14 August 2026

Ms Diane Brown
Deputy Secretary, Revenue Group
The Treasury
Langton Crescent
PARKES ACT 2600

By email: mintaxtrusts@treasury.gov.au

Dear Ms Brown

Minimum Tax on Discretionary Trusts

We write to provide our submissions in relation to the abovementioned Treasury Consultation Paper dated 8 July 2026.

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

In broad terms, the Consultation Paper proposes to introduce a minimum tax of 30% on the taxable income of discretionary trusts[1] and provide for a non-refundable tax offset (for the 30% tax paid by the trustee) to individual beneficiaries assessed on that income. It also provides that transitional roll-over relief over a three year period will be provided for transferring assets from discretionary trusts to other structures such as companies and fixed trusts. We have set out our submissions in response to the Consultation Paper below.

All statutory references in these submissions are to the *Income Tax Assessment Act 1997* (Cth) ("**ITAA97**") or the *Income Tax Assessment Act 1936* (Cth) ("**ITAA36**"), unless stated otherwise.

1. **Underlying Premise of Reform**

   1.1 We question the underlying premise of the proposed changes which appear to treat discretionary trusts as nothing more than an artificial income splitting device.

   1.2 This starting point for the proposed change entirely neglects the long-standing role of discretionary trusts as legitimate family business and investment vehicles commonly adopted in Australia by small and medium-sized enterprises. This premise ignores the practice of using discretionary trusts for various non-tax purposes, namely:

[1] As with the Consultation Paper, the term "taxable income" is technically a reference to "net income" for the purposes of section 95(1) of the ITAA36.

(a) asset protection to mitigate against third party claims against trust assets;

(b) seamless succession planning where assets may pass from one family generation to the next by changing control without the disruption caused by changes to legal ownership;[2] and

(c) a more flexible business structure for family businesses either to operate a business itself or to hold the equity interests in companies or fixed (typically) unit trusts carrying on businesses or holding property.

1.3 Although discretionary trusts are sometimes used for income splitting, we consider such benefits are relatively modest. All that is often achieved is spreading income to different family members or structures which form part of the family unit. The limited income splitting benefits often spreads the tax to beneficiaries who ultimately have real claims against the trust for the income they have been assessed upon. There is no artificialness to such arrangements.

1.4 There appears to be a misguided policy rationale for the proposed changes in that the income splitting benefits achieved through discretionary trusts are not available to salary and wage earners. To us, this appears to demonstrate a misunderstanding of some of the fundamental principles of income tax law. For instance, it is a long-held principle that income from property (including business assets) may be alienated and taxed by the entity that derives such income as opposed to income from personal exertion that may not be alienated when derived in a structure and must ultimately be taxed to the individual whom that exertion relates.[3] This makes sense from a policy perspective since the income from carrying on a business is often putting the underlying owners at risk and the income from property has often already been subject to income tax (in many cases – several times over) to accumulate wealth and acquire property.

1.5 Indeed, if one opposes income splitting for this reason then, taken to its logical conclusion, all income of entities or structures (companies, partnerships and superannuation funds for instance) should be derived in the same way as salary and wage income. This would significantly reduce risk-taking in business and investment and therefore adversely impact commercial activity.

1.6 For all of the above reasons, we consider that the underlying premise of the proposed changes does not support a compelling reason to depart from the existing flow through treatment of trusts which should instead continue with income tax being imposed only on the beneficiaries according to their present entitlement to trust income (or to the trustee where no beneficiary is presently entitled to the trust income).

2. Proposed Taxation Treatment of Discretionary Trusts

2.1 In our view, the proposed taxation treatment of discretionary trusts is intended to be punitive. This makes little sense in terms of the history of the tax laws treating discretionary trusts like any other business or investment vehicle.

2.2 Under more considered policy changes to the taxation laws, discretionary trusts have received neutral treatment across a range of different tax laws where Treasury have simply proposed rules to accommodate their legitimate use.

[2] Particularly in the case of corporate trustees.

[3] *Federal Commissioner of Taxation v Gulland, Pincus & Watson* (1985) 160 CLR 55; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440; and *Federal Commissioner of Taxation v Galland* [1986] HCA 83.

2.3 For instance, the following laws have accommodated discretionary trusts with special rules to take account of the peculiarities of this business and investment structure:

(a) division 152 of the ITAA97 dealing with small business CGT concessions;[4]

(b) subdivision 328-G of the ITAA97 which contains the small business restructure roll-over;[5] and

(c) division 6E of the ITAA36 and subdivisions 115-C and 208-B of the ITAA97 which introduced specific measures to ensure that the beneficiary obtaining the economic benefit of a distribution would be subject to tax on it under the trust streaming measures.

2.4 There are countless other examples in our income tax legislation that have modified the specific provisions to take account of discretionary trusts on the basis of their existing legitimacy as a family business and investment structure. The recognition of discretionary trusts as a legitimate part of the legislative framework of the Australian tax laws has been the case under various governments of different political persuasion – leaving the underlying premise of the Consultation Paper (that trusts are merely tax planning devices of "high-income" and "high-wealth" taxpayers) as unfounded.

