

MTT Regime for Trusts - Start Planning Now...

19 October 2026

The proposal for a new tax regime for discretionary trusts is one step closer to reality with the recent introduction of the draft legislation to Parliament.¹

Under the proposed new measures to take effect from 1 July 2028, the taxation treatment of discretionary trusts (and non-fixed unit trusts) will be fundamentally altered. The measures will have a major impact on private groups whether they conduct businesses or hold investments within discretionary trusts. It will also impact groups who conduct business or investments through companies and other structures where the equity interests are held by discretionary trusts.

In the authors' view, these measures are set to become the most significant "shake-up" of the tax treatment of the modern discretionary trust in Australian tax law history.

Legislative Framework

Before turning to the key planning issues associated with the proposed new measures, it is necessary to provide an overview of the framework established under the draft legislation.

The proposed new measures may be summarised as follows:

- most discretionary trusts (and many non-fixed unit trusts) with some limited exceptions² will be treated as minimum tax trusts ("**MTTs**");
- fixed trusts, one of the major exceptions to MTTs, will have an expanded definition to include trusts where there are no material discretionary elements capable of significantly affecting the entitlements and rights of trust beneficiaries to income and capital of the trust (see further below);
- the trustee of an MTT will be subject to a 30% tax rate on its net income³ that amounts to minimum tax income ("**MTI**");
- MTI will include most sources of a trust's net income including trading and investment income, franked dividends and taxable capital gains, however, primary production income and income generated from certain testamentary trusts are excluded from MTI;
- the tax paid by the trustee will give rise to a non-refundable tax offset for the MTT beneficiaries equal to 30% of a beneficiary's share of MTI (see further below);
- the tax offsets are only available to non-corporate beneficiaries, that is individuals or recipient trustees of trusts – any corporate beneficiary receiving a share of MTI will be taxed on that MTI at their applicable corporate rate with no offsets;

¹ Schedules 1 to 3 of *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* (Cth) and *Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026* (Cth).

² Proposed section 101AB of the *Income Tax Assessment Act 1936* (Cth) ("**ITAA36**") in effect brings in all trusts and then applies specific exceptions such as fixed trusts, deceased estates and complying superannuation entities (amongst others). The Treasurer has a discretion to exclude certain trusts from being MTTs in accordance with proposed section 101AB(2) of ITAA36.

³ For the purposes of section 95(1).

- the tax offsets generated from franked dividends derived by MTTs will be able to be applied against the trustee's 30% tax liability for MTI;
- the derivation of franked dividends by MTTs and their application against the 30% tax imposed on the trustee will have the effect of converting refundable franking credits into non-refundable tax offsets that are only available to non-corporate beneficiaries;
- transitional income tax roll-over relief is proposed to facilitate the transfer of assets from MTTs to new structures from 1 July 2027 to 30 June 2030 so as to allow taxpayers to choose to restructure out of MTTs if they wish to do so; and
- as an alternative to restructuring, the measures also contain a transitional concession for MTTs in existence at 1 July 2028 to opt out of the proposed tax treatment by making an election. The election requires the trustee to specify the manner in which their income (and non-income earnings) will be allocated between beneficiaries on a fixed percentage basis from 1 July 2028 onwards.

This regime substantially alters the current "flow through" tax treatment of discretionary trusts which in typical circumstances assesses the beneficiaries on the net income of the trust based on each beneficiary's proportionate entitlement to a share of the income of the trust estate ("**trust income**"). The existing tax treatment also allows the character of the trust income to be maintained.

The end of the "flow through" treatment for discretionary trusts will have a significant impact on distributing retained earnings held in company structures via trust shareholders within private groups, as well as the use of tax losses.

MTT Regime – Observations

In the authors' view, the MTT regime clearly involves adverse tax treatment and greater compliance burdens for discretionary trusts when compared to the existing "flow through" model. By design, the measures are intended to discourage the use of discretionary trusts.⁴ Although purportedly aimed at preventing income splitting (and other perceived tax minimising arrangements), the measures will upset the use of these structures for effective asset protection and succession planning given the new tax treatment.

All the same, it is important for every private group to make a clear assessment of how the tax treatment will impact discretionary trusts within their group. For some groups, it may still be acceptable to leave assets in an MTT rather than restructuring or using the election regime discussed below. In some cases an MTT may still be preferable to holding assets in a company or other alternatives.

