring, the EET may cause the same legal and commercial issues to arise to that of a restructure due to the practical effect of making the tax election.
19. Accordingly, the Exposure Draft does not provide a genuinely low-cost or low-risk pathway for affected taxpayers. Instead, taxpayers are required to choose between a costly restructure or an election that may create many of the same legal, fiduciary, duty and compliance concerns.

E. SIMPLER AND TARGETED PROPOSED ALTERNATIVE

20. The restructuring and EET pathways are directed at addressing the two principal concerns created by the Exposure Draft: first, the punitive treatment of distributions to corporate beneficiaries; and secondly, the inability of existing trust groups to effectively utilise pre-existing tax losses. For example, an EET election permits distributions to be made through loss trusts within the group and allows distributions to corporate beneficiaries without the adverse consequences that would otherwise arise under the

minimum tax regime. The proposed roll-over relief is similarly intended to facilitate restructures that remove taxpayers from these outcomes.

21. However, if the EET and restructuring pathways are intended to remove the punitive treatment of corporate beneficiaries and the inability of existing trust groups to utilise pre-existing tax losses, it is unclear why simpler alternatives have not been considered. In our view, it is possible to achieve the same policy outcomes, while collecting greater revenue, without requiring taxpayers to undertake restructures, incur substantial compliance costs or make long-term decisions regarding beneficiary entitlements.
22. Our alternative proposal adopts the framework contained in the Exposure Draft but introduces two targeted modifications. First, it allows the minimum tax offset to be recognised through a corporate beneficiary by preserving the character of discretionary trust distributions as they pass through a company. Secondly, it provides targeted transitional relief for distributions to certain existing trusts with genuine pre-existing tax attributes. Together, these measures address the two principal concerns identified above while avoiding the need for restructures or EET elections.
23. As illustrated below, the proposed approach is capable of producing substantially the same commercial outcomes as the EET regime, but in a manner that is simpler, imposes lower compliance costs and may result in higher overall revenue for the Government. The following examples compare the operation of the EET regime with our proposed alternative.

Example 1 – EET Approach

24. Trust A derives \$1.2 million of income and distributes the amount to Trust B under the EET regime. Trust B, also a trust with an EET, utilises its \$200,000 carried-forward tax losses and distributes the remaining \$1 million to Aco Pty Ltd. Aco pays company tax of \$250,000 (25%), leaving after-tax profits of \$750,000.
25. Aco distributes \$180,000 as fully franked dividends, being \$90,000 to each shareholder. Each shareholder receives a cash dividend of \$90,000 and franking credits of \$30,000, resulting in assessable income of \$120,000 each.
26. Tax on \$120,000 is \$26,520 and Medicare levy is \$2,400, giving a total liability of \$28,920. After applying franking credits of \$30,000, each shareholder receives a refund of \$1,080.
27. The total tax collected is therefore \$247,840, comprising company tax of \$250,000 less shareholder refunds of \$2,160. The effective tax rate on the \$1 million combined net income of Trusts A and B after utilisation of the losses and payment of some of those profits as dividends to shareholders is approximately 24.8%.

Example 2 – Proposed Alternative

28. Trust A derives \$1.2 million of income and distributes the amount to Trust B. Because both trusts are members of the same family trust elected group, the distribution qualifies for transitional loss relief, and Trust B utilises its \$200,000 carried-forward tax losses.
29. Trust B distributes the remaining \$1 million to Aco. Trust B pays minimum tax of \$300,000 and distributes the after-tax balance of \$700,000 to Aco. The distribution is recorded in Aco's Trust Distribution Account together with the associated minimum tax offset of \$300,000.
30. Aco subsequently distributes \$180,000, being \$90,000 to each shareholder. The distributions are sourced from the Trust Distribution Account and therefore retain their character as indirect trust distributions. Each shareholder receives a cash distribution of \$90,000 and is assessed on \$128,571, being the cash amount grossed up by the attached minimum tax offset of \$38,571.
31. Tax on \$128,571 is \$29,091 and Medicare levy is \$2,571, giving a total liability of \$31,662. After applying the non-refundable minimum tax offset of \$38,571, the income tax liability is reduced to nil. However, the offset does not reduce Medicare levy. Each shareholder therefore pays Medicare levy of \$2,571.
32. The total tax collected is therefore \$305,143, comprising \$300,000 of minimum tax paid by Trust B and Medicare levy of \$5,143 paid by the shareholders. The effective tax rate on the \$1 million combined net income of Trusts A and B after utilisation of the losses and payment of some of those profits as dividends to shareholders is approximately 30.5%.