2.5 In contrast to the historic recognition of trusts as a legitimate family business and investment vehicle, the proposed changes do not simply provide for a new way of taxing trusts but instead propose punitive treatment.

2.6 The proposed measures do this by:

(a) applying a minimum 30% tax on the taxable income derived by trusts regardless of the amount derived (even where the effective rate would be less than 30%);

(b) only allowing individual beneficiaries to receive the full benefit of the tax paid by the trustee in the form of an offset if the individual receives considerable entitlements to the trust income such that the beneficiary also has a very high taxable income (i.e. at least $229,320 to entirely recoup the tax offset);[6]

(c) requiring the tax offset to be non-refundable, returning the taxation regime to an entirely artificial situation where, as outlined above, sufficient tax must be assessed to eligible taxpayers to ensure tax offsets are not lost (something entirely rejected in the *Ralph Review of Business Taxation* of 1999);[7]

(d) only allowing the tax offset to be claimed by individuals – an approach that is inconsistent with Australia's well established dividend imputation system which adequately addresses issues of double taxation in a company context; and

(e) preventing Australian businesses and investors from effectively using tax losses and capital losses genuinely incurred by trusts.[8] For instance, profits distributed by other trusts in the same group to the loss trust will have already been subject

[4] In particular, sections 152-70, 152-75 and 152-78 of the ITAA97.
[5] In particular, sections 328-125(3)-(4) and 328-440 of the ITAA97.
[6] Applying the current marginal tax rates for the 2026-27 income year and assuming the individual does not derive other assessable income.
[7] See Part 5 *'Implementing a unified entity regime'* of the *Review of Business Taxation* (Report, 12 September 1999) ("**Ralph Review**").
[8] An arrangement clearly allowed – and in fact legitimised – on the basis that the income injection test is passed for tax losses under schedule 2F of the ITAA36.

to tax and the loss trust will not receive the benefit of the tax offsets nor generate its own tax offsets.

2.7 Taken together, it is difficult to see any discerning policy in these measures other than an underlying prejudice towards the use of discretionary trusts and a need to raise revenue regardless of the policy consequences.

2.8 If Treasury were to have greater impartiality in their approach to policy and were still intent on changing the taxation treatment of trusts, a proposal similar to the proposed entity taxation regime by the Ralph Review would at least have a more sound policy base by:

(a) taxing accumulated income at the corporate tax rate;

(b) allowing trusts to maintain a franking account; and

(c) consistent with the imputation system, allowing trusts to pay franking credits to individuals, companies and other trusts (taxed as companies) with a refundable tax offset – such that no tax would be payable for passing franked distributions between trusts and companies or trust and other trusts (taxed as companies).[9]

2.9 Whilst, in our view, the current "flow through" taxation treatment of trusts should remain, this approach would be far more justifiable from a policy perspective as it would place trusts on an equal footing with companies and allow for income to be accumulated in trust structures for the ultimate benefit of the trust beneficiaries. There is no mischief whatsoever in allowing income accumulated being taxed at a corporate tax rate – something the Australian taxation system has long accommodated.

3. **Impact on Primary Producers**

3.1 The proposed measures state that primary production income derived by discretionary trusts will be exempt from these measures.

3.2 The Consultation Paper does not provide any detail as to how this exemption is to work.

3.3 If, as we suspect, the existing income tax definition of "assessable primary production income"[10] is to be adopted, this will present numerous issues for primary producers that chiefly use discretionary trusts for intergenerational succession and asset protection, namely:

(a) where rent needs to be derived within a genuine primary production group, for instance, to provide cash-flow to a land holding trust to pay bank debt or to provide an income stream for the retiring generation, such income will not amount to primary production income;

(b) many farms now hold wind farms, solar farms or other energy projects to provide a steady source of alternative income to the farm group. The income from such projects will not in the usual course amount to primary production income;

(c) many large farms have over the years needed access to the corporate tax rate on the income that is reinvested in the business and have therefore adopted a company structure. However, any primary production income derived by a

[9] See Part 5 '*Implementing a unified entity regime*' of the Ralph Review. See also, Peter Slegers' article published in The Tax Institute's *Taxation in Australia* (December 2000): '*Entity Taxation: The Non-Fixed Trust Regime*'.

[10] Section 392-80(2) of the ITAA97.

company does not have the ability to amount to primary production income under the tax legislation;

(d) following on the above point, where company structures have been adopted to conduct primary production business activities, typically any well-structured company is owned by one or more discretionary trusts to facilitate intergenerational succession. The dividends now paid by such companies face the above-mentioned punitive tax treatment. The holding of shares in such companies by individuals places the assets of the company at risk as well as undermining the ability to provide for intergenerational succession; and

(e) any primary production land owned by trusts will be subject to the punitive taxation treatment when capital gains are made which again will also not qualify as primary production income.

3.4 If the exemption of primary production income from the new measures is as narrow as the Consultation Paper suggests,[11] one major unintended consequence is that all effective succession planning for primary producers will be at risk. This will undermine one of the Australian economy's most significant sectors by creating significant uncertainty for the future of primary producers.

