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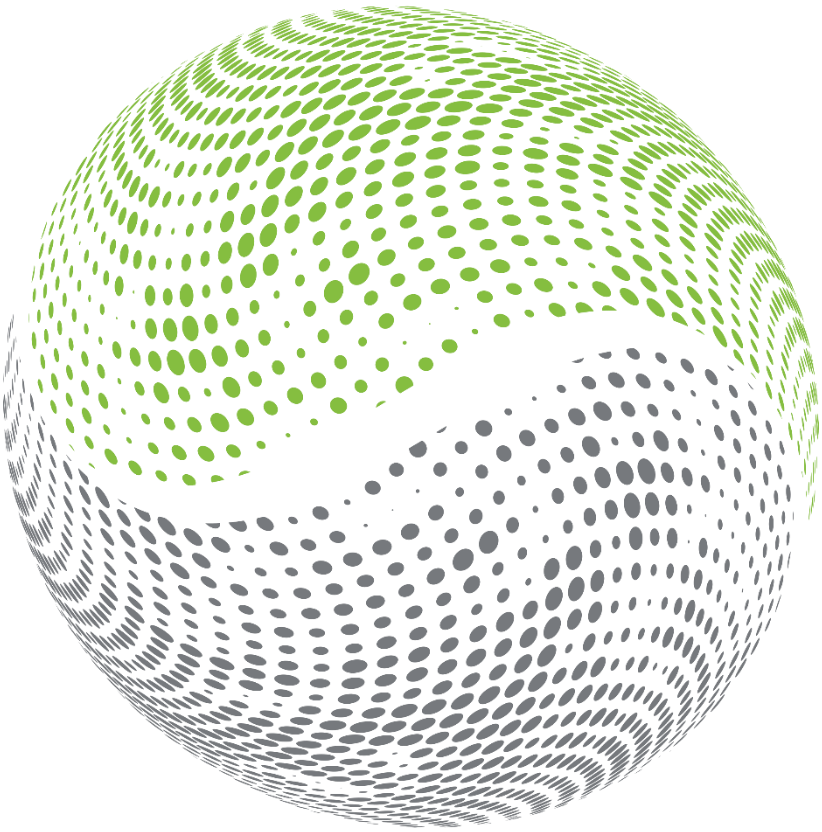

Tax Insights

Treasury issues consultation paper on minimum tax for discretionary trusts

In the 2026-27 Australian Federal Budget, the government announced that as from 1 July 2028, trustees will pay a minimum tax of 30% on the taxable income of discretionary trusts. On 8 July 2026, Treasury released its long-awaited consultation paper on the implementation of the proposed minimum tax. The short consultation period closes on 31 July 2026.

The consultation paper seeks feedback on key aspects of the proposed changes, including:

- What entities and income are in scope;
- The treatment of individual, corporate, and trustee beneficiaries;
- Distributions to tax exempt entities;
- Restructuring relief and the various conditions that would need to be satisfied;
- How excess franking credits in a trust could be dealt with;
- Tax administration implications of collecting the tax at trustee level; and
- Interactions with the High Court decision in the *Bendel* case (*Commissioner of Taxation v. Bendel [2026] HCA 18*).

Executive summary

While the consultation paper provides greater clarity on a number of important design features, it also highlights that several of the most significant aspects of the regime remain unresolved.

In particular, the definition of a discretionary trust, the treatment of corporate beneficiaries, the interaction with the imputation system, the practical administration of trustee-level tax, and the future treatment of trust-company arrangements following the High Court's decision in *Bendel* will be critical in determining the ultimate impact of the reforms on private groups and family businesses.

Scope of discretionary trust

The definition issue may ultimately be the most important design question arising from the consultation paper. The existing fixed trust definition was developed for different tax integrity purposes and relies on beneficiaries holding vested and indefeasible interests. Many modern commercial trusts, including unit trusts, managed investment structures, and other widely held arrangements, include amendment powers, issue powers, or other trustee discretions which may create uncertainty regarding fixed trust status. As a result, the distinction between fixed and discretionary trusts may not align with the policy objectives of the proposed minimum tax.

More fundamentally, taxpayers cannot determine whether restructuring relief is required until they know whether they are within the scope of the regime. Consequently, the definition of a discretionary trust is not merely a drafting issue but one of the foundational policy questions underpinning the reform.

Corporate beneficiaries

If trust income is to be subject to double taxation if distributed to a company as proposed, the rules effectively remove companies as a viable beneficiary for many discretionary trust structures.