⁴ See paragraphs 1.2 to 1.8 inclusive of the Explanatory Memorandum to *Treasury Laws Amendment (Tax Reform No. 3) Bill 2026* ("**EM**").

The fact that the tax offset is not refundable will mean that sufficient distributions of trust income will need to be made by the MTT to generate enough of a tax liability at the beneficiary level to fully use the tax offsets. Under the draft legislation, a beneficiary is entitled to the 30% offset on their share of the MTI, which in turn will depend on the beneficiary's share of net income that is reasonably attributable to MTI.⁵ As stated, the offset is not available to a corporate beneficiary, meaning any distribution of MTI to a company will be highly tax-ineffective.⁶

On the basis that distributions to corporate beneficiaries will be tax-ineffective, the alternative would necessarily involve distributing 100% of the trust income that represents MTI to individual beneficiaries. With this in mind, we have set out below a basic worked example of how a discretionary trust generating net income of \$1,000,000 (that is wholly MTI) and distributing its trust income equally to two adult resident individuals might work.

Trustee

Net income of trust (MTI)	\$1,000,000	
Tax payable by trustee (at 30%)		\$300,000

Beneficiary A

Share of net income	\$500,000	
Tax (at marginal rates) ⁷	\$200,870	
less Non-refundable offset	(\$150,000)	
Tax payable by Beneficiary A		\$50,870

Beneficiary B

Share of net income	\$500,000	
Tax (at marginal rates) ⁸	\$200,870	
less Non-refundable offset	(\$150,000)	
Tax payable by Beneficiary B		\$50,870

Total tax payable		\$401,740
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It can be seen that from the above example that:

- The overall tax (including Medicare Levy) payable on the \$1,000,000 of net income in the above circumstances would be \$401,740. That is an effective tax rate of around 40.17%.

⁵ Or more specifically adjusted net income: see proposed sections 101AG(1)(c) and (2) of the ITAA36.

⁶ By way of example on \$100 of MTI, the trustee pays \$30 in tax. The corporate beneficiary is then assessed on \$100 with no offset and pays a further \$30 in tax. The corporate beneficiary pays a \$40 fully franked dividend with the remaining cash which has a maximum allowable franking credit (at the 30% corporate tax rate) of approximately \$17. The individual is therefore assessed on the grossed-up amount of \$57 with a tax liability at 47% of \$26.79, less a franking credit of \$17. The "top-up" tax for the individual is therefore \$9.79. Hence, the total tax on \$100 of income is \$30 (trustee) plus \$30 (company) plus \$9.79 (individual) equalling \$69.79.

⁷ Individual marginal tax rates for adults for 2026/27 income year. Includes 2% Medicare Levy.

⁸ Individual marginal tax rates for adults for 2026/27 income year. Includes 2% Medicare Levy.

- The above figure is materially higher than what would have been the case if the whole \$1,000,000 had been distributed corporate beneficiary on a 30% tax rate i.e. \$300,000 or 25% if the corporate beneficiary was a base-rate entity i.e. \$250,000.
- It is materially higher again than a situation under the current law in which the trust income is distributed to the two individual beneficiaries in way that optimises their marginal tax rates, with the excess amount (i.e. the amount otherwise subject to a marginal tax rate greater than the applicable corporate tax rate of 30% or 25%) being distributed to the corporate beneficiary.

It must not be overlooked, however, that any comparison with a corporate beneficiary being assessed under the existing tax regime would ultimately involve more tax being payable when funds are extracted from the company. By comparison, no deferral of tax is involved in the above MTT scenario.

A number of other observations should be made about the potential outcomes from the MTT tax treatment, namely:

- If the net income of the trust was lower than \$1,000,000 and closer to what might be taxed at an effective tax rate of 30%, the MTT taxation treatment is likely to become more palatable. Therefore, family groups on or close to an effective overall 30% tax rate under the current tax treatment are unlikely to be any worse off (leaving aside increased compliance costs).
- By contrast, MTTs with MTI that would generate less tax than an effective 30% rate will have the overall family group's tax increased to at least a 30% effective rate.
- High income groups where most family members are already on the top marginal rate or close to the top marginal rate are likely to be worse off where the use of the corporate beneficiary would have at least capped the surplus net income at 30%.
- Corporate beneficiaries will therefore cease to be used in relation to MTI but may still be used where income is exempt, for instance in the case of primary production income or where the election regime (discussed below) is adopted.

