25 September 2026

The Treasury
Langton Crescent
PARKES ACT 2600

By email: mintaxtrusts@treasury.gov.au

Dear Sir/Madam

Minimum Tax on Discretionary Trusts – Exposure Draft Legislation

We write to provide our submissions in relation to the abovementioned Exposure Draft legislation released on 3 September 2026 ("**Exposure Draft**").[1]

We note the deadline for responding to the Exposure Draft has closed, however, given the extraordinarily short deadline to receive submissions, we respectfully request that these submissions are still considered.

All statutory references below are to the proposed amendments to, or existing provisions of, the *Income Tax Assessment Act 1997* (Cth) ("**ITAA97**"), *Income Tax (Transitional Provisions) Act 1997* (Cth) ("**ITTPA97**") or the *Income Tax Assessment Act 1936* (Cth) ("**ITAA36**").

1. Taxation Treatment on Minimum Taxation Trusts

By way of background, the minimum tax trust ("**MTT**") regime proposes to impose a 30% tax on the net income of a trustee of a discretionary trust.

The proposed measures allow the beneficiaries assessed on that income to apply a non-refundable tax offset of 30% against the tax payable by the beneficiary. The tax offset is only available to non-corporate beneficiaries.

1.1 No Policy Rationale

We stand by the submissions made in our letter to Treasury on 14 August 2026. That is to say, in our view, there is no sound policy basis for introducing these measures.

The explanatory materials to the Exposure Draft suggest that the only purpose of using discretionary trusts is income splitting amongst family members to gain the benefit of lower marginal tax rates.[2]

1 Exposure Draft – *Treasury Laws Amendment Bill 2026* (Cth): Minimum tax on discretionary trusts.
2 Paragraph 1.3 of the Explanatory Memorandum to the *Treasury Laws Amendment Bill 2026* (Cth): Minimum tax on discretionary trusts.

In our view, Treasury has significantly overstated the use of discretionary trusts for income splitting and has ignored the fact that discretionary trusts are widely used to protect family assets and to achieve effective succession planning.

Rather than address the perceived mischief of income splitting, the MTT measures create a significant tax disincentive for using discretionary trusts generally. The measures therefore undermine effective asset protection and succession practices widely adopted by the private business and investor community. This cannot be good for Australian business and our economy as a whole.

In our view, there is no proper basis for a departure from the existing treatment of discretionary trusts that broadly assesses beneficiaries on the trust's net income[3] based on their present entitlement to a proportionate share of the trust's income.[4] However, if a proper model of tax reform is to be considered, we would suggest an entity tax model that simply taxes trusts that accumulate income at the corporate rate.[5]

1.2 **Ineligibility of Corporate Beneficiaries for Tax Offset**

The proposed MTT regime proceeds on the basis that the 30% tax paid by the trustee of the MTT on the trust's minimum tax income ("**MTI**") generates a non-refundable tax offset which beneficiaries can use to reduce the tax payable on their share of the trust's net income.[6] However, the non-refundable tax offset is proposed to only be available to non-corporate beneficiaries.[7]

In our view, there is no legitimate basis for denying the tax offset to companies. Such companies will typically have a 30% tax rate (or sometimes 25% rate) and should receive a credit for the tax paid by the trustee.

The current drafting of the MTT regime would have the result that any MTI assessed to a corporate beneficiary would be subject to double taxation – first, at the trustee level at 30% and then at the company level at the company's tax rate (i.e. 30% or 25% for base rate entities). Further tax would be payable when the company pays a franked dividend to its shareholder resulting in tax of almost $70 generated on every $100 of income.[8]

Moreover, where an MTT derives a franked dividend, the effect of the Exposure Draft is to convert a refundable franking credit into a non-refundable tax offset. A further level of taxation would apply when the corporate beneficiary declares and pays a dividend in favour of its shareholder.