Comparison of the EET to our Proposed Alternative

33. Accordingly, both approaches permit utilisation of the same \$200,000 of carried-forward losses. However, the proposed alternative raises approximately \$57,303 more tax than the EET approach while avoiding restructuring, EET elections and the associated fiduciary, duty and compliance risks.

Potential impact on revenue

34. As outlined above, we believe our proposed alternative may result in a significant increase in overall revenue as compared to the EET regime. The Australian Taxation Office statistics for 2023-24 (Table 7 - Trusts) indicate that approximately \$35 billion of trust distributions are made annually to corporate beneficiaries that appear to be small or micro companies. On a purely illustrative basis, if 50% of those distributions were made to entities eligible for the 25% corporate tax rate, or if only 50% of affected taxpayers elected into the EET regime, the 5% differential between the minimum tax

rate and the corporate tax rate would conservatively equate to approximately \$875 million of additional annual revenue under our proposed approach. Over a four-year period, this would equate to approximately \$3.5 billion.

35. These figures are illustrative only and do not represent a formal revenue estimate. We do not have access to the assumptions, behavioural modelling or underlying data required to undertake a Treasury-style costing. We therefore recommend that Treasury confirm whether a similar revenue effect exists and disclose the assumptions and methodology used in its analysis.

F. ADDITIONAL INTEGRITY MEASURES

36. We understand that the alternative approach outlined in this submission will require the support of integrity measures.
37. In particular, we understand that the Government is moving to treat trust distributions to corporate beneficiaries as Division 7A loans. This, together with section 100A (reimbursement agreements) and the family trust election provisions would help to ensure that the integrity of these measures are retained. Other integrity provisions, such as the definition of tax benefit, would need to be explored.

Alternative is not an attack on franking credits

38. While the Government may be reluctant to adopt measures that could be perceived as restricting access to refundable franking credits, our proposal does not do so. Rather, it operates as an integrity measure that preserves the character of a discretionary trust distribution as it passes through a corporate beneficiary, ensuring that the distribution remains subject to the minimum tax regime when ultimately distributed by the company. Importantly, the proposal applies only to discretionary trust distributions that are subject to the minimum tax regime. Franking credits generated from ordinary company profits would continue to operate under the existing imputation system without modification.
39. Indeed, the current proposal has a greater impact on refundable franking credits than the alternative outlined in this submission. Under the Exposure Draft, a corporate beneficiary may be taxed on trust income without receiving credit for the minimum tax already paid by the trustee, and no franking credits arise in respect of that tax. By contrast, our proposal preserves the existing operation of refundable franking credits for ordinary company profits, while ensuring that discretionary trust distributions remain subject to the intended minimum rate of tax. Accordingly, the proposal supports the integrity of the minimum tax regime without requiring any broader change to Australia's refundable franking credit system.

Retaining the character of a trust distribution through a company

40. Implementing this system would be relatively straightforward. A company would maintain a Trust Distribution Account (**TDA**) to track trust distributions received and not yet distributed through a company. The balance of this account would come from data already provided in the income tax return. The balance would be calculated as the opening balance from the prior year, plus taxable trust distributions received during the year (net of the 30% minimum tax),¹ less dividends paid during the year (but not below zero).²
41. While a balance remains in the TDA, distributions made by the company would first be treated as a payment from the TDA and thus an indirect trust distributions for the purposes of the minimum tax trust regime. Accordingly, the distribution would carry with it the corresponding non-refundable minimum tax offset for individuals. This would preserve the integrity of the minimum tax regime without imposing the punitive outcomes that arise under the current proposal.