Naturally, there are a lot of other permutations to consider for various family groups. However, the salient point is that before considering restructuring or EET elections, a thorough assessment should be made of the likely tax treatment for MTTs in each private group.

In many ways any additional tax compared to the current tax treatment needs to be weighed against the succession and asset protection benefits of continuing to hold the assets in a discretionary trust subject to the MTT regime. Unfortunately, these commercial benefits of using discretionary trusts may now therefore come at a greater tax and compliance cost.

MTI – Exemptions

As already noted, MTTs are subject to the abovementioned tax treatment on their MTI.

MTI is broadly defined as the MTT's net income with certain exclusions. One of the major exclusions is for primary production income derived by an MTT.

The concept of “primary production income” falls back on the existing definition of primary production income under the income tax legislation. In broad terms, a taxpayer will only have primary production income where the taxpayer’s assessable income includes income derived from or resulting from the carrying on of a “primary production business” by the taxpayer, a partnership of which the taxpayer is a partner, or a trust of which the taxpayer is a beneficiary.⁹

The MTT regime will still nevertheless apply to many farming groups. This is because, for numerous commercial reasons, many primary production groups will necessarily have to charge intra-group rent or interest to trusts and such receipts will not amount to primary production income. Also, where a primary production business is conducted by a company, the income generated will not amount to primary production income. This may be important where the operating company pays dividends to MTTs.

Many land owning trusts within primary production groups now derive income such as rent or royalties from wind, solar or other energy projects on primary production land. Such income, typically used as a supplementary source of income, will mean that primary production land owning trusts are subject to the MTT regime on those receipts.

Where it is necessary for land owning trusts to derive some income from within the group, it may be worthwhile considering share farming arrangements between the land owning entity and the operating entity in an effort to treat the income derived by the land owning trust as exempt from MTI as primary production income. It will be important to take account of the ATO’s views on share farming under Taxation Determination TD 95/62 in structuring these arrangements.¹⁰

Another major exception to MTI is for income derived from testamentary trusts. Certain grandfathered exceptions apply for testamentary trusts established before 7:30pm (AEST) on 12 May 2026 and those created on or after that time but before 1 July 2028.¹¹

Going forward, any testamentary trusts established from 1 July 2028 will only generate income exempt from MTI if the beneficiaries of the testamentary trust are limited to individuals, tax exempt entities or special disability trusts.¹² Therefore, it will be necessary for any individuals with testamentary trusts under their Wills to have the terms reviewed. In most cases, given the provision of eligible companies and trusts within the range of potential beneficiaries of most modern testamentary trusts, it will be necessary for Wills to be updated to fall within the MTI exception for income generated from testamentary trusts.

Of course, it may simply be too late for clients who are still living but are legally incapacitated to amend the terms of the testamentary trust under their Will. Such testamentary trusts will necessarily derive MTI that is subject to the MTT regime. This is, in the authors’ view, a significant flaw in the proposed legislation.

⁹ More precisely “assessable primary production income” is defined under section 392-80 of the *Income Tax Assessment Act 1997* (Cth) (“**ITAA97**”).

¹⁰ Also see a helpful summary of the law in *Takhar v Commissioner of State Taxation* [2020] SASC 119.

¹¹ Proposed section 101AD of the ITAA36.

¹² Proposed section 101AD(1)(c). Note there are other restrictions on injecting income (or assets) into such testamentary trusts that will deem the income to be MTI.

Three-Year Roll-Over

Where the taxation treatment of MTTs provides for undesirable outcomes and/or unacceptable compliance costs, many private groups may choose to transfer their assets from an MTT to another structure, typically, to a company.¹³

The draft legislation provides transitional roll-over relief¹⁴ ("**Three-Year Roll-Over**") to facilitate this outcome. This relief will apply from 1 July 2027 – a whole income year before the commencement of the MTT regime.