---

3 For the purpose of section 95(1) of the ITAA36.

4 Or assess the trustee under section 99A at the top marginal rate on the net income where no beneficiary is presently entitled to the trust income.

5 This was proposed under Part 5 of the *Review of Business Taxation* (Report, 12 September 1999), chaired by Mr John Ralph ("**Ralph Review**").

6 Proposed section 101AF(2) of the ITAA36.

7 Proposed section 101AF(1)(d).

8 For instance, on $100 of MTI, the trustee pays $30. The corporate beneficiary is then assessed on $100 with no credit and pays a further $30. 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 approx. $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.

This appears to be a deliberate feature of the Exposure Draft – that is, to deter private groups from using corporate beneficiaries. As with the MTT regime itself, the approach is unjustifiably punitive and fails to recognise the legitimate use of corporate beneficiaries. Such companies are typically used as family investment vehicles and also to quarantine family wealth from the risks associated with trading trusts and companies.[9]

Under the existing tax legislation, corporate beneficiaries either pay tax (on ordinary income distributed to them) or are imputed with the tax already paid by another company (on franked dividend income). To imply that corporate beneficiaries are some sort of tax rort that need to be penalised to deter their use is, in our view, entirely misconceived.

1.3 Tax Offset Non-Refundable

In our view, the non-refundable nature of the tax offset has the effect of penalising trustees of MTTs who choose to distribute trust income to low income beneficiaries.

Under the current proposal, the tax offset will be effectively "lost" unless the trustee can ensure the MTI is assessed to beneficiaries with an effective tax rate of 30%. We consider that this will encourage trustees to distribute in a manner otherwise than in accordance with the legitimate needs of the trust beneficiaries.[10]

Making the tax offsets non-refundable will also mean that beneficiaries of trusts with relatively low incomes will not be able to fully recoup the tax offset generated by the trustee being taxed at 30% on its MTI. Therefore, groups that use discretionary trusts for a variety of non-tax reasons that would not have had an effective rate of tax of 30% are now taxed at 30%. This is plainly inequitable.

This failure to make the tax offsets refundable is entirely inconsistent with other aspects of the Australian taxation system such as the refunds available to taxpayers in receipt of franked dividends. Instead, it will return the Australian tax system to the ill-conceived patchwork of the pre-Ralph Review of Business Taxation system where groups artificially generate taxable income to use tax credits in a "use it or lose it" system.

We submit that the tax offsets generated should be refundable or, at the very least, should be able to be carried forward for future income years so they are not effectively lost to the numerous family groups subject to the MTT regime.

1.4 Exclusions from MTT – Fixed Trusts and "Material Discretionary Elements"

One of the types of trusts that is excluded from being an MTT is a "fixed trust".[11]

A "fixed trust" is currently defined by reference to the definition contained in section 272-65 of Schedule 2F to the ITAA36. However, the Exposure Draft proposes that the above definition is amended to include a trust where either:

- the beneficiaries have fixed entitlements to all of the income and capital of the trust; or

9 For instance, where a trading company pays a franked dividend via a trust to a corporate beneficiary to remove cash reserves from the risk associated with trading. Or when the trustee of a discretionary trust that trades distributes its income to a corporate beneficiary to create a claim against the property of the trust.

10 In the writers' view, this may also call into question whether the trustee has satisfied its duty of due consideration in making trust distributions: see for instance, *Re Hay's Settlement Trusts* [1981] 3 All ER 786 and *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142.

11 Proposed section 101AB(1)(a).

- there are no "material discretionary elements" affecting the entitlements or rights of the trust's beneficiaries.[12]

The Exposure Draft proposes to include in Schedule 2F a list of matters suggesting there are no material discretionary elements affecting the rights and entitlements of beneficiaries.[13]

As stated in the explanatory materials, the above proposed amendments are intended to provide taxpayers with greater certainty on the definition of a "fixed trust" and address longstanding concerns with the current definition.[14] However, in our view the proposed changes only further confuse the situation.