G. EXCEPTION FOR TRUST LOSSES

42. As outlined earlier, the minimum tax regime does not provide meaningful transitional relief for trust groups that contain multiple trusts and pre-existing tax losses. While the EET regime effectively allows taxpayers to continue utilising those losses within the group, the proposed roll-over relief does not address the issue because the losses remain trapped in the trust that is subject to the restructure.
43. In doing so, the Exposure Draft departs from a long-standing policy position that trusts within the same family-controlled group should, in appropriate circumstances, be able to utilise losses on a group basis. Instead, the legislation arbitrarily isolates each trust and subjects it to the minimum tax regime on a stand-alone basis, rather than considering the net income and losses of the economic group as a whole. The result is that trust groups may be subject to tax at effective rates well in excess of 30 per cent even where genuine losses exist elsewhere within the same family-controlled structure.
44. The proposed departure marks a significant shift in policy that goes well beyond the stated objective of ensuring discretionary trust income is subject to a minimum rate of tax. Many taxpayers operate through multiple trusts for asset protection reasons, with separate trusts commonly used to isolate commercial, investment and liability risks.
45. Those structures are economically no different from corporate groups that operate through multiple subsidiaries. In both cases, separate entities are used to isolate risks and assets within a common economic group. However, corporate groups are able to offset profits and losses across the group through the tax consolidation regime,

¹ This amount is reported at Label 6E of the Company income tax return each year.

² This amount is reported at Label 8J and 8K of the Company income tax return each year.

whereas the Exposure Draft would deny equivalent treatment to family trust elected groups.

46. This distinction is difficult to justify. For many years, family trust elected groups have been afforded trust loss grouping concessions on the basis that they form part of the same economic family group. The proposed minimum tax regime departs from that approach by effectively ignoring losses elsewhere within the group and taxing each trust in isolation. The result is that economically identical groups may be taxed differently merely because one group uses companies and the other uses trusts.
47. Prior Governments have recognised the unfairness that arises when trusts within the same economic group are prevented from offsetting losses against profits. In Parliamentary debates introducing trust loss grouping relief, the then Treasurer made the following comments:³

What it did not allow in relation to the income injection test was an income injection where the beneficiaries may have traded through another trust or they may have traded through another entity. That was the prime area of concern which would have meant that, for example, if the beneficiaries had one trust owning a block of land that made profits, and another trust operating a small business that made a loss, they would not be in a position to offset the losses and the profits.

Nobody would say that that would be a fair situation. On what basis, where overall business was through two entities, would you tax the income and leave aside the loss? You would not do it in relation to an individual; you would not do it relation to a company. You would not say to an individual, if they had income from this particular area, 'That is assessable, but losses which were incurred as part of deriving that income will not be offset against the income.' Of course you would not do that. The basic principle was to bring it back to exactly the same situation in relation to other entities.

(emphasis added)

Concessions that were provided on entry into tax consolidation

48. The introduction of the tax consolidation regime recognised that taxpayers should not be disadvantaged merely because they operated through a group structure. Accordingly, when the former group loss transfer rules in Division 170 were repealed, transitional measures were introduced to preserve access to pre-existing tax losses within the economic group.
49. In particular, the consolidation regime included a concessional loss utilisation method that allowed transferred losses to be utilised progressively by the consolidated group over time. The regime also contained specific transitional rules that recognised the

³ House of Representatives Official Hansard, No. 217, 1997 (27 October 1997).

need to preserve access to losses that arose before the introduction of the new grouping framework.⁴

50. In addition, taxpayers were permitted to utilise the 100 per cent loss donation and value donation rules as part of the transition to consolidation.⁵ Those rules ensured that losses and value that existed within a corporate group before consolidation could continue to be recognised after the new regime commenced.
51. The relevance of these measures is not to recommend the specific mechanism adopted previously, but to highlight the policy principle they reflect. When a new tax regime altered the manner in which groups could access losses, transitional relief was provided to avoid unfair outcomes for taxpayers with existing structures and pre-existing tax attributes.
52. No comparable relief has been proposed for family trust elected groups. Instead, the minimum tax regime would effectively deny many existing trust groups the practical benefit of losses that were accumulated under the current law, notwithstanding that equivalent corporate groups were afforded transitional protections when similar grouping changes were introduced for tax consolidated groups.
53. In our view, this supports the provision of targeted transitional relief for existing family trust elected groups with genuine pre-existing tax losses. Such an approach would be consistent with historical tax policy, would alleviate the harshest consequences of the proposed regime and would better recognise that many affected taxpayers have structured their affairs in accordance with long-standing legislative settings.

