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Lodged via Inquiry website

Minimum tax on discretionary trusts legislative package — Senate Economics Legislation Committee Inquiry

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission in relation to the minimum tax on discretionary trusts (MTDT) draft legislative package (the MTDT Legislation) in relation to the proposed minimum tax on discretionary trusts, comprising the following:

- the Treasury Laws Amendment (Tax Reform No. 3) Bill 2026
- the Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026,

along with an accompanying draft Explanatory Memorandum (EM).

The IPA is one of the three professional accounting bodies in Australia, representing over 50,000 members and students in Australia and in over 100 countries. Approximately three-quarters of the IPA's members work in or are advisers to small business and small to medium enterprises.

While the MTDT Legislation includes proposed amendments in relation to matters other than the MTDT, this submission focuses on the proposed MTDT provisions. Our comments are concerned with ensuring that the proposed regime operates with minimal adverse consequences for taxpayers who are not using discretionary trust structures primarily for tax reasons; we are not advocating for an unfettered ability to split income on a discretionary annual basis.

Public hearings

We understand that public hearings are likely to be held on Thursday 5 and Friday 6 November 2026. Should the IPA be invited to participate in these hearings, our preference is to attend on Friday 6 November.

Observations in relation to stakeholder engagement

The Treasury Laws Amendment (Tax Reform No. 1) Act 2026 (the Tax Reform No. 1 Act) and the Income Tax Rates Amendment (Tax Reform No. 1) Act 2026, both now enacted, introduced Tranche 1 of the CGT and negative gearing legislative reforms (the Tranche 1 legislation). We are pleased to see that the Treasury and the Government have noted and addressed in the Draft Tranche 2 Package a number of the significant issues raised by stakeholders in relation to the Tranche 1 legislation.

We appreciated the opportunity to engage in consultation on the exposure draft legislative package (the ED Package) in relation to the MTDT in September before the MTDT Legislation was introduced into Parliament. This was a marked improvement over the approach undertaken in relation to the Tranche 1 legislation in relation to the CGT and

negative gearing reforms, for which there was no public consultation period on either a consultation paper or exposure draft legislation prior to the introduction of the relevant bills into Parliament.

We also appreciated the fact that in developing the ED Package, Treasury clearly took into account earlier stakeholder feedback about the consultation paper released in July 2026 in relation to the introduction of an elective regime to avoid restructuring; and that Family Trust Distribution Tax should not arise from a compliant restructure.

However, we express our concerns in relation to inadequate consultation timeframes.

We consider that the September 2026 consultation period for the ED Package was unacceptably short — being a mere 12 business days to understand, analyse, consult with stakeholders on, and draft a submission in relation to these very significant changes to the taxation of trust which in many cases will necessitate restructuring and transfers of assets. Given the nature of the changes taxpayers may also need to engage professionals other than their regular tax advisor for the review of trust deeds and to obtain other trust law advice. A longer consultation period would have contributed to better policy design and legislative drafting to avoid unintended consequences which could be extremely costly or even catastrophic for taxpayers.

This rushed consultation followed the insufficient 18 business days allowed for feedback on the consultation paper.

There remains a number of issues which will be the subject of future tranches of legislative amendments (at an unknown timeframe). While it is reasonable to expect with any new regime that some issues may not be fully understood at the initial drafting stage, such as specific integrity risks, other matters which could be considered to be fundamental to the design and operation of the core rules are also left to future tranches. These core issues include the notification of beneficiaries, the administration and reporting of the minimum tax, the interaction with CGT and the interaction with international tax and residency rules. Such matters are integral to the operation of the proposed new regime. A rushed consultation process leaves taxpayers, their advisors and the general public with ongoing uncertainty.

Similarly, certain key aspects which are central to the operation of the proposed rules — such as roll-over continuity requirements for non-family trusts and material discretionary elements which affect members' rights — will at least partially depend on the exercise of ministerial power. Draft determinations were not included in the ED Package or the MTDT Legislation and there is no indication as to the intended timing for the release of draft determinations. Again, this creates a lot of uncertainty and hinders taxpayers who may wish to commence planning for a restructure or an election.

The Office of Impact Analysis (OIA) has stated that:

> *When you provide detailed information as part of a consultation, people need time to understand it, consider it and respond. Give people as much time as is reasonable to absorb the information you provide and gain a proper understanding of the issues so they can offer a considered view. Depending on the complexity of your proposal,* ***this could be as much as 60 days but should not be less than 30*** *[emphasis added].*

We urge the Government and the Treasury to consider the OIA recommendations in future consultations — including in relation to future tranches of the minimum tax reforms — to enable the best consultative outcomes.