We say this as the only mechanism proposed for determining whether a beneficiary's rights or entitlements in a trust have material discretionary elements is the application of a list of items that "suggest" situations where the beneficiaries do *not* have material discretionary elements. This only defines the concept of "material discretionary elements" by giving mere indications of what it does *not* mean.

Given the importance for taxpayers in confirming whether a fixed trust is excluded from the MTT regime, we consider a comprehensive definition should be adopted rather than the piecemeal and inherently uncertain approach currently proposed.

The Exposure Draft also leaves open the possibility for the Treasurer by legislative instrument to make a determination of whether rights or entitlements have material discretionary elements. This approach does not provide for transparency and certainty and simply avoids the need to provide a robust definition to taxpayers and their advisers who need to rely on such concepts.

1.5 **Testamentary Trusts – Included from MTI?**

Treasury's Consultation Paper released in July 2026 suggested that income from "all types" of discretionary testamentary trusts would be exempt from the MTT regime provided the trust was established for genuine testamentary purposes.[15]

However, the Exposure Draft has been prepared on the basis that:

- testamentary trusts will constitute MTTs that may be captured under the proposed new regime;[16] and

- whether or not a testamentary trust's income is exempt from the scope of MTI will depend on when the trust was established, the underlying assets from which the income has been derived and how those assets were acquired.[17]

This creates inevitable complexities in forward planning with respect to testamentary trusts. We say this for the following reasons:

- The MTI exclusions provided under the Exposure Draft are more favourable to testamentary trusts established prior to 1 July 2028. It is of course not open to taxpayers to organise their affairs such that a testamentary trust is

12 Proposed new section 272-65(1) of Schedule 2F of the ITAA36.
13 Proposed section 272-65(2).
14 Paragraph 1.5 of the Explanatory Memorandum to the *Treasury Laws Amendment Bill 2026* (Cth)*:* Minimum tax on discretionary trusts.
15 Page 4 of the Consultation Paper.
16 Proposed section 101AB(1)(c) of the ITAA36.
17 Proposed section 101AD(1).

established at a particular point in time, with a testamentary trust normally being established upon the death of the testator.

- The Exposure Draft provides that the MTI exclusions for income from testamentary trusts established on or after 1 July 2028 will only apply where the scope of the trust's beneficiaries is limited to individuals and exempt entities.[18] This reinforces the ill-founded policy prejudice against corporate beneficiaries notwithstanding their entirely legitimate use in business and investment structures as set out above.

- Moreover, even if a testator strives to fall within the proposed new measures by limiting the scope of beneficiaries of the testamentary trust to be established under their Will, a large proportion of testators who remain living but have already lost capacity cannot amend their Wills before 1 July 2028 to limit the scope of beneficiaries of the testamentary trusts created under their Will.

In summary, the Exposure Draft creates unnecessary complexity concerning testamentary trusts and leaves many testators, through no fault of their own, governed by the punitive tax measures of the MTT regime. Rather than exempting a narrow category of income derived from testamentary trusts, a broad exemption should apply for testamentary trusts to exempt all trusts created on death under a testator's Will from the MTT regime.

1.6 **Exclusions from MTI – Primary Production Income**

One of the exclusions is in respect of MTI is "primary production income" under section 392-80 of the ITAA97.[19]

In broad terms, section 392-80 provides that an entity will only have taxable 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.

By reverting to the primary production income concepts in the existing tax legislation, the MTT regime will still apply to many farming groups. For instance, 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.

Moreover, many land-owning trusts derive relatively small amounts of income such as rent or royalites from wind and solar energy projects on the primary production land. Such income, typically used as a supplementary source of income to assist the primary production business given the general volatility of farming, will now make those land-owing trusts subject to the MTT regime.

The above situations will lead to significant compliance costs for farming groups who will typically be deriving both primary production income which is exempt from MTI and other receipts of the kind described above that will amount to MTI. This will only add to the growing compliance burden placed on this sector of the economy.