Concessional loss treatment for family trust elected group trusts

54. We believe that a simple transitional rule could be provided that uses the mechanics contained in the Exposure Draft.
55. At a high level, we recommend that that trust distributions to a 'transitional family trust' be excluded from minimum tax trust income in a similar manner to section 101AE(1)(a) (i.e. a similar exclusion is used for primary production income).
56. A transitional family trust could be identified as a trust: (1) established before a date (e.g. 1/7/2026); (2) that is part of the family trust elected group; (3) which has one of the following transitional attributes that are not capable of being restructured. The three types of transitional attributes would include:
 - 56.1. Land rich trusts holding direct or indirect real property acquired before [date of introduction].

⁴ <https://www.ato.gov.au/law/view/document?docid=CON/C3-0-100>

⁵ <https://www.ato.gov.au/law/view/document?DocID=CON%2FC3-4-255>

- 56.2. Business trusts with potential goodwill, where the business commenced before [date of introduction].
- 56.3. Trusts with tax losses or capital losses carried forward as at the [date of introduction].

Example demonstrating the exception

- 57. Assume Trust A is a minimum tax trust that derives \$120,000. Trust B is also a minimum tax trust that has a tax loss of \$20,000. Trust A distributes \$20,000 to Trust B and \$100,000 to Individual C. Trust B holds real property, has made an FTE and is in the same family group as Trust A. Trust B is a transitional family trust. Under section 101AE, the distribution to Trust B is treated as excluded income. Accordingly, the minimum tax income is reduced to \$100,000 and is allocated to Individual C.

Period for transitional rules

- 58. To the extent that transitional relief could be provided for certain trusts, we would be happy to discuss with you the period for which such relief should be afforded. If accompanied with an integrity rule, we believe it could be possible to provide the relief for as long as the trust has those tax attributes. Alternatively, a simpler approach may be to provide an exception for a period of time, e.g. 10 years. This would recognise the long-term nature of the assets held in these trusts.

H. FIXED TRUST DEFINITION

Gateway provision

- 59. The proposed gateway should be reconsidered. The policy objective of the regime is to address income splitting through discretionary trust structures. However, the gateway operates by excluding entities that do not satisfy a highly technical fixed trust definition. This risks bringing within the regime a large number of trusts that do not present the mischief the measure is intended to address.
- 60. Rather than requiring taxpayers to establish that a trust is a "fixed trust", the legislation should focus on identifying trusts that are genuinely discretionary in nature. The critical feature of a discretionary trust is not the absence of fixed entitlements, but the ability of the trustee to determine the quantum and destination of distributions between beneficiaries. Where distributions are determined by commercial rights, governance arrangements or economic ownership interests, the policy concerns associated with income splitting are substantially reduced.
- 61. The compliance burden created by the current approach is significant. As at 30 June 2024 there were approximately 145,000 unit trusts in Australia. Unless specifically

excluded, many of these trusts will need to undertake a detailed analysis of the fixed trust provisions to determine whether they are subject to the regime and potential trustee taxation at 30 per cent. This creates uncertainty, compliance costs and administrative complexity for arrangements that were never intended to be the target of the measure.