Corporate beneficiaries and access to offsets for trustee tax paid

The proposed restriction on corporate beneficiaries to obtain an offset for the tax paid by the trustee ("offset") will result in double — and excessive — taxation of income that is disproportionate to addressing any purported integrity issues involving the use of corporate beneficiaries.

Under the proposed rules, the effective rate is likely to exceed 47 per cent where it is distributed to a shareholder in the 14 per cent tax bracket (even if the shareholder is exempt from the Medicare Levy).

The effective rate on distributions should not exceed 47 per cent. Distributions made through a legitimate interposed entity structure should not be taxed more punitively than distributions paid outside the defined family group or retained trust income, which are both taxed to the trustee at 47 per cent.

As noted towards the end of this submission, we encourage the Government to consider an alternative proposal outlined in the EM whereby offsets for the minimum tax paid by trustees would be made available to all beneficiaries, including corporate beneficiaries.

Comments in relation to roll-over relief

Discretion to provide relief where roll-over requirements not met due to circumstances outside the transferor/transferee's control

Under the proposed rules, roll-over relief will only be available if, relevantly, all relevant assets are transferred by the end of the transitional period and the notification requirements have been met within the statutory timeframes.

We suggest that the Commissioner should be given a discretion to provide relief where the asset transfer or notification requirement is not completed on time, but is subsequently satisfied, due to circumstances outside the transferor's and transferee's control. Examples of such circumstances may include the death or serious illness of a key person, or a natural disaster or other unanticipated disruption.

Continuity requirements for non-family trusts

The MTDT Legislation proposes that transferor discretionary trusts that are not family trusts may only access roll-over relief if they satisfy continuity requirements which may be determined by the Minister by legislative instrument. It is proposed that, if no such determination is in force, this pathway for satisfying the continuity requirements will not be available. That is, in practice, if the Minister does not exercise their discretion to make a relevant determination, a trust that is not a family trust would need to make a family trust election in order to restructure with the benefit of roll-over relief.

This is not an acceptable outcome. A trustee that is making their best efforts to comply, including making decisions to restructure, should be provided with the same roll-over relief regardless of whether they have made a family trust election.

We suggest that core continuity requirements be legislated in the enacted legislation, with a Ministerial discretion to make determinations to vary or add eligibility requirements where necessary. As a starting point for consideration, the continuity requirements for non-family trusts could include that every entity who has an interest in the transferee just after the transaction takes effect was, just before the transaction took effect, a beneficiary under the terms of the non-family trust.

If this is too broad, there could be requirement that eligible entities must have received a distribution of income within a certain timeframe, e.g. the previous three or five years.

This would provide a reasonable starting point for non-family trusts to satisfy the continuity requirements and the Minister could augment the continuity requirement by legislative instrument as necessary.

Immediate deductibility of restructuring expenses

We recommend that the Government introduces a specific immediate deduction for all expenses incurred in relation to the restructuring in the year incurred. While taxpayers may be able to claim an immediate deduction for some amounts in the year incurred as a tax-related expense under section 25-5 of the ITAA 1997, other costs may be required to be capitalised in an asset's CGT cost base or may be deductible over five years under section 40-880. Tax relief arising from capitalised costs may not be realised for many years and in this case the restructure costs incurred for the purposes of complying with the minimum tax rules may not result in a corresponding increase in ongoing revenue or capital value to offset the impact of those costs. A specific deduction for all relevant one-off restructuring costs would provide the certainty of immediate relief from the inevitable significant upfront financial costs without the requirement of additional compliance costs and record keeping.

Comments in relation to the excluded election trust (EET) election

Beneficiaries must exist at 1 July 2028

An entity is only eligible to be specified as a beneficiary in an EET nomination if they were capable of benefitting under the trust on 1 July 2028.

This is unnecessarily restrictive. Trust deeds may be amended to include individuals and entities as new beneficiaries and potential beneficiaries due to life events such as marriage and the birth or adoption of children and grandchildren. Such individuals may not have been capable of benefitting on 1 July 2028 under the trust deed in effect at that date — in many cases they would not even have been born. Allowing the future inclusion of additional beneficiaries who were not specified beneficiaries as at 1 July 2028 in limited circumstances would not frustrate the purposes of the MTDT or the EET rules.