Finally, whilst many large primary production groups have corporatised their trading structures and in some cases their land-holding structures, these groups will often still have discretionary trusts as the shareholders in such companies. The clear commercial reason for this approach is that discretionary trusts offer the ability for intergenerational

18 Proposed section 101AD(1)(c).
19 Proposed section 101AE(1).

changes of control of such companies over time without impacting the ownership structure.

However, due to the limitations of the primary production income definition under the existing tax legislation, neither these companies nor their shareholders can derive primary production income – even where the company is conducting what is clearly a primary production business and all of the dividend income paid to discretionary trust shareholders is sourced from that primary production business. Based on the apparent policy rationale for excluding primary production income from the MTT regime, income derived from such businesses should not be subject to the MTT regime.

In summary, we consider that a much broader exemption from the MTT regime should apply to all primary producers. The trusts used in a primary production group should be exempt from the MTT regime altogether rather than applying the approach of only exempting the existing narrow concept of "primary production income" from MTI.

2. Three-Year Roll-Over Relief

The Exposure Draft proposes to allow taxpayers transitional roll-over relief to transfer assets from MTTs to other entities that are not subject to the MTT regime. This will be available over a three-year period commencing on 1 July 2027 and ending on 30 June 2030.

The three-year roll-over relief provides that a transfer of an asset will have no direct consequences under income tax law where its criteria are met.

2.1 Limits on Transferees with "Material Discretionary Elements"

One of the key features of the transitional roll-over is that relief will not be available in circumstances where there are material discretionary elements affecting the rights or interests of members of the transferee entity.[20]

A similar approach is adopted to the proposed amendments to the "fixed trust" definition under Schedule 2F of the ITAA36 as set out above.

For the same reasons as set out above, we consider the definition of "material discretionary elements" is flawed. It is neither coherent (simply providing a list of things that are *suggested* as *not* amounting to material discretionary elements) nor transparent, leaving it for the Treasurer to deem what is and what is not acceptable by legislative instrument rather than through proper Parliamentary process.

2.2 Continuity Requirements

The continuity requirement provided under the Exposure Draft turns on whether the transferor trust has a family trust election ("**FTE**") in force for Schedule 2F purposes.

A transferor trust without an FTE cannot satisfy the continuity requirement and therefore cannot access roll-over relief unless and until the Treasurer prescribes an alternative continuity requirement by way of legislative instrument.[21] It should be emphasised that, on the current drafting of the Exposure Draft, the Treasurer is <u>not</u> required to prescribe an alternative continuity requirement and, in the absence of any determination being made, the FTE method must be used. A further reliance on the Treasurer's determination represents a continued theme throughout the Exposure Draft of providing no certainty to taxpayers and their advisers and avoiding transparency.

---

[20] Proposed section 126-430(5) of the ITTPA97.

[21] Proposed sections 125-440(2), (3) and (4).

In our view, relying on the FTE system under Schedule 2F takes a highly controversial part of the existing tax legislation and uses that as the sole criterion for passing the continuity test and therefore accessing the transitional roll-over relief. The need to make FTEs under Schedule 2F has led many private groups to an increased exposure to family trust distribution tax which is grossly out of proportion to the initial mischief that Schedule 2F seeks to address.[22]

To now use that patently flawed legislation - that is urgently in need of reform according to the Tax Institute and other professional bodies[23] – as one of the mandatory criteria for determining whether the three-year roll-over relief is available is entirely misconceived.

2.3 Time Period for Roll-Over Relief

The transitional roll-over relief is stated to only be available where the asset transfers occur during the period commencing on 1 July 2027 and ending on 30 June 2030.[24]

We consider that this is too short a period of time to allow relief. It does not reflect the need for taxpayers to seek professional legal, tax and accounting advice on asset transfers, appropriate holding structures and the satisfaction of the roll-over requirements in any given situation.