The consultation paper does not clearly explain why targeted integrity measures could not address its concerns without creating materially different outcomes depending on the type of beneficiary receiving the distribution.

More fundamentally, the policy concern identified in the consultation paper is difficult to reconcile with the existing operation of the imputation system. The paper appears concerned that a company beneficiary may be able to convert the benefit of trustee-level tax into shareholder value. However, it does not clearly explain the mechanism by which this occurs under existing law.

Treatment of excess franking credits in a trust

Treasury’s discussion of excess franking credits in a trust raises a broader question as to how the proposed minimum tax is intended to interact with Australia’s imputation system. If the objective is simply to ensure a minimum 30% tax rate on trust income, it is unclear why recognition and pass through of company tax already paid should be restricted.

The carry-forward option may also prove difficult to administer, requiring credits to be traced over time despite changes in beneficiaries, distribution patterns, and trust structures. Without a clearer articulation of the policy concern being addressed, there is a risk that the proposal introduces significant complexity while achieving little beyond reducing the value of existing franking credits.

***Bendel* case**

The inclusion of *Bendel* and division 7A consultation questions within a paper ostensibly directed at the minimum tax is notable. It suggests Treasury is considering the future of trust-company arrangements more broadly, rather than viewing the minimum tax in isolation.

The proposed minimum tax, the treatment of corporate beneficiaries, and the potential reintroduction of division 7A consequences for unpaid present entitlements (UPEs) collectively point towards a broader reassessment of traditional discretionary trust structures.

Private groups therefore face uncertainty on multiple fronts. Even where the minimum tax itself does not compel restructuring, the cumulative effect of future UPE reforms and reduced attractiveness of corporate beneficiaries may materially alter the structure of long-standing trust-company arrangements.

The main consultation paper issues are addressed in more detail below.

Scope of a discretionary trust

Critical to the operation of the new rules is how to define a discretionary trust. The current tax legislation defines discretionary trusts by exclusion—as any trust that is not a fixed trust. The concept of a fixed trust relies on beneficiaries having "vested and indefeasible" interests, with the trust deed a critical factor in making this assessment.

In practice, it may be difficult for many trusts to satisfy the definition of "fixed trust," which has led to the Australian Taxation Office (ATO) issuing Practical Compliance Guideline 2016/16 *Fixed entitlements and fixed trusts* which outlines the factors the Commissioner of Taxation ("the Commissioner") will consider when deciding whether to exercise their discretion under subsection 272-5(3) of schedule 2F to the Income Tax Assessment Act 1936 (ITAA 1936) to treat an interest in the income or capital of a trust as being a fixed entitlement.

Given the issues with the existing definitions, many more trusts than originally envisaged may be caught in the measures. As such, the government is seeking feedback on an appropriate definition and examples of modern commercial trusts, where trustees typically retain powers to change entitlements, add beneficiaries, or amend trust deeds, whether or not those powers are exercised.

Exclusions

The minimum tax would not apply to:

- Fixed and widely held trusts (including fixed testamentary trusts);
- Complying superannuation funds;
- Special disability trusts;
- Deceased estates; and
- Charitable trusts.

Some types of income such as primary production income, certain income relating to vulnerable minors, amounts to which non-resident withholding tax applies, and income from assets of discretionary testamentary trusts existing at announcement would also be excluded.

On 18 June 2026, the government further advised that it would exempt income from all types of discretionary testamentary trusts from the minimum tax provided they are established for genuine testamentary purposes. The exclusions include:

- Income from assets of the deceased estate, with income from assets injected after Budget night, 7.30 p.m. AEST on 12 May 2026 unrelated to the deceased estate subject to the minimum tax; and
- For discretionary testamentary trusts established on or after 1 July 2028, the exclusion would only apply to trusts that can only benefit individuals and income tax exempt entities.

Both the exclusions in respect to vulnerable minors and testamentary trusts as outlined above are confirmed in the paper.

The consultation paper also sets out that distributions to foreign resident beneficiaries of discretionary trusts, to the extent that they are comprised of dividends, interest, and royalties to which foreign resident withholding tax applies, would be excluded from the minimum tax.

Income tax exempt entities

On 18 June 2026, the government advised that individuals making deductible gifts and donations would not be disadvantaged in respect to the calculation of minimum tax on capital gains (to maintain tax incentives for charitable giving).

Questions remained as to whether deductible gifts and donations by discretionary trusts would similarly reduce exposure to the minimum tax.

The consultation paper does not anticipate a similar exclusion and appears to confirm that the minimum tax would still be levied at the trustee level and generate a non-refundable tax offset for the tax paid by the trustee.