3.5 Many farmers will be faced with the prospect of having little or no tax relief on income invested into their enterprise. If they wish to access the corporate tax rate, they may be forced to use companies owned by individuals with no asset protection and no effective succession planning. If they wish to continue to use trusts, so as to derive "assessable primary production income" for the purposes of the tax legislation, then they will have no ability to cap their income in the corporate rate when they have successful seasons and will instead be taxed at the top marginal rate even where income is to be reinvested for poor performing seasons.

3.6 The complexities of administering discretionary trusts whereby some income (e.g. rent paid within the group, royalties from energy companies and dividends generated within the group) is subject to the new taxing regime and other primary production income is exempt will also present its challenges.

3.7 The Consultation Paper gives the impression that farming families are exempt from the measures when the reality (at least as the measures are currently presented in the Consultation Paper) is likely to be substantially different.

4. **Rollover Relief**

4.1 The transitional rollover relief provided for in the Consultation Paper that supposedly allows for assets in trusts to be transferred to companies or fixed trusts within three years from 1 July 2028 presents little respite for the vast number of taxpayers affected by the measures.[12]

4.2 The lack of any consultation with the States and Territories regarding stamp duty or transfer duty relief means that the opportunity to restructure will in numerous cases be cost prohibitive.

4.3 The timing is unrealistic in that it assumes that a business, investment or equity interest could simply be restructured at 1 July 2028. Many affected taxpayers will still be coming to terms with the 1 July 2027 CGT and negative gearing measures and assessing the damage done to their businesses and assets by these measures. Further, taxpayers will

[11] Page 3 of the Consultation Paper.
[12] Pages 8–11 of the Consultation Paper.

also still be coming to terms with the requirements of the rollover – as well as putting measures in place to comply with its criteria, seeking advice and addressing other major issues impacting the business or enterprise.

4.4 Perhaps the greatest problems with the rollover, however, is that no viable alternative structure is offered. If assets are to be transferred to a company, how are the equity interests to be held? Is it expected that Australian business people and investors will simply hold their assets at risk? The references to fixed trusts are unclear but if a fixed trust is intended in many cases to be a unit trust with fixed interests, how is the equity to be held? Again, is there an assumption by Treasury that individual taxpayers should hold their equity interests in a fixed trust personally and therefore at risk? For the reasons already explained, this is not commercial from an asset protection and succession perspective.

5. **Unpaid Present Entitlements as Loans**

5.1 The Consultation Paper proposes to reverse the outcome of the High Court decision of *Bendel*[13] by deeming unpaid present entitlements to be loans for the purposes of division 7A of the ITAA36.[14]

5.2 This purports to simply back the Commissioner of Taxation's entirely unfounded view on the manner in which division 7A operates. It is *not* about reversing a change the taxpayer should not be entitled to on a policy basis. Indeed, much of the reasoning of the High Court in *Bendel* is based on the intention of Parliament and the fact that division 7A already deals with any mischief of using corporate beneficiaries only for tax purposes. It does this by preventing funds from leaving the structure by way of loans, a forgiveness of debt or other payments under subdivision EA of ITAA36. In fact, the treatment of UPEs as loans for the purposes of division 7A represents a contrast to the correct interpretation administered by the ATO for over a decade before the ATO adopted its untenable view with effect from 16 December 2009.[15]

5.3 The result of the ATO's enforcement of its unlawful view (that Treasury now seeks to legitimise by overturning the High Court decision by legislation) has brought considerable cash flow problems to business and investors legitimately using corporate beneficiaries to cap their tax rate on income kept within the structure at 30% whilst also protecting wealth from third party claims.

5.4 There is commentary by some tax policy advocates and tax advisers that the operation of division 7A is complex and this is a reason in favour of legislative reform. However, it must be recognised that such complexities have arisen from the ATO's incorrect administration of the law which created additional and unnecessary administrative compliance requirements for taxpayers. With the law administered correctly (as determined by the High Court) the operation of division 7A is, in our view, simplified.

5.5 In our view, the High Court decision in Bendel should be recognised not only for confirming the correct view of the law but also for the underlying policy rationale that division 7A (and in particular subdivision EA) already addresses any mischief in this area.[16]

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13 *Commissioner of Taxation v Bendel* [2026] HCA 18 ("***Bendel***").

14 Page 17 of the Consultation Paper.

15 See, for instance, the Commissioner's withdrawn pronouncement Taxation Determination TD 2004/63W.

16 For further analysis, see the writers' and Joshua Pascale's article published in The Tax Institute's *Taxation in Australia* (August 2025): '*Bendel goes to the High Court: critical issues for private groups*'.

6. **Summary**

Our view is that the measures for the proposed taxation of discretionary trusts are founded on a misguided premise and presently lack policy depth. Further, we consider that measures which seek to treat the use of discretionary trusts as punitive in nature are bound to have considerable unintended consequences. Without fundamental change, we consider that the proposed measures cannot proceed and should be abandoned by Treasury.

We would be pleased to discuss any of the issues raised in these submissions as required.[17]

Yours sincerely

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