Inflexibility regarding a variation of beneficiary

The once-only specification of beneficiaries in an EET nomination and the narrow opportunities to vary the nomination is extremely inflexible.

The restrictive EET regime, while being proposed as a solution to avoid both restructuring and the minimum tax, will create practical difficulties for trustees and their advisers trying to maintain the validity of the election over time, given the multitude of reasons for trustees deviating from the original nominated beneficiaries and/or the nominated proportions.

There are genuine non-tax reasons why a trustee may no longer wish to distribute to a particular beneficiary in the originally nominated proportion or why the beneficiary is excluded from being able to benefit under the trust deed. These may include mental incapacity, serious illness, newly diagnosed medical conditions, incarceration, estrangement or not satisfying certain behavioural standards. Further, there may be situations where a beneficiary disclaims their entitlement to a distribution. These types of situations are not contemplated in the circumstances in which a variation of an EET nomination is permissible under proposed section 102UYE — that is, death and eligible relationship breakdowns.

We propose that the situations in which it may be reasonable to grant a variation rather than require a permanent revocation be expanded to specified changes in limited, specified circumstances beyond the trustee's control.

Inability to make an election in a year subsequent to 2028-29

Pursuant to proposed subsection 102UYB(4)(b) of the EET Bill, an eligible trust will only be able to make an election no later than the earlier of the trust's due date of lodgment and the actual date of lodgement of its tax return for 2028-29 (or for its substituted accounting period). There is no opportunity to make the election in a later income year.

There should be a provision to allow a prospective election to be made in a subsequent income year. There would be no loss to revenue as the trust would be subject to the minimum tax rules in the years preceding the year in which the election takes effect.

The ability to choose to make an election in a future year, while complying with the minimum tax rules in the meantime, would allow trustees and family and corporate groups the opportunity to assess and adapt to changing situations.

Commissioner's discretion to disregard automatic discretion

The MTDT Legislation proposes a new Commissioner's discretion to disregard an automatic revocation in limited circumstances is a welcome development. However, we are concerned at the statement in the EM (para. 3.94) that the discretion is not intended to extend to circumstances where the trustee has decided, in the proper exercise of their fiduciary duties, that entitlements should not reflect the EET nomination due to a change in the beneficiaries' personal circumstances.

We request that the discretion be extended to circumstances where automatic revocation may arise due to the trustee's decision that entitlements should not reflect the EET nomination due to certain changes in beneficiaries' personal circumstances. Families and businesses utilise discretionary trusts specifically to manage changing circumstances over time. Accommodating reasonable changing circumstances, where there is no tax mischief or tax minimisation motive, will not defeat the underlying restriction of flexible distributions.

Inability to reverse a revocation

The proposed EET election is a once-only election. Once the election is revoked, whether automatically or voluntarily, the trust cannot make another election. This is unnecessarily inflexible. There may be situations in which it would be reasonable to allow another election to be made, such as where the revocation arose as the result of incompetent professional advice or the life circumstances of the specified beneficiaries. We suggest that the once-only nature of the election is reconsidered and that trustees may make another election in

specified circumstances and with appropriate integrity safeguards to ensure that trustees do not make and revoke elections frequently, such as a lock-out period of three years and/or a lifetime limit of the number of elections permitted.

Trustee and corporate beneficiaries which become ineligible

Under the proposals, if a trust specified as a beneficiary in the EET nomination vests or is wound up, or if a company specified as a beneficiary in the EET nomination is wound up or is deregistered or is otherwise no longer eligible, the EET election is automatically and irreversibly revoked.

This is unnecessary harsh. For example, the circumstances could arise due to a creditor's recovery actions or a key person's misdemeanours which are not under the control nor perhaps even the knowledge of the trustee and advisors of the trust in respect of which the election is made.

Where a trustee or corporate beneficiary is no longer eligible to be a specified beneficiary in the EET nomination, the trustee should be able to allocate that beneficiary's allocated proportional entitlement under the EET nomination to one or more other eligible beneficiaries by the end of the relevant income year.