Given income tax exempt beneficiaries would not be able to use these offsets, feedback is sought on the treatment of distributions to income tax exempt entities.

The mechanics of the minimum tax

Trustees would be required to calculate, report, and pay the minimum tax, as well as notify beneficiaries of their entitlements and associated minimum tax offset. There would be differing treatment depending on whether beneficiaries are individuals, companies, or trusts.

Individual beneficiaries

Individuals would continue to be assessed on their share of the discretionary trust's taxable income at their relevant marginal tax rates and would receive a non-refundable tax offset (or credit) for tax paid by the trustee.

The minimum tax offset would be calculated based on individual's share of the trust's taxable income, rather than their share of the trust income (broadly the accounting distribution).

The offset would not be able to be used to reduce the Medicare levy.

The consultation paper includes the following example for a high-income earner:

Discretionary trust A: Income year 2028-29	
Taxable income\trust income	$200,000
Minimum tax @30% which is payable by the trustee	$60,000

For 2028-29 the trustee makes only Individual A presently entitled to all of trust A's income ($200,000).

Individual A taxable income (all trust income)	$200,000
Tax liability based on marginal rates	$55,602
Medicare levy @2%	$4,000
Subtotal	$59,602
Maximum tax offset ($60,000) applied	($55,602)
Net tax payable	$4,000

The remaining $4,398 of the offset is not refundable and cannot be carried forward.

For taxpayers earning less than $45,000 before their trust distribution is added in their income, the new minimum tax paid at the trust level would result in a higher tax impost across the discretionary trust group from 2027-28 onwards.

Interestingly, while individual taxpayers on specified government income payments who received capital gains were exempt from the minimum tax on capital gains, there is no such exclusion for beneficiaries on government payments receiving trust distributions (due to the tax being levied at the trust level). The consultation paper does not raise this as an issue.

Corporate beneficiaries

Corporate beneficiaries would continue to be assessed on their share of the discretionary trust's taxable income at their relevant marginal tax rates but would not be eligible to receive a non-refundable tax offset (or credit) for tax paid by the trustee.

This would effectively result in double taxation as the company would be taxed a second time on the same income, notwithstanding that the later payment of tax by the company would allow on-payment of those profits to be paid as a frankable distribution to eligible shareholders.

As such corporate beneficiaries would be prohibitively taxed from commencement as compared to other beneficiaries who may be subject to similar tax rates.

The paper appears concerned that a company beneficiary may be able to convert the benefit of trustee-level tax into shareholder value. Deloitte Australia presumes the government's concern is that, if a corporate beneficiary were allowed access to the minimum tax offset, the benefit of the tax paid at the trust level could somehow be converted into franking credits in the company's franking account. Those franking credits could then be used to frank a dividend paid to shareholders, with individual shareholders potentially obtaining a refundable tax offset for the franking credits attached to that dividend. If this is the concern, it would be useful for Treasury to explain the mechanics more clearly, as the current paper does not identify precisely how the refundable credit outcome is expected to arise or why it could not be addressed through targeted integrity rules.

The proposed outcome (of double taxation) also appears difficult to reconcile with the treatment of other corporate structures. Consolidated groups may generally use losses within the group, holding companies may retain profits within corporate groups, and companies may receive dividends and preserve those benefits within a corporate structure. However, where profits are distributed through a discretionary trust to a corporate beneficiary owned by the same family group, a materially different outcome may arise.

Similarly, where a trust distributes income to a company with carried forward losses owned by the same family unit, the minimum tax may diminish the economic value of those losses despite no change in ultimate ownership.

Trustee beneficiaries

Trustee beneficiaries would continue to be assessed on their share of the discretionary trust's taxable income at their relevant marginal tax rates and would be eligible to receive a non-refundable tax offset (or credit) for tax paid by the trustee.

As for individual beneficiaries, the minimum tax offset would be calculated based on their share of the trust's taxable income, rather than their share of the trust income (broadly the accounting distribution).

Where a beneficiary is itself a discretionary trust subject to the minimum tax, the tax offset would have to be applied against its own income tax liability (including minimum tax) and consistent with other tax offsets, could not be used to reduce the Medicare levy. The minimum tax offset would be non-refundable, and any excess would not be refunded, carried forward, or passed onto further beneficiaries.

Where a trustee beneficiary is not a discretionary trust subject to the minimum tax (such as a fixed trust), the minimum tax offset could be passed on to its own beneficiaries and used by non-corporate beneficiaries eligible for the offset.