62. The difficulties are illustrated by existing fixed trust guidance, including PCG 2016/16 and the sixth safe harbour covering “other trusts”. Under those approaches, certain trusts are capable of being treated as fixed trusts notwithstanding that discretionary powers exist, provided those powers are not exercised in the relevant income year. The focus is therefore on the existence of practical discretion, rather than the mere presence of powers in a trust deed.
63. Any gateway provision should be capable of being applied with certainty to these types of arrangements. The current approach risks requiring extensive analysis of trust deeds, fiduciary powers and theoretical discretions even where beneficiaries' economic interests are, in substance, fixed. We are also concerned that this uncertainty will increase reliance on ATO private rulings and administrative guidance.
64. In our view, a more targeted approach would be to identify whether a trust is a discretionary trust through a series of cumulative tests directed at the ability to undertake income splitting. For example:
 - 64.1. Discretionary distribution requirement: the trustee has the power to allocate income or capital between beneficiaries in differing proportions.
 - 64.2. Distributions not linked to economic interests: the allocation of income or capital is not broadly consistent with the beneficiaries' underlying economic interests in the trust.
 - 64.3. Capacity for income splitting: the trustee or an associate has the ability to direct trust income or capital gains to related entities or persons in differing proportions.
 - 64.4. Safe harbour: the trust does not satisfy being a fixed trust.
65. Such an approach would more directly target the policy concern of income splitting while substantially reducing compliance costs and uncertainty for commercial trust structures.
66. Consideration should also be given to excluding categories of trusts that are unlikely to present income-splitting concerns. This may include managed investment trusts, attribution managed investment trusts, public unit trusts, employee share trusts and professional service practice structures.

67. More broadly, a gateway based on identifying discretionary trusts would better align the operation of the regime with its stated policy objective. Rather than requiring all trusts to prove that they are fixed trusts, the legislation would focus on those trusts that genuinely possess and exercise the discretionary powers that make income splitting possible. This would improve certainty, reduce compliance costs and allow both taxpayers and the ATO to focus on arrangements that present genuine integrity concerns.

Broader application

68. We welcome the definition of fixed trust being expanded to ensure that the minimum tax only applies to trusts that are genuinely discretionary in nature, given the difficulty for most trust to satisfy the current definition of fixed trust.
69. As part of modernising the definition, we urge Treasury to adopt their definition for other purposes, namely:
- 69.1. The trust loss provisions.
 - 69.2. The qualified person rules which rely on a taxpayer having a 'fixed interest';⁶
 - 69.3. The non-arm's length income rules for complying superannuation funds which has exclusions for income derived by a fund that holds a 'fixed entitlement' in a trust.⁷
 - 69.4. Deemed present entitlement rules.⁸
70. If the uncertainty is removed about whether interests or entitlements in a trust meet the definition of 'fixed' for all key purposes of the tax legislation this would remove a significant amount of red tape and costs from the system. The first two items are outlined below.

Trust loss provisions

71. While the current proposed amendment to the definition of fixed trust will sit within s 272-65 in Schedule 2F, we note that the change to the definition of 'fixed trust' may cause the trust loss provisions to not work properly. That is, while it may deem a non-fixed trust to be a fixed trust, the term 'fixed trust' is not used for the mechanical tests contained in Schedule 2F. Reference is given to the 50% stake test in s 269-50, which requires that unit holders have 'fixed entitlements' to income and capital. That term is currently not proposed to be amended.

⁶ Former subsections 160APHL(10)-(11) of the ITAA36.

⁷ Subsection 295-550(4) of the ITAA97.

⁸ Subsection 95A(2) of the ITAA36.

Qualified person test

72. The qualified person test contained in s 160APHL(11) requires “the taxpayer’s interest in the trust holding is a fixed interest to the extent that the interest is constituted by a vested and indefeasible interest in so much of the corpus of the trust as is comprised by the trust holding.” The change to the definition of fixed trust will not assist in applying this provision.

Potential solution

73. To correct this problem, we believe that a provision is needed to treat a beneficiary of a fixed trust, under the expanded definition in proposed s 272-65(1)(b) in Schedule 2F, as having a fixed entitlement in the income and capital of the trust. This would be a similar approach to that for AMITs under section 276-55 of the ITAA97. Without such a change, the trust loss provisions will not properly work as it may result in an entity being a fixed trust (under the new definition) that is required to apply the 50% stake test which can only be satisfied if fixed entitlements are maintained throughout the testing period. A fixed trust with no fixed entitlements could never satisfy the test.
74. Treasury should also consider whether the new definition of fixed trust could be made to work retrospectively for certain purposes. For example, a trust with a 2025-year loss would only apply the fixed trust loss rules if it was a fixed trust at all times in the test period (i.e. the period beginning 1 July 2024). If the expanded definition only starts to apply from 1 July 2028 then the trust may need to apply the non-fixed trust loss rules. This may create complexity if that fixed trust starts to have fixed entitlements held in it from 1 July 2028 due to a changed definition commencing then.
75. We believe that an additional limb may be required for former s 160APHL(11) purposes, as this not only requires a fixed entitlement, but also requires the entitlement to be in the corpus corresponding to the trust holding. Accordingly, a specific deeming rule for former s 160APHL(11) may be required.

