The Law Society OF NEW SOUTH WALES

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31 July 2026

Assistant Secretary
Individuals and Indirect Tax and Superannuation Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: mintaxtrusts@treasury.gov.au

Dear Assistant Secretary,

MINIMUM TAX ON DISCRETIONARY TRUSTS – CONSULTATION PAPER

The Law Society of NSW appreciates the opportunity to provide feedback to The Treasury's "Minimum tax on discretionary trusts" Consultation Paper. The Law Society's Business Law and Revenue NSW/Law Society Liaison Committee contributed to this submission.

The Law Society acknowledges the Government's policy objective of addressing income splitting through discretionary trusts, which it states can have the effect that high-income and high-wealth taxpayers, utilising such arrangements, pay less or similar tax amounts relative to salary or wage earners on lower income levels. Detailed responses to the specific questions raised in the Consultation Paper are set out in the **Comments table** to this submission. A summary of the key issues and themes of these submissions is provided as follows:

- **Discretionary trust definition:** The Law Society suggests Treasury considers a narrower definition for 'discretionary trust' that directly targets discretionary trusts used for income splitting, with express carve-outs for other specified trust arrangements that are not intended to be covered.
- **Beneficiary-level taxation:** In our view, a beneficiary-level tax model would be simpler and better targeted than trustee-level collection. Taxing beneficiaries at their marginal rate, subject to a 30 per cent minimum, would reduce cash flow, offset and compliance difficulties for trustees.
- **Corporate beneficiaries:** The proposed treatment of corporate beneficiaries may result in effective double taxation at rates approaching 70%, which is inconsistent with the imputation system and disproportionate to the policy concern. Corporate beneficiaries should receive a non-refundable credit for tax paid by the trustee.
- **Rollover relief:** The rollover relief is supported in principle but will be incomplete unless coordinated with State and Territory duty relief. It should also, in our view, preserve legitimate asset protection and succession planning arrangements.
- **Collection mechanisms:** The proposed collection mechanisms, including personal liability for directors of corporate trustees, Commissioner reimbursement rights and PAYG instalments, appear disproportionate in the absence of evidence that discretionary trusts pose a heightened collection risk.

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- ***Bendel* decision and franking credits**. The minimum tax should be coordinated with the proposed response to *Commissioner of Taxation v Bendel* [2025] HCA 21 to avoid cumulative outcomes that may be more severe than intended. Excess franking credits should be refundable to trustees.

Given the complexity of these issues and their potential impact on a wide range of taxpayers, the Law Society suggests that an extended consultation period would assist Treasury in developing an appropriate and workable design for the proposed reforms.

Any questions in relation to this letter should be directed in the first instance to Sonja Hewison, Policy Lawyer, on (02) 9926 0219 or sonja.hewison@lawsociety.com.au.

Yours faithfully,

pp.
Ronan MacSweeney
President

Attachment.

No.	Areas of focus	Law Society comments
Taxing Point		
1.	How should discretionary trusts be defined to appropriately distinguish them from fixed trusts for the purposes of the minimum tax?	The Law Society is concerned that adopting the current tax framework definition of 'discretionary trust' for the purposes of the new regime would result in an inappropriately broad scope. Under the current framework, discretionary trusts are defined by exclusion – 'as any trust that is not a fixed trust'.[1] The fixed trust test, 'grounded on equitable principles' and which 'relies on beneficiaries having "vested and indefeasible" interests',[2] could result in the scope of discretionary trusts for minimum tax purposes being overly inclusive. Many modern commercial, fiduciary and professional trust arrangements may not satisfy this strict test where trustees retain powers to amend trust deeds, vary entitlements or add beneficiaries, even where those powers are never exercised. The existence of such powers does not necessarily indicate the type of income-splitting arrangements that the proposed minimum tax is intended to address. The breadth of the current definition has given rise to uncertainty as to whether the following types of trusts and trust arrangements may be inadvertently caught under the proposed regime: • managed investment schemes; • unit trusts with proportionally fixed income entitlements; • wholesale and institutional trusts; • stapled structures and infrastructure trusts; • employee share trusts and employee benefit trusts; • securitisation trusts; • special purpose vehicle trusts • single unitholder trusts; and • solicitors' trust accounts and other professional or fiduciary trust arrangements regulated under the Legal Profession Uniform Law or equivalent State and Territory legislation.[3] In NSW, solicitors routinely hold client money on trust, often in circumstances where the ultimate beneficiaries may not be known or ascertained at the time of receipt (for example, settlement proceeds pending completion, or funds

[1] See *Income Tax Assessment Act 1936* (Cth), s 102UC(4) and Sched 2F, 272-5 as cited in Treasury, *Minimum tax on discretionary trusts – Consultation Paper*, July 2026, online, https://storage.googleapis.com/files-au-treasury/treasury/p/prj3db684154d10300c3a1e1/page/c2026_784079_cp.pdf, 3.