Rollover relief

The government would provide expanded rollover relief for a time limited period of three years as from 1 July 2027 to support those that wish to restructure out of discretionary trusts into another entity type, such as a company or a fixed trust. This would provide expanded relief from direct income tax consequences, including capital gains tax, for those who choose to restructure.

The consultation paper does not make any commitment for relief in respect of indirect tax costs. Any restructure could give rise to GST and/or state or territory stamp duty, and it is currently unclear whether the states and territories would provide corresponding relief to support the proposed rollover.

The rollover would be based on the existing small business restructure rollover (SBRR) but would be available to discretionary trusts regardless of size.

The rollover would not require continuity of identical legal ownership following a restructure.

Changes in legal ownership through companies, partnerships, or other entities should not, of themselves, prevent access to relief where ultimate economic ownership remains within the same family unit.

The measure is intended to support transition out of discretionary trust structures into arrangements with more fixed and transparent economic outcomes, not a mere change in legal structure.

Feature	**Existing SBBR**	**New rollover**
Policy objective	Facilitate genuine restructure rollovers	Facilitate transition out of discretionary trusts
Eligible transferors	Small business entities with aggregated turnover of less than $10 million	Discretionary trusts within the scope of the minimum tax
Genuine restructure requirement	Required	Not required
Assets covered	Active business assets and revenue assets	Active business assets and revenue assets, as well as assets used to produce passive income
Post-restructure outcomes	No specific focus on economic flexibility	Intended to support more fixed and transparent economic outcomes

Under a rollover/restructure, the transferee must be an entity that is not a discretionary trust within the scope of the minimum tax. Eligible transferees would include a company, fixed trust, individual, or one of the listed entities that are in a partnership.

The following entities would not be an eligible transferee: a complying superannuation fund or an income tax exempt entity.

The transferor and transferee must be Australian residents.

The rollover would not require the restructure to be a “genuine restructure” of an ongoing business, as is currently required to access the SBRR.

The rollover would apply to all trust assets capable of being transferred, including assets earning passive income. The rollover would require all, or essentially all, of the trust’s assets to be transferred to the new structure. A nominal (very small or token value) asset may be left in the trust to avoid the rollover indirectly requiring the trust to be wound up. Whether a trust should wind up would remain a matter for the trustee and relevant stakeholders having regard to the trust deed.

The rollover would also be designed to ensure that family trust distributions tax does not arise on restructuring out of a discretionary trust into a new entity.

Transitioning to more fixed and transparent economic outcomes

Broadly, the government's aim is to require the new entity to have economic entitlements that are sufficiently predetermined and stable. This would mean that distributions are set based on the legal rights attaching to the interests, rather than dependent on a broad discretion and would preclude for example, company structures with multiple classes of shares that permit dividends or capital returns to be directed between participants on a discretionary basis (and likewise fixed trusts with discretions).

The government is also considering restrictions on the transfer of ownership rights within a certain period, other than equity injections from, or sales to, genuine third parties.

Ultimate economic ownership

Ultimate economic ownership must remain within the same family unit. Given the ongoing issues with family trust elections, the government would not limit the rollover to family groups defined around a test individual. Instead, the new rollover could instead use a new statutory family unit definition, deeming the ultimate economic ownership test to be passed where the economic interests in the transferee entity are held by members of the same family unit as those who controlled the transferor discretionary trust.

This new statutory family unit could include individual family members, as well as other entities where individual family members satisfy a "clearly defined rights test" and there are "no material discretionary elements" to all of the income and capital.

For example, a rollover from a discretionary trust controlled by a trustee who is a spouse, to a company owned by both spouses, could be deemed to satisfy the ultimate economic ownership test, as the economic interests remain within the same family unit.

However, a rollover into a company that is owned by another discretionary trust, where no family members have any clearly defined rights, would not satisfy the ultimate economic ownership test.

Treatment of franking credits within a trust structure

An uncertain aspect of the proposed changes is the use of franking credits in a discretionary trust.

Trustees that receive franked dividends would be required to use their franking credits to pay the minimum tax.

There are two possibilities in the design:

- The imputation credit is a merely a credit against the minimum tax; or
- The imputation credit reduces the amount of minimum tax that would be credited to beneficiaries.

It would be useful to clarify this treatment prior to the draft legislation being released.

Treatment of excess franking credits in the trust

Excess franking credits may arise where a trustee offsets its income tax liability, including any minimum tax liability, and franking credits remain.

The government is considering two options for the treatment of excess franking credits for trustees:

- Refunding excess franking credits to the trustee; or
- Allowing excess franking credits to be carried forward to reduce the trustee's future income tax liabilities.