Moreover, the transitional nature of the roll-over relief does not contemplate that taxpayers may not necessarily consider a need to restructure out of a trust now and may only determine this to be a necessary course of action once the full impact of the MTT regime is recognised over its initial years of operation.

We consider a five-year period would be preferable so that business have sufficient time to assess the impact of the MTT, take professional advice, implement any restructure under the roll-over and adjust whilst continuing to focus on the other (and often more pressing) needs of the business.

2.4 Notification Requirements

Unlike any other roll-over under the income tax legislation, the Exposure Draft contains three different notification requirements which must be satisfied for roll-over relief to apply.

The first notification requirement involves both the transferor and transferee making choices in the approved form to apply roll-over relief and providing those choices to the Federal Commissioner of Taxation ("**Commissioner**").[25]

---

[22] That mischief as the explanatory memorandum to the trust loss legislation provides was trusts trafficking in tax losses: see paragraph 1.5 of the explanatory memorandum to the *Taxation Laws Amendment (Trust Losses and Other Deductions) Bill 1997* (Cth). Whereas, in the writers' experience, exposure to family trust distribution tax typically arises because of the extraordinary complexity of the measures and the fact it is nearly impossible to comply with Schedule 2F in practice.

[23] The Tax Institute's '*Submission on amendments to the Family Trust Election and related provisions*' (5 May 2026). See also, Chartered Accountant Australia and New Zealand, CPA Australia, Institute of Public Accountants, National Tax & Accountants' Association, and Tax Institute '*Joint Bodies submission on Family trust elections and Family trust distribution tax*' (5 May 2026).

[24] Proposed section 126-430(1)(b) of the ITTPA97.

[25] Proposed sections 126-430(1)(c) and 126-431(1) and (5).

The second notification requirement involves the transferor notifying the Commissioner (in the approved form) of the progress of the restructure in circumstances where trust assets are restructured over multiple income years.[26]

The third notification requirement involves each of the transferor and transferee notifying the Commissioner (again in the approved form) if any of the roll-over requirements are subsequently not satisfied.[27]

In our view, the notification requirements are likely to significantly add to the compliance costs for private groups. The notifications also seem inconsistent with the broader notion of a self-assessment system. In this sense, no other roll-over under the income tax legislation requires this extraordinary level of compliance by way of notification to the ATO.

The notification requirements also rely heavily on the ATO's record-keeping practices. In our experience, the ATO does not have the resources to effectively retain and accurately monitor this volume of notifications particularly where in time there may be disputes about what has been "given"[28] to the ATO by way of roll-over notifications. It would be preferable for the ATO to rely on self-assessment, review and audit to ensure compliance as is the case with every other roll-over under the income tax legislation.

2.5 Extended Review and Amendment Period

One unexpected feature of the transitional roll-over is the extension of the usual amendment periods as set out under section 170 of the ITAA36.

The Exposure Draft provides that the Commissioner can amend the income tax assessments of the transferor, transferee or any of their beneficiaries or members (as relevant) for any years in which an asset is transferred pursuant to the roll-over within four years of the notice of assessment where the amendment is "connected to the availability or otherwise of a roll-over… in relation to the asset".[29]

The explanatory materials assert that the amendment period broadly aligns with the ordinary amendment period for businesses.[30] This is inaccurate. Under section 170(1) of the ITAA36, taxpayers generally have either a two-year or four-year amendment period from the notice of assessment, and the amendment period is limited to the taxpayer in question.[31]

In our view, the extended period of review is "heavy handed" and does not adequately justify any departure from the existing two-year to four-year period of review for taxpayers.

2.6 Deferred Capital Gains and Availability of 50% Discount

The Exposure Draft contains a number of rules to ensure that there are no direct tax consequences under income tax law as a result of the roll-over.[32] However, the Exposure Draft does not contemplate a situation where an asset is being transferred out

---

26 Proposed sections 126-430(1)(d) and 126-432.
27 Proposed section 126-433.
28 Proposed sections 126-431 (1)(c), 1263-431(5)(c), 126-432(2)(b) and 126-433(2)(b).
29 Proposed section 126-431(9).
30 Paragraph 1.82 of the Explanatory Memorandum to the *Treasury Laws Amendment Bill 2026* (Cth): roll-over relief.
31 In broad terms, the two year period being for individuals or entities that constitute small/medium business entities and the four year period for all other taxpayers.
32 Proposed sections 126-450, 126-451, 126-455 and 126-480 of the ITTPA97.

of a structure that qualifies for certain tax concessions to a structure that does not qualify for those same concessions.

For instance, assets may be transferred from a discretionary trust which would qualify for the general 50% discount under division 115 on its deferred capital gain (i.e. the capital gain calculated from the trust's acquisition date up until 1 July 2027) to a company structure that would not qualify for the 50% discount in respect of the same gain.

The 50% discount on a deferred capital gain should be based on the ownership of the asset during the period in which the deferred capital gain accrued and not because the taxpayer has had to roll-over assets from a trust to a company to avoid punitive tax treatment under the MTT regime.

3. **Excluded Election Trust Regime**

The Exposure Draft provides for discretionary trusts that cannot easily restructure, in many cases because of the imposition of State/Territory duty, to opt out of the MTT regime by making an excluded election trust ("**EET**") election.

The EET election involves the trustee nominating which beneficiaries are to receive the specific shares of income and capital of the trust, with the requirement that the total shares add up to one hundred percent.

A departure in trust distributions from the identity of the nominated beneficiaries or the shares of income and capital the nominated beneficiaries are to receive as set out in the EET election will result in the trustee being taxed at the top marginal rate on all of the net income of the trust.[33] Moreover, any revocation of the EET whether voluntary or automatic will also result in this highly penal taxation treatment.[34]

3.1 **Beneficiary's Share of Income and Capital**

As stated above, the Exposure Draft provides that an EET nomination must specify each beneficiary's share of the income and capital of the trust.[35] Although there is a requirement for the shares to equal one hundred percent of the trust's income and capital,[36] it is not clear what is meant by a beneficiary's "share" of income and capital.

If, for the purposes of the EET nomination, a beneficiary's share of trust income is required to be expressed as a percentage, we consider this to be an inflexible approach given the abundance of practice methods currently adopted for distributing trust income. For instance, it should be possible for the EET election to accommodate different sources or classes of income. It should also be possible for an absolute numbers approach to be adopted with a "balance of income" stipulation. These techniques have long been adopted by accountants and other tax advisers in diligently preparing year-end trust distribution resolutions and should be maintained for flexibility and certainty of outcomes.

Although the Exposure Draft does not expressly rule out these approaches, the position is unclear, and the explanatory materials do not address the issue.

We consider there should be a more sophisticated approach to determining a beneficiary's "share" of income and capital as stated under the Exposure Draft, rather than simply stating and adding up percentages – having regard to the variety of trustee practices in this area. The proposed legislation should ensure that trustees continue

33 Proposed sections 102UYF(2)(a), 102UYG(3) and 102UYG(4) of the ITAA36.
34 Proposed sections 102UYF(1), 102UYF(2) and 102UYG.
35 Proposed sections 102UYB(2)(a) and (b).
36 Proposed section 102UYB(c)

to have the flexibility of distributing trust income according to absolute numbers with a balance expression and according to the class or character of the income as well as by percentages. This is consistent with the trustee's obligations to the beneficiaries.

3.2 **Equal Income and Capital Percentages**

The Exposure Draft proceeds on the basis that an EET nomination will set out each beneficiary's percentage entitlement to income *and* capital and provides that a beneficiary's income and capital entitlement must be equal.[37]

In our experience, this will create major problems for the administration of the trust deeds of many older discretionary trusts which may have beneficiaries with different income and capital entitlements. It is also often common practice to distinguish between income and capital beneficiaries in testamentary discretionary trusts where "bloodline" beneficiaries might receive income and capital, with relatives by marriage only receiving income. It would seem impossible for these trusts to make an EET election.

Moreover, relying on the beneficiary's share of income and capital to be the same will invariably result in unforeseeable mistakes being made by clients and their advisers. As a result of the proportionate approach as confirmed by the High Court in *Bamford*,[38] it is common for modern discretionary trust deeds to contain an income equalisation clause automatically equating trust income with the trust's net income.[39]

However, if all capital receipts of a trust are to be distributed in accordance with the EET election, then any amounts sheltered by cost base, the general 50% discount (up until 1 July 2027) or indexation cannot automatically form part of the trust's section 95 net income. Instead, these amounts will need to be distributed by a capital distribution to ensure that the relevant beneficiaries have the same percentage of income and capital – a point that could easily be overlooked by the trust's advisers.[40]

We consider far more guidance should be provided in the explanatory materials as to precisely determine how capital is to be distributed or conferred on a beneficiary to comply with the EET nomination.

3.3 **Variation Cases**

The Exposure Draft provides taxpayers with very limited situations in which an EET nomination can be varied.

One of the situations is where an individual nominated dies.[41] However, a different individual can only be included in the EET nomination where that individual is a beneficiary of the deceased's estate.[42] This is an odd and unjustifiable restriction.

In our view, this requirement will create rigidity and unintended outcomes for family succession planning where there will often be a divergence of beneficiaries under a testator's Will and beneficiaries of a discretionary trust. Such beneficiaries may often not

37 Proposed section 102UYB(2)(b)(ii).
38 *Commissioner of Taxation v Bamford*]2010] HCA 10.
39 For section 95(1) purposes.
40 We are assuming here that the reference to capital being distributed in the Exposure Draft is a reference to capital receipts. The idea that existing capital has to be distributed appears non-sensical, however, clarity is also required here.
41 Proposed section 102UYE(2).
42 Proposed section 102UYE(2)(b).

be the same and, in some cases, there will be no overlap whatsoever between the two categories of beneficiaries.

3.4 Duty and Trust Law Implications of EET Nomination

The Exposure Draft currently provides that, where an EET nomination is in force, the trustee must confer present entitlements to trust income and capital in accordance with the nomination.[43]

Concerns have been raised within the tax community as to whether this may have unintended duty outcomes across the various State and Territory jurisdictions. These issues should be clarified with certainty with the State and Territory revenue authorities prior to the introduction of the EET regime.

We also have concerns that the premise of the MTT regime, and in particular proposed section 102UYD of the ITAA36, requires the trustees of discretionary trusts to distribute income and capital in a manner that is potentially inconsistent with the trustee's duty of due consideration.[44] This may have the implication of giving rise to a swathe of new trust law disputes brought about by beneficiaries who are capable of benefitting under the trust deed but not named in an EET election, putting more strain on private groups and the Court system.

3.5 Automatic Revocations – Vesting of Discretionary Trusts

The Exposure Draft provides that an EET nomination will automatically be revoked in several instances, including where:

- a nominated beneficiary that is a trust vests or is wound up;[45] or
- there is a change in the shareholder of an eligible company other than for an allowable reason (i.e. pursuant to a Family Court order).[46]

In all jurisdictions except South Australia, a perpetuity period is imposed on discretionary trusts. That period is 80 years in each jurisdiction with a perpetuity period, except for Queensland whose perpetuity period was recently extended to 125 years. It follows that most discretionary trusts will need to ultimately vest as a matter of law and the vesting of those trusts is not at the discretion of the individual controllers of the trust.

Moreover, in our experience it is common, for the asset protection and succession planning benefits stated above, for the shares in a private company to be owned by a discretionary trust. Where the trust has a perpetuity period, a transfer of shares in the company will ultimately be required on the vesting and winding up of the trust.