I. ROLLOVER PROVISIONS

Continuity requirements should permit trust-owned transferee companies

76. Subdivision 126-C has the potential to provide an efficient pathway for taxpayers to restructure existing discretionary trust groups in response to the minimum tax regime. In particular, it may allow assets held across multiple trusts to be transferred into a single corporate group through a single restructuring framework, reducing reliance on more complex alternative restructuring pathways.
77. However, the practical operation of the rollover appears to be significantly limited by the continuity requirements in section 126-440. In particular, those requirements may

prevent a company from acting as a transferee where its shares are held by a discretionary trust. This is a significant limitation given that many private groups operate through structures in which trading or holding companies are owned by family trusts.

78. For example, a group may already conduct the majority of its business through an operating company owned by a family trust. Under the current drafting, that company may be unable to receive assets from other trusts under Subdivision 126-C. As a consequence, taxpayers may instead be required to undertake more complex Division 122-A and Division 124-M restructures, mixed with tax consolidation, to achieve an outcome that could otherwise be achieved directly under the new rollover provisions.
79. We see no policy reason for preventing a trust from holding shares in a transferee company. Any integrity concerns that would ordinarily arise from trust ownership are already addressed by the broader minimum tax regime. The trust shareholder remains subject to the proposed 30 per cent minimum tax, cannot stream dividend income and franking credits and thus cannot pass refundable franking credits through the trust structure. Accordingly, permitting a trust to hold shares in a transferee company does not appear to create any material integrity risk.
80. Importantly, allowing trustee-owned companies to act as transferees would not undermine the policy objective of the rollover. The purpose of Subdivision 126-C is to facilitate the movement of assets out of discretionary trust structures and into operating corporate vehicles. That objective is achieved regardless of whether the shares in the transferee company are held directly by individuals or by a family trust. Restricting eligibility to companies owned by individuals materially limits the effectiveness of the rollover while providing no apparent corresponding integrity benefit.
81. We therefore recommend that section 126-440 be amended to permit companies owned by family trusts to satisfy the continuity requirements. This would significantly expand the practical operation of the rollover provisions, facilitate restructures into efficient corporate group structures and reduce the need for more complex restructuring pathways and private binding rulings from the ATO.

Breach of fiduciary duties

82. A secondary but related concern is that the continuity requirements may increase the risk of disputes between beneficiaries. In many cases, the rollover may result in trust assets being transferred to a company whose shares are held directly by only some of the trust's beneficiaries. Over time, this may give rise to allegations that the restructure has prejudiced the interests of other beneficiaries or has altered the practical enjoyment of trust assets for the benefit of a narrower group of persons. Even a transfer for full consideration may risk a breach of fiduciary duties as any further growth

in the assets of the trust may be forgone as the assets are replaced by a receivable which may generate no income.

83. Furthermore, we note that all other rollovers preserve the same entity or entities as the economic owner of the assets being rolled over. Accordingly, outside of Subdivision 328-G, this issue does not occur for other rollovers.
84. By contrast, where the shares in the transferee company are held by a trust with substantially the same class of beneficiaries, the economic benefit of the transferred assets continues to be held within a structure for the benefit of the same family group. This is more closely aligned with the underlying trust relationship and may reduce the risk of disputes regarding whether beneficiaries have been unfairly excluded from future participation in assets formerly held by the trust.
85. Permitting trustee-owned transferee companies would therefore not only improve the practical operation of the rollover, but may also reduce the likelihood of restructuring outcomes that create tension between beneficiaries or expose trustees to future challenge. In many cases, maintaining trust ownership of the shares in the transferee company is likely to produce outcomes that are more consistent with existing beneficiary expectations and the trustee's obligations to administer the trust for the benefit of all beneficiaries.