To qualify for the Three-Year Roll-Over, the following requirements must be satisfied:

- a transaction as part of a restructure must occur involving the transfer of all of the relevant assets - with some relatively minor exceptions¹⁵ - from the MTT to a new entity;
- the relief will only apply for the transfer of an asset under the transaction that occurs from 1 July 2027 to 30 June 2030;
- a choice must be made by the transferor and transferee to apply the roll-over in the approved ATO form which must be given to the ATO by the date the transferor and transferee lodge their income tax returns or the due date for lodgement (whichever is earlier) for the income year in which the first transfer occurs;¹⁶
- notification must be given by the MTT in writing to the ATO - also in an approved ATO form - for any income year after the income year in which the first transfer occurred which must be provided to the ATO by the date the MTT lodges its income tax return;¹⁷
- the transferor and transferee must meet a continuity test.¹⁸ This broadly requires that the MTT has a family trust election¹⁹ in force during the income year in which the assets are transferred and that every individual who is the transferee or who has a direct or indirect interest in the transferee are both beneficiaries of the transferor trust and persons within the family group relating to the transferor trust;²⁰
- the transferor and the transferee must be Australian residents;
- the transferee cannot be an exempt entity, a complying superannuation fund or an MTT; and
- there must be no material discretionary elements affecting the rights or interests of the transferee.

¹³ Treasury's promotion of the idea of transferring assets from MTT to fixed trusts appears to us to be commercially naive since such fixed trusts such as unit trusts would typically be owned by discretionary trusts, which, if they amount to MTTs, is not allowable under the proposed roll-over. There may be some reasons for fixed unit trusts to be owned by companies but in the authors' experience this is a relatively uncommon.

¹⁴ Proposed subdivision 126-Z of the *Income Tax (Transitional Provisions) Act 1997* (Cth) ("**ITTPA**").

¹⁵ For instance, any assets reasonably required to discharge liabilities properly incurred by the transferor as trustee of the MTT, winding up costs of the MTT, assets with a cost under \$1,000: see further proposed section 126-905(4) of the ITTPA.

¹⁶ Proposed section 126-910.

¹⁷ Proposed section 126-915.

¹⁸ Proposed section 126-925.

¹⁹ For the purposes of Schedule 2F to the ITAA36.

²⁰ As defined by Schedule 2F.

The continuity test contains a provision allowing the Treasurer to, by legislative instrument, determine further ways to satisfy the test.²¹ However, in the absence of a determination being in force (no draft of which has been released to date), the family trust election requirement must be relied upon and is the only means to satisfy the continuity test.²²

The roll-over contains a significant concession for primary producers where the “all of the relevant assets” requirement does not extend to assets used to generate assessable income from carrying on a primary production business.²³ This may be helpful for farming groups wishing to segregate out assets generating non-primary production income from an operating trust. An example might be a wine production and sales business (non-primary production business) conducted by an MTT which also generates income from commercial viticulture (primary production business).

The requirement for the transferee to have no material discretionary elements affecting the rights or interests of its members is significant. This concept of “material discretionary elements” is used throughout the draft legislation including to define whether a trust is a fixed trust.²⁴

Broadly, in the context of the roll-over it requires that the members of the transferee have clearly defined specific and enforceable rights and interests to all of the income and capital of the entity and no powers to significantly vary such rights and interests.²⁵ This must not only be the case during the restructure but also for four income years after the income year in which the last transfer pursuant to the restructure occurs.²⁶

In practical terms, the above requirement will generally require any transferee company to have ordinary shares rather than special classes of shares. Importantly, the requirement for the transferee to have no material discretionary elements extends to interposed entities and thereby has the effect of eliminating the ability to have discretionary trusts (including MTTs) as shareholders in the transferee company. Curiously, this contrasts with the requirement for a company nominated under the EET regime. In that context, the company may be owned by a discretionary trust even though the company itself may not have rights or interests with material discretionary elements – see further below.

Where the requirements of the Three-Year Roll-Over are satisfied, the direct consequences of the transfer of the assets under income tax law can be disregarded.²⁷ This extends beyond capital gains tax to income tax consequences such as balancing adjustment assessments on the transfer of depreciating assets or trading stock income on the disposal of trading stock outside of the ordinary course of business. This aspect of the Three-Year Roll-Over makes it superior to the various CGT rollovers that will normally only provide roll-over relief from capital gains on the disposal of capital appreciating assets.

Whilst it is laudable for some form of roll-over relief to be provided, the real difficulty with the concession is that it will, in effect, require the transferee company to be wholly owned by individuals. This will have an adverse impact on the asset protection and succession planning of many family businesses and investments. The assets of the company will generally be at far greater risk with individual owners. Moreover, succession planning will lose the flexibility offered by changing the control of discretionary trusts (that own companies) over time in accordance with the family succession plan.