Other implications

Trust deeds are legal documents governed by state and territory laws. Accountants are not permitted to provide advice in relation to trust deeds as this is considered to be legal advice. The 2022 Victorian Supreme Court decision in Owies v JJE Nominees Pty Ltd [2022] VSCA 142 reaffirmed that trustees must give 'real and genuine consideration' to the positions of the trust's beneficiaries in exercising discretionary powers of distribution, including where there had been periods of estrangement. The proposed election effectively requires a trustee to predetermine the outcome of the exercise of a discretionary distribution power before the relevant year's circumstances a known and a proper consideration of the positions of all potential beneficiaries can occur. Further, a regime that locks trustees into fixed beneficiaries and percentages may inhibit a trustee's ability to respond to illness, financial hardship, disability, family breakdown, or other material changes affecting beneficiaries during the income year. The proposed design of the EET election therefore risks undermining the proper administration of discretionary trusts. Where tax practitioners advise their clients in relation to choosing to make an EET election and advise on making EET-compliant distributions in subsequent years, it could expose them to potential litigation as trustees have trust law obligations which may be inconsistent with decisions made to ensure ongoing validity of an EET election. Family law and intergenerational disputes are already on the rise, and the EET election may give rise to more legal disputes as beneficiaries may challenge the proper exercise of trustee fiduciary obligations required by the trust deed.

While trust deeds have common features, each deed is a unique legal document with specific trustee obligations and beneficiary entitlements. The EET regime must be sufficiently flexible and robust as a one-size-fits-all design will not be effective. A trust structure is a complex legal entity and the additional compliance, operational and legal complexity will come at a large cost which will be difficult to bear for many small businesses.

The inflexibility and rigidity of the EET election requirements may also have implications for trusts which need to satisfy the significant individual test for the purposes of applying the

small business CGT concessions and non-family trusts which need to consider the pattern of distributions test, which looks back for up to six income years, under the trust loss provisions.

Finally, the Treasury should consider whether an election that nominates beneficiaries and fixes their entitlement proportions could give rise to unintended State and Territory revenue consequences, for example by creating interests that do not currently exist. State and Territory duty provisions are wide ranging and could trigger trust resettlement when income and capital are fixed as required under the EET election.

Comments in relation to future tranches of legislation

As discussed above, some elements of the proposed new minimum tax regime remains subject to future tranches of legislation and Ministerial determinations. We request that the Treasury release an anticipated timeline in relation to the release of draft legislation and draft instruments. Taxpayers and their advisers are unable to plan with any certainty without all of the technical rules, and a timeline of expectations will at least assist in the planning process. Entity restructures and the making of permanent EET elections cannot be done quickly.

Alternative options

We urge the Government to revisit and reconsider alternative models which have been proposed by stakeholders, some of which are set out in Attachment 1 to the EM.

In particular, we support a serious consideration of the alternative proposal to introduce a 30 per cent minimum tax on the net income of discretionary trusts with offsets for all beneficiaries (including corporate beneficiaries). This would assist groups that use trust and corporate beneficiary structures for genuine commercial reasons — such as group financing, asset protection and separation of asset ownership from business operation — while retaining the minimum tax.

Closing comments

Taxpayers are advisers will have to adapt to the proposed changes at a time when businesses are already under pressure and when the Australian economy needs to improve productivity. Businesses will now be facing significant additional one-off and ongoing compliance costs and will also have to make some hard decisions regarding the ongoing use of a discretionary trust structure well before the intended start date of 1 July 2028, where all available options will result in greater cost and burden. These burdens will be particularly difficult to bear for smaller businesses and advisory practices. The Treasury's own impact analysis set out in Attachment 1 to the EM identifies that trusts with high advice requirements will be particularly affected by the financial and non-financial costs. This creates a significant barrier to productivity and economic growth for these entities, some of which may not have the upfront resources to invest in the necessary structural changes while maintaining and growing operations.

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) has independently highlighted the array of additional costs and disruption that the proposed changes to the taxation of discretionary trusts will potentially have on small businesses in its

submission to the Treasury's consultation in July 2026[1]. We particularly note that the ASBFEO considers that the Treasury has underestimated the practical and economic costs of restructure. We urge the Government to revisit the projected financial and non-financial impacts of the proposed changes in consultation with experts.

We would be willing to engage in further consultation with Government and the Treasury in relation to the underlying purpose and intent of the proposed changes, the particular tax integrity concerns and relevant legislative loopholes, and workable and practical alternative solutions.

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If you have any queries or require further information, please don't hesitate to contact Tony Greco, Senior Tax Advisor, either at tony.greco@publicaccountants.org.au or mobile: 0419 369 038.

Yours sincerely

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[1] https://asbfeo.gov.au/sites/default/files/2026-08/260731%20SB%20-%20Treasury%20-%20Minimum%20tax%20on%20discretionary%20trusts.pdf