The second option would delay the cash flow impacts of the imputation credit and require trustees to maintain franking credit carried forward balances and related records. Additional integrity rules may also be required to ensure that the benefit of any carried forward franking credits remains appropriately linked to the beneficiaries whose distributions were subject to the minimum tax. The government is also considering limiting the carry forward, including through time-based restrictions or a cap on the amount of credits that may be carried forward.

Collection mechanisms

Currently, trustees must lodge the trust's income tax return by the date assigned by the ATO, which generally falls between late October and mid-May of the following year.

In practice, the full tax consequences of a beneficiary's entitlement are often not fully known until closer to the trust's lodgment date.

Notification by trustees

Under the minimum tax, the trustee would be required to notify beneficiaries of their entitlements and associated non-refundable tax offset to assist beneficiaries in completing their income tax returns, leveraging existing trustee notification and reporting requirements.

Collection from trustees

The minimum tax on discretionary trusts would be paid by the trustee.

To ensure the minimum tax is paid, the paper outlines that it may be necessary to implement complementary changes to address known challenges with collecting tax from trustees, particularly corporate trustees that do not own substantial assets of their own.

These include:

- Providing the Commissioner a similar right of reimbursement from trust assets;
- Making directors of corporate trustees jointly and severally liable to pay the minimum tax;
- Empowering the Commissioner to issue notices facilitating collection where the trustee fails to pay; and
- Adopting mechanisms for earlier collection at the trustee level (such as pay as you go instalments).

High Court decision in the *Bendel* case

As a separate matter, but also relating to trusts, the government has included consultation questions around the interaction of the minimum tax and division 7A; particularly in how it pertains to the treatment of an unpaid present entitlements to a corporate beneficiary, together with general implications of the court decision in *Bendel*.

On 10 June 2026, the ATO lost its appeal in the High Court in *Bendel*. The *Bendel* case broadly considered the tax consequences of UPEs owing to corporate beneficiaries and tests the ATO's longstanding position as outlined in Taxation Determination TD 2022/11 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?* Broadly, the majority of the High Court ruled that a corporate beneficiary's UPE to trust income was not a "loan" for the purposes of division 7A.

The government is considering legislative amendments to deal with this issue and notes there is a longstanding announced but unenacted measure from 2018-19 to bring UPEs within division 7A. The government is seeking feedback on how to implement this measure.

Deloitte Australia comments

The consultation paper usefully identifies a number of practical uncertainties that have emerged since the proposed minimum tax on discretionary trusts was announced.

However, significant concerns remain with the design and implementation of the proposed measure:

- The states and territories have not yet announced whether they would provide corresponding stamp duty or other relief for restructuring arrangements. This will be critical to the practical effectiveness of any restructuring rollover;
- The proposed new statutory family unit has not been comprehensively defined. This will also be critical to determining whether the rollover can operate effectively in practice; and
- The interaction between tax law and trust law adds significant complexity across Australia's current tax rules. Restructuring provisions are unlikely to be a "one size fits all" basis, given the variety of trust deeds and commercial arrangements in existence. Alternative approaches are also likely to be complex, both conceptually and in practical application.

Material inequities also remain:

- It appears that corporate beneficiaries would be taxed on a materially more adverse basis than other beneficiaries under the proposed measure. The consultation paper does identify alternative design options, and some of the apparent policy concerns may be capable of being addressed through targeted integrity rules;
- Some individual trust beneficiaries may also be recipients of government income support. It appears inconsistent to exempt these individuals from the minimum tax on capital gains, while not providing equivalent protection from the impact of the minimum tax on trust distributions; and
- The proposed design needs to be carefully considered to ensure that not-for-profit beneficiaries are not penalised under the proposed taxing regime. Given discretionary trusts are significant donors to deductible gift recipients and giving foundations, this aspect for relief will be important for society in general.

Tax reform should be guided by clear principles of equity, efficiency, simplicity, sustainability, and policy consistency. While the proposed minimum tax is intended to promote greater fairness between salary and wage earners and taxpayers deriving income through discretionary trusts, the proposed minimum tax raises questions against many of these principles.

We also note that the Treasurer's media release states that the reforms are intended to make the tax system fairer and help fund income tax cuts for workers. It is unclear whether this refers to already announced personal income tax cuts or further tax cuts that may be announced in future budgets.

The proposed minimum tax involves much more than a simple 30% tax rate and the consultation process will be an important opportunity for stakeholders to influence the design of what may become one of the most significant reforms to the taxation of discretionary trusts in decades.

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