²¹ See proposed sections 126-925(4) of the ITTPA.

²² Proposed section 126-925(5).

²³ Proposed section 126-905(4)(b).

²⁴ Under proposed section 272-65(1) of Schedule 2F of the ITAA36 it applies to the beneficiaries’ rights and interests in the trust.

²⁵ Proposed section 126-935 of the ITTPA.

²⁶ See proposed section 126-905(5).

²⁷ Proposed section 126-945.

In many circumstances it will be preferable to consider using other roll-overs to transfer assets from MTTs including:

- small business CGT concessions under division 152;
- small business restructure relief under subdivision 328-G; and
- the roll-over by a trustee to a wholly owned company under subdivision 122-A.

The last-mentioned roll-over might be particularly significant given that, unlike the first two, it has no financial thresholds and no requirement for the assets being transferred to be active assets. Moreover, unlike the Three-Year Roll-Over, the trust becomes the sole shareholder in the company which is likely to be preferable from an asset protection and succession planning perspective.

Outside of the criteria and consequences of a roll-over, there are a range of other issues that will need to be considered. One significant issue is that it appears that the benefit of any grandfathered CGT discount on the notional disposal of assets at 1 July 2027 under the new CGT legislation²⁸ will be lost if assets are transferred to a company. This may be a highly significant concession to give up if the amount sheltered by the grandfathered 50% discount is material.

Another issue to consider is that, under the current law, duty will apply to some asset transfers. All states and territories apply duty on the transfer of real estate,²⁹ and Western Australia and Queensland impose duty on the transfer of a wide range of business assets. Whilst there have been some favourable recent developments with the NSW government announcing that, if re-elected, it would not impose duty on EET elections (see below) this announcement did not extend to asset transfers – the latter being a far more significant issue as it is debateable whether duty applies to EET elections in any event.³⁰

Forward planning issues should also be considered if assets are to be transferred to a company. For instance, any capital gains on those assets will no longer qualify for indexation of the cost base which may, for instance, in the case of real estate be a significant concession over time. Depreciating assets carrying capital allowance deductions or buildings and structures carrying capital works deductions in companies will ultimately create tax sheltered income that, when paid to shareholders, will be an unfranked dividend. Such tax-free income accruing in a discretionary trust (as opposed to a company or unit trust) is still able to be distributed from discretionary trusts to the beneficiaries tax-free³¹ and is not affected by the MTT regime, given it only applies to net income.³²

Excluded Election Trust Regime

In order to deflect criticisms that the above roll-over would result in state transfer duty on the transfer of many asset categories, the Government has also included an Excluded Election Trust (“**EET**”) regime in the draft legislation.

This regime allows an MTT to opt out of the MTT taxation regime by making an election nominating each beneficiary to whom the trustee will confer fixed present entitlements to a share of income and non-income earnings for the year ending 30 June 2029 and all future income years.

²⁸ Section 112-165 of the ITAA97.

²⁹ Subject to exceptions for “qualifying land” (broadly, non-residential and non-primary production land) in South Australia (although land transfer registration fees still apply at *ad valorem* rates) and property that has entered into the Commercial and Industrial Property Tax regime in Victoria.

³⁰ Ministerial media release, NSW Treasurer, Minister for Finance, Minister for Small Business, “Delivering certainty for New South Wales businesses” (15 October 2026).

³¹ Tax Determination TD 97/15.

³² For section 95(1) purposes.

To be eligible, the trust must be in existence at 1 July 2028. The nomination involves the trustee stipulating the percentages of income and non-income earnings each beneficiary must be entitled to and all of those percentages must add up to 100%. It is not clear at this stage whether this limits the year-end distribution minutes of a trust to percentages or whether it will be sufficient to use absolute numbers in a trust resolution provided that they result in the same percentages as are stipulated in the EET nomination.

The initial exposure draft legislation released by Treasury stipulated that the EET declaration needed to prescribe a fixed percentage of income *and capital* to be distributed to each beneficiary. However, the requirement to stipulate capital distributions has been replaced with “non-income earnings”.

“Non-income earnings” are defined as any amount that is included in the assessable income of a trust estate excluding any income of the trust estate.³³ Therefore, amounts such as taxable capital gains and the gross up on franking credits might be expected to readily fall within the concept of non-income earnings, even if trust law principles (by reference to the trust deed) would treat these amounts as capital receipts (in the case of capital gains) or no receipt at all (in the case of the gross up and franking credits).