We consider that an automatic revocation of an EET nomination and the penal tax consequence that follows in circumstances outside the taxpayer's control (such as the required vesting of a trust structure) is an unjust outcome. This is particularly so where the nomination can only be made within the period specified in the Exposure Draft and therefore once revoked (even inadvertently), cannot be made again.[47]

[43] Proposed section 102UYD(2).
[44] See above at footnote 9.
[45] Proposed section 102UYF(2)(b).
[46] Proposed sections 102UYF(2(d) and (3).
[47] Proposed sections 102UYB(4) and (6)(a).

A preferable approach to prevent the above outcome may be to extend the situations in which an EET nomination can be varied to allow a taxpayer to remove/delete a trust which has vested from the nomination.

3.6 **Automatic Revocations – Eligible Companies**

The Exposure Draft provides that an EET nomination will automatically be revoked where:

- a corporate beneficiary ceases to be an eligible company;[48] or
- a corporate beneficiary is deregistered or wound up.[49]

As reflected in other parts of the proposed MTT regime and the proposed amendments to the fixed trust definition, the definition of "eligible company" requires no material discretionary elements to affect the rights or interests of the company's members.[50]

The Treasurer is given further power to determine by legislative instrument matters suggesting that there are material discretionary elements in a company.[51] This definition is lacking coherence and transparency for the reasons outlined above.

Again, the Exposure Draft has been prepared on the basis that an EET nomination can be revoked as a result of factors outside the taxpayer's control and we recommend that further consideration is given to extending when a nomination can be varied to account for these situations.

3.7 **Voluntary Revocations**

The Exposure Draft also provides a mechanism for trustees to voluntary revoke an existing EET nomination.[52] We expect this may be relevant in circumstances where, for instance, a trustee expects that the trust may need to distribute income or capital in a manner that is inconsistent with the nomination.

However, it appears to us that the consequences for voluntarily revoking an EET nomination are no different to that for an automatic revocation. That is, the trustee being assessed on all net income in the relevant income year at the top marginal rate.[53] This is highly objectionable. It means that where taxpayers take a considered approach, take specialist professional advice in order to comply with the tax laws (that is often necessitated by an area of this complexity) and decide to opt out of the EET system, they are then penalised with the trustee being taxed on all of the net income for the year of opting out at the top marginal rate.

We do not see any clear policy reason for treating a taxpayer who voluntarily revokes an EET nomination to be subject to this penal taxation treatment i.e. a section 99A assessment to the trustee on all of the net income for that year.

In our view, the proposed MTT regime, the three-year roll-over and the EET election process proposed under the Exposure Draft do not achieve Treasury's stated objectives of limiting tax minimisation. Instead, the proposed measures create a myriad of practical problems, unintended consequences and a huge

48 Proposed section 102UYF(2)(c)(iv).
49 Proposed sections 102UYF(2)(c)(i) and (ii).
50 Proposed section 102UYC(1).
51 Proposed section 102UYC(4).
52 Proposed section 102UYF(1).
53 Proposed section 102UYG(1) does not distinguish between a voluntary revocation under proposed section 102UYF(1) and an automatic revocation under section 102UYF(2).

compliance burden for taxpayers who use discretionary trusts for legitimate business, investment and succession planning purposes.

Our strong preference is for the MTT regime to be abandoned and for some fresh thinking to occur in this area with better consultation of business and the tax advisory community. On the basis the proposed measures are to proceed, the legislation should at least take account of the numerous shortcomings outlined above.

We would be pleased to discuss any of the issues raised in these submissions as required.[54]

Yours sincerely

Peter Slegers
Director – Tax & Revenue Group
PSlegers@cowellclarke.com.au

Amy Lancaster
Associate – Tax & Revenue Group
ALancaster@cowellclarke.com.au

[54] The writers would like to thank Jack Cooper, Lawyer in Cowell Clarke's Tax & Revenue Group, for his assistance in the preparation of this submission.