[2] Consultation Paper, ibid.

[3] See for example, John Kehoe, "Lawyers' trusts snared by 30pc tax", *Australian Financial Review*, 25 July 2026, 2. We also note that the Law Society has received numerous queries from practitioners concerned that the proposed reforms will apply to solicitors' trust accounts.

No.	Areas of focus	Law Society comments
		held pending resolution of a dispute). These arrangements do not necessarily give rise to a trust as that concept is understood at law, and are already subject to detailed professional regulation. Moreover, those arrangements, as well as certain other commercial trust arrangements commonly used for purposes of investment, financing, business structuring and funds management either do not give rise to the possibility of (or are not used for) income-splitting as identified in the Consultation paper. The Law Society submits that applying trustee-level minimum tax obligations, beneficiary notification requirements, or associated tax collection and recovery mechanisms to such arrangements would be inappropriate and potentially unworkable. The Consultation Paper acknowledges that relying on the existing definition may result in a broader scope than intended.[4] The Law Society suggests that discretionary trusts are defined as narrowly as possible, with reference to the legal features of a trust, and directly targeting the specific mischief the Government seeks to address, namely discretionary trusts used for income-splitting. In our view, a well-designed definition should: • include positive elements defining what constitutes a discretionary trust for these purposes, including features giving rise to an integrity risk (for example, income-splitting and streaming arrangements that produce improper tax outcomes); • specifically identify the features of the legal structure that is to be taken to be a trust for the purpose of the minimum tax, to avoid doubt and possible conflation with solicitors' trust accounts used for their regulated purpose; and • contain specific carve-outs for commercial, fiduciary and regulated professional trust arrangements that do not appear to fall within the income-splitting concern identified in the Consultation Paper, and which should not be caught unless a policy basis for doing so is clearly articulated. These rules should be set out with clarity and precision in the legislation itself, rather than by reference to ATO guidance which does not have the force of law and may be changed at any time. In accordance with fundamental rule of law principles, it is important that the new regime is readily known, available, certain and clear.[5]

[4] Consultation Paper, above n1.
[5] See Law Council of Australia, *Rule of Law*, online, https://lawcouncil.au/policy-agenda/international-law/rule-of-law.

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2.	What is the appropriate minimum tax treatment for income tax-exempt entities?	In our view, the imposition of a minimum tax on distributions to income tax-exempt entities, such as registered charities and public ancillary funds, is not warranted, given that these entities do not present the income-splitting concerns identified in the Consultation Paper. The Consultation Paper notes that income tax-exempt beneficiaries would not be able to use minimum tax offsets given they have no income tax liability and the offsets are non-refundable. Where the ultimate recipient of trust income is an income tax-exempt entity, there appears to be limited policy justification for imposing the minimum tax, as there is unlikely to be any tax avoidance or income-splitting risk – it is, by definition, exempt from income tax liability. As the Consultation Paper notes, income tax-exempt beneficiaries would not be able to use minimum tax offsets given they have no income tax liability and the offsets are non-refundable. A carve-out from the trustee-level minimum tax should apply where trust income is paid to an income tax-exempt entity, disclosed on the trust tax return, and matched in the records of the exempt entity (for example, by reference to the ATO's annual NFP self-review form[6]). Such an approach avoids unnecessary cash flow impacts where a trustee pays the minimum tax only for the exempt entity to subsequently seek a refund. It would also appropriately avoid imposing additional compliance and administrative costs on charities and other tax-exempt entities, given the policy rationale for their exempt status.
3.	Are there any other implementation matters not addressed in this paper that should be considered in designing the minimum tax on discretionary trusts?	The Law Society suggests the following additional implementation matters for consideration: • **Interaction with existing anti-avoidance rules**: Division 7A, section 100A and Part IVA of the ***Income Tax Assessment Act 1936*** **(Cth)** (**the 1936 Act**) already address trust tax avoidance. Care should be taken to ensure the minimum tax does not create a disincentive to the use of otherwise legitimate structures. • **Preservation of pre-1 July 2027 discount capital gains**: Consideration could be given to excluding gains arising on assets held before this date from the minimum tax where they would otherwise benefit from the CGT discount at a rate below 30%. • **Trust loss provisions**: It would be helpful to clarify that trusts with tax losses can apply those losses to reduce taxable income and, hence, the minimum tax.

[6] See ATO, *Lodge your NFP self-review return online*, online, https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/not-for-profit-newsroom/lodge-your-nfp-self-review-review-online.

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		• **Beneficiaries with carried forward tax losses**: Beneficiaries should not lose the benefit of carried forward losses or the minimum tax offset where losses absorb assessable income. • **Liquidity**: Trusts may not have sufficient liquid assets to fund a trustee-level minimum tax liability. This concern does not appear to have been fully addressed in the Consultation Paper. • **Interaction with small business CGT concessions:** Additional guidance on how the minimum tax interacts with Division 152 small business CGT concessions is required. • **Solicitors as trustees and holders of client money:** Solicitors hold client money on trust in circumstances where beneficiaries may not be known or ascertained, and they also act as trustees in their own right. The Law Society's view is that it would be inappropriate to define the discretionary trusts subject to the proposed minimum tax such that the definition might inadvertently 'catch' the mere use of a solicitor's trust account for its regulated purpose. It would also be inappropriate for the definition to include trusts involving a solicitor trustee that do not come into existence for the purpose of income-splitting or some other tax advantage or benefit. The Consultation Paper does not address how these arrangements would be treated, and nor does it make clear that they are not intended to be subject to the minimum tax regime. See further our response under questions 1 and 13.
Rollover relief		
4.	Are the proposed rollover relief arrangements appropriate?	The Law Society supports the proposed rollover relief arrangements. However, in our view, they are not sufficient on their own. We acknowledge that the proposed rollover is broader than the existing Small Business Restructure Rollover, extending beyond small business entities to discretionary trusts regardless of size. However, a critical gap that the Consultation Paper does not address is State and Territory stamp duty implications. Without corresponding relief from State and Territory transfer duties, restructuring costs could remain prohibitive for many taxpayers. The same restructure may produce differing financial and tax outcomes purely because of the State or Territory in which the taxpayer or its assets are located. The compliance burden increases if the Government legislates that rollover relief requires all trust assets to be transferred to the new structure (so that it is therefore not available in the case of partial restructures).

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		The Law Society urges Treasury to coordinate with State and Territory governments to agree a position before legislation is formally introduced. One such position could be that restructures, including asset transfers, contemplated under the minimum tax rollover relief provisions, are not subject to stamp duty in the relevant State or Territory. Care should also be taken to account for differences in the way “fixed trust” and “discretionary trust” are defined across relevant legislative regimes.
5.	Are existing integrity rules sufficient to address arrangements that substantially preserve discretionary economic outcomes through alternative legal structures?	The Law Society considers that this question requires further clarification. To the extent Treasury is concerned to prevent discretionary economic outcomes being replicated through alternative legal structures, the Law Society notes that most commercial trust structures include discretions of some kind. In our view, the relevant question should be whether such discretions impact on the allocation of taxable income, rather than whether any discretion exists at all.
6.	Is it appropriate that the rollover is designed to prevent Family Trust Distributions Tax (**FTDT**) from applying where a discretionary trust with an existing family trust election and/or interposed entity election(s) transfers property to an entity that is not a member of the family group?	Yes. As noted in the Consultation Paper, many discretionary trusts have an existing family trust election and/or interposed entity election. It would not be appropriate for FTDT to apply in light of the purpose of the rollover, which is to allow taxpayers to restructure out of a discretionary trust into other arrangements. A consistent approach to family membership should be considered for the rollover and FTDT application.
7.	Are there any other matters that should be considered in finalising the design of the rollover relief?	The Law Society suggests the following additional matters: • **State and territory taxes**: The rollover should be accompanied by corresponding relief from State and Territory transfer duties. • **Part IVA**: The rollover should be accompanied by an express carve-out confirming that Part IVA of the 1936 Act will not apply to restructures undertaken in accordance with the rollover. • **Trust law exposure**: The trustee’s obligations under trust law and the terms of the individual trust deed should be taken into account when designing rollover relief. In practice, trustees will need to obtain appropriate legal and tax advice to confirm that they have power to undertake restructuring for which rollover relief is sought. Transferring assets to a company with restricted shareholders may breach fiduciary duties or trigger disputes from excluded beneficiaries. In some cases, an application to the relevant Court may be necessary to achieve the restructure.

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		• **Division 7A interaction**: Where a trust has a loan to, or an unpaid present entitlement owed by, a company that is transferred as part of the rollover, the legislation should make clear that Division 7A of the 1936 Act will not apply to treat the transfer as giving rise to a deemed dividend. If Division 7A could otherwise apply, consideration should be given to a specific carve-out for restructures undertaken in accordance with the rollover relief provisions. • **Preservation of asset protection and succession benefits:** The rollover relief provisions should accommodate restructures that preserve legitimate asset protection and succession planning benefits, including where a company is interposed between a discretionary trust and the income-producing assets, and the trust holds shares in the interposed company. Under this structure, the income-producing assets would be held by the company and taxed at corporate rates, achieving the policy objective of the minimum tax, while the trust's shareholding preserves the non-tax benefits (such as asset protection and flexibility in succession planning) that are often the primary reason for the original structure. The rollover relief should extend to such arrangements with full tax relief.
8.	Are there other approaches that could reduce the need for upfront restructuring? What practical or legal considerations would arise in implementing these approaches, including their interaction with trust law and trustees' obligations?	The Consultation Paper notes that stakeholders have raised the possibility of allowing existing discretionary trusts to make an irrevocable election to enter into a taxation regime with the effect that the trust would be treated and taxed as a fixed trust for all income tax purposes. The Law Society supports exploration of such approaches, which would be considerably simpler than the proposed offset mechanism. The practical and legal considerations include trust law interactions, trustees' obligations, and the need for trustees to obtain appropriate legal and tax advice to confirm any restructure is within their powers. A potentially more effective approach might be beneficiary-level taxation such that the minimum tax is borne by the beneficiary at their marginal rate (with a 30% minimum), rather than imposing a trustee-level tax payment obligation. This would avoid the compliance burden and cash flow difficulties associated with a regime that imposes a tax liability on trustees before the beneficiary's final tax position is resolved. It would also reduce the practical need to restructure out of discretionary trusts, thereby avoiding many of the associated trust law, transaction cost and State and Territory duty issues.
Treatment of excess franking credits		
9.	Having regard to tax system integrity, compliance costs and administrative	The Consultation Paper notes that the Government is considering two options for the treatment of excess franking credits for trustees:

No.	Areas of focus	Law Society comments
	simplicity, should excess franking credits be refundable to the trustee? Why or why not?	1. refunding excess franking credits to the trustee; or 2. allowing excess franking credits to be carried forward to reduce the trustee's future income tax liabilities. The Law Society supports option 1, the refunding of excess franking credits, for the following reasons: • **Complexity:** A carry-forward model as proposed under option 2 would involve significant additional complexity and compliance costs, as trustees would be required to maintain franking credit carried forward balances and related records. • **Benefit never realised:** Trusts may not generate sufficient future income to utilise carried forward credits, meaning the benefit may never be realised. • **Trustee-level tax obligations:** Trustees may face unfunded trustee-level tax obligations under the minimum tax regime, and access to refunds would put them in a stronger financial position. • **Tax losses:** For trusts with tax losses, a refund ensures they receive the immediate benefit of franking credits. In our view, there is no principled basis for denying refunds of franking credits in this context. The imputation system is designed to ensure corporate profits are taxed only once.
10.	What compliance costs or tracing requirements may arise under a carry-forward model? Could existing integrity rules adequately address these matters?	As the Law Society does not favour the carry-forward model under option 2 in Q 5, we limit our response to noting the following compliance costs and tracing requirements that would arise: • **Record-keeping**: Trustees would need to maintain franking credit carried forward balances and related records over time. • **Integrity rules:** Additional integrity rules may 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. Rules may also be needed to prevent new beneficiaries from accessing any indirect benefit of excess franking credits carried forward before their involvement in the trust. • **Tracing:** Trustees would effectively need to trace which beneficiary received the distribution to which the franking credits attached, and determine whether they must use those carried forward credits only against future income distributed to that beneficiary.

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		The Law Society considers that these tracing requirements could impose substantial compliance burdens on trustees and their advisers.
11.	Are there any other matters that should be considered when finalising the treatment of excess franking credits?	The Law Society suggests the following additional matters for consideration: • **Priority of offsets**: The Consultation Paper does not specify whether minimum tax offsets or franking credits take priority where both are available to reduce a trustee tax liability. Clarification on this point is required. • **Corporate beneficiaries**: The proposal that corporate beneficiaries will not receive minimum tax offsets may produce effective double taxation. We note external commentary has suggested effective tax rates approaching 70% on distributions to companies.[7] On $100,000 of taxable income, a corporate beneficiary would bear $30,000 of minimum tax at the trust level and then a further $30,000 of corporate tax on the gross amount, resulting in a 60% rate on the trust income before any further taxation when the company distributes to its shareholders. This is inconsistent with the policy rationale of the imputation system. Corporate beneficiaries should receive a non-refundable credit for tax paid by the trustee, rather than being denied credit recognition in a manner that produces an excessive effective tax rate.
Collection mechanisms		
12.	What additional safeguards, administrative modifications, or beneficiary notification requirements should be considered to support the effective operation and collection of the minimum tax, particularly for arrangements involving corporate trustees?	The Law Society has significant concerns about the proposed collection mechanisms, which we consider disproportionately burdensome having regard to the purpose they are intended to serve. Making directors of corporate trustees jointly and severally liable for the minimum tax, alongside new ATO collection notice powers, would increase compliance requirements and create meaningful new personal exposure for small family-run businesses using a corporate trustee. As previously noted, the Consultation Paper proposes providing the Commissioner with a right of reimbursement from trust assets, personal liability for directors of corporate trustees, and PAYG instalment obligations. The cumulative effect of these mechanisms would be a collection regime materially more burdensome than that applying to other categories of taxpayer. No policy justification has been presented in the Consultation Paper to support the position that discretionary trusts present a heightened collection risk warranting such measures.

[7] For example, see Jenny Wong, *CPA AustraliaTax News*, 28 May 2026, online, https://www.cpaaustralia.com.au/taxnews/28-may-2026.

No.	Areas of focus	Law Society comments
		Should this model be adopted, the Law Society suggests that notification arrangements be integrated with existing distribution statement processes and that separate reporting to the ATO beyond what is already captured in the trust income tax return should not be required. Any personal liability imposed on solicitors acting as trustees in some circumstances would be a particular concern in this context and would, in our view, be inappropriate. See the responses to questions 1, 3 and 13 which are also relevant to the proposed collection mechanisms.
13.	What notification arrangements would be most effective for trustees and beneficiaries to give effect to the minimum tax in a way that minimises compliance costs?	In our view, notification should be integrated with existing distribution statement processes and not require separate reporting to the ATO beyond information already captured in the trust income tax return. Real-time or interim notification requirements may be disproportionate to the purpose they are intended to serve. The full tax consequences of a beneficiary's entitlement are often not known until close to lodgement, and this is particularly relevant for trusts receiving distributions through a chain. If solicitors' trust accounts or other fiduciary arrangements were within scope, notification requirements would raise significant practical difficulties. Solicitors often hold funds on trust in circumstances where the ultimate beneficiaries are not known or ascertained at the relevant time, such as, settlement proceeds pending completion, funds held in escrow, or amounts held pending resolution of a dispute. If those arrangements, which may not amount to a trust in the usual sense, are nonetheless caught by the proposed regime, then in those circumstances, it may not be possible for solicitors to comply with notification obligations that assume the trustee can identify beneficiaries and their entitlements at a particular point in time.
14.	Are the complementary collection mechanisms for trustees and corporate trustees proportionate to support the effective collection of the minimum tax?	In our view, the collection mechanisms are not proportionate. PAYG instalments would require trustees to prepay tax on income not yet earned and where beneficiary entitlements have not been determined. Discretionary trusts typically have variable income, making instalment calculations inherently difficult. As noted in our response to question 8, consideration should be given to implementing the regime without trustee-level tax payment obligations. Instead, trust income could be 'tagged' as a separate category and included in the beneficiary's tax return at a 30% minimum rate.
15.	Are there any other matters that should be considered in the design of the collection mechanisms?	The Law Society suggests the following matters for consideration:

No.	Areas of focus	Law Society comments
		• Trustee-level tax payment obligations may need to be confined to the final trust in a distribution chain to avoid cascading liabilities that cannot be funded from available cash. • Timing must be considered, as trustees may have no liquid assets if the minimum tax is assessed after trust income has been distributed. Although trustees may have a general right of indemnity from trust assets for liabilities properly incurred, it is unclear, in the context of the reforms, whether that right would include the ability for trustees to retain amounts from distributions or recover amounts from beneficiaries to fund a trustee-level minimum tax liability where the payment obligation arises after the trust income has been distributed. • See the responses to questions 1 and 3 in respect of solicitors' trust arrangements. In addition, amended assessments may create offset entitlements that beneficiaries cannot retrospectively claim given the non-refundable, non-carry-forward nature of the offset.
High Court decision in the *Bendel* case		
16.	What, if any, consequential interactions arise between the minimum tax on discretionary trusts and the revised 2018-19 Budget measure?	The Law Society suggests that Treasury reconsiders whether