Corporate beneficiaries can be included in an EET nomination provide the company has no “material discretionary elements” affecting the rights and entitlements of shareholders. The same concept of material discretionary elements as applying to any transferee under the Three-Year Roll-Over applies here. However, one significant difference is that the company can be owned by a discretionary trust (including an MTT) as there is no requirement that the absence of material discretionary elements applies to interposed entities.³⁴ Therefore, a corporate beneficiary with ordinary shares owned by a discretionary trust will not, as a matter of course, be excluded from an EET nomination.

Variations to the EET can only be made in very limited circumstances. That is, upon death of one of the nominated beneficiaries or on relationship breakdown.³⁵ In the former case, a successor individual nominated must not only be within the class of eligible beneficiaries of the trust but a beneficiary under the deceased’s Will.³⁶

Trust distributions resulting in income and non-income earnings being conferred on beneficiaries other than strictly in accordance with the percentages stipulated in the EET nomination will amount to an automatic revocation of the EET election.

An automatic revocation also occurs where:

- the nominated trust is wound up or vested;
- a company specified in an EET election is wound up, deregistered, ceases to be an eligible beneficiary of the trust, no longer has membership interests with an absence of material discretionary elements or where an entity ceases being a shareholder in the company (except in the event of the shareholder’s death or relationship breakdown).³⁷

Revocations can also occur on a voluntary basis by the trustee notifying the ATO that the EET election is to cease to apply from a particular income year in the approved form.³⁸

³³ Proposed section 102UYA of the ITAA36.

³⁴ See paragraph 3.45 of the EM.

³⁵ Proposed section 102UYF of the ITAA36.

³⁶ Proposed section 102UYF(2)(b).

³⁷ Proposed sections 102UYG(2)(e) and 102UYG(2)(f).

³⁸ Proposed section 102UYG(1).

With one exception (see below), where a revocation of an EET election occurs either voluntarily or automatically, the trustee is liable to pay tax at the top marginal rate on the trust's net income for the income year in which the revocation occurs.³⁹ All of the net income for that income year is subject to a 99A assessment and not just income and non-income earnings that might not, for instance, have been distributed in accordance with an EET election. The trust then reverts to being an MTT in future income years.

The only exception to the above is where the trust is wound up or vested in accordance with the trust deed.⁴⁰ However in these circumstances, on the basis that the trust had valuable assets there will often be a significant CGT cost in vesting the trust in any event.

The above tax outcome can be avoided by seeking an exercise of the Commissioner's discretion to determine that it is unreasonable for the given events to cause a revocation of the EET.⁴¹

While the EET regime clearly has its dangers and pitfalls, it may be advantageous for some high income trusts to simply nominate 100% of their distributions to a corporate beneficiary and continue to have the benefits of a 30% tax rate on the income of the trust (including capital gains without any benefit of discounting or indexation) while preserving the asset protection benefits that may otherwise be lost through restructuring. Trusts with significant high-yielding real estate that would otherwise be subject to duty on a restructure may, for instance, be better nominating a company under an EET election.

Of course, the obvious pitfall is that once the EET election is revoked, either voluntarily or otherwise, the income for that year will be taxed at the top marginal rate. It is a curious and illogical aspect of the draft legislation that imposes this penal tax on voluntary revocations. Query, however, if forward planning is undertaken to prevent this outcome in any event. For instance, assets might ultimately be transferred to a company in the income year before the income year the election will be revoked. Factors such as duty costs, if real estate is involved, would need to be weighed up in this process.

Planning Issues. . .

It can be seen from the above analysis that there are a range of planning issues for private groups to immediately consider. In the authors' view, these issues are better addressed sooner rather than later. Although the legislation has a 1 July 2028 commencement date, specific advice and significant commercial decisions will need to be made by each private group according to their particular circumstances and this will take time.

By way of summary of the main planning issues, we note the following:

1. Evaluation of all private groups that use discretionary trusts (or non-fixed unit trusts) will need to be undertaken to ascertain whether the impact of the proposed MTT tax treatment is acceptable or whether it is necessary to restructure or make an EET election.
2. Such an assessment will not only be required of active businesses but investments owned by MTTs. Also, companies (and other non-MTTs) whose equity or membership interests are held by MTTs will need to be evaluated.
3. Except for primary producers and companies that are nominated under the EET regime, corporate beneficiaries will become a thing of the past.

³⁹ The draft legislation does this in a similar manner to section 100A of the ITAA36 by deeming no beneficiary to be presently entitled to the trust income: proposed section 102UYI(2).

⁴⁰ Proposed sections 102UYI(1) and 102UYI(3).

⁴¹ Proposed section 102UYH of the ITAA36.

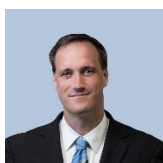
4. Following on from the above point, for active businesses it will be worthwhile considering using CGT roll-overs (subdivision 122-A, subdivision 124-M and division 615 in particular) to interpose holding companies between the MTT shareholders and the operating company to quarantine cash reserves from trading risk within the structure without needing to pay a dividend via the MTT shareholder.
5. For primary producers and corporate beneficiaries under an EET election, whether the government legislates to reverse the outcome of High Court decision in *Bendel*⁴² by deeming UPEs to be division 7A loans will need to continue to be monitored. The legislation currently before Parliament does not address this issue.
6. Care will need to be taken when base rate entities, normally companies that pay tax and frank dividends at 25%, pay dividends to MTTs. The trustee will be assessed at 30% on the income, giving rise to a 5% "top up" tax but also generating a 30% non-refundable tax offset.
7. Primary producers may consider quarantining their non-primary production income into corporate structures so that the MTT has no MTI and does not need to bear the compliance burden of segregating the MTI from the primary production income. The Three-Year Roll-Over provides a concession to primary producers in this regard.
8. Primary producers, to the extent it is commercially feasible, may cease paying rent from operating entities to land owning trusts to prevent the derivation of MTI.
9. All private groups considering transferring cash within the group by paying franked dividends from private companies to trusts and then on-distributing to other companies should consider undertaking such action prior to 1 July 2028. After this time, the "flow-through" treatment of most discretionary trusts will be lost.
10. All private groups should consider whether there are any entities with tax losses in the group that should be subject to income injections from "tax positive" discretionary trusts prior to 1 July 2028. With the end of "flow through" treatment, the only way such tax losses will be able to be recouped will be if the loss entity recommences income producing activities. This may be undesirable for a range of tax and commercial reasons.
11. Any restructuring either under the Three-Year Roll-Over or other roll-overs into companies should consider the impact of the loss of the grandfathered CGT discount on the assets being transferred and the loss of indexation of the cost base of those assets going forward.
12. Any restructuring, at least for the time being, needs to consider the impact of duty on the transfer of assets.
13. Any restructuring that involves transferring assets to companies should consider the need to eliminate division 7A loans – possibly by transferring the assets in satisfaction of such loans. Some roll-overs can accommodate this outcome – others cannot.
14. The rights attaching to shares in companies under the company constitution and related documentation such as company minutes issued pursuant to the constitution are going to require careful attention to determine whether there are material discretionary elements.
15. Classes of shares in existing corporate beneficiaries that might be the subject of future EET elections might need to be converted back to ordinary shares as a precursor to the company being nominated under the EET election.

⁴² *Commissioner of Taxation v Bendel* [2026] HCA 18.

16. Similarly for unit trusts, the trust deeds and related documentation such as trustee minutes will also need to be carefully scrutinised to ensure there are no material discretionary elements for the trust to qualify as a fixed trust if that is a desired outcome.
17. For trusts either operating under the MTT tax treatment or excluded by making an EET election, the content of the trust deeds and the preparation of year-end trust distribution minutes will be an exercise requiring a heightened degree of diligence. The ongoing differences between trust income and net income are still ever-present and will need to be considered in light of these measures.
18. Under the EET regime, the need for the trust to be in existence as at 1 July 2028 means that some groups may consider establishing numerous "shelf trusts" at that date for future acquisitions given the election is a once-off concession.

It should be emphasised that the legislation has not yet become law. Therefore, all private groups and their advisers should keep a watching brief on developments as further announcements and changes unfold before the proposed measures are enacted.

Cowell Clarke's Tax & Revenue Group is well placed to assist accounting advisers and their clients in optimising outcomes and effectively managing issues relating to these measures. Please feel free to contact any member of our team should you need advice or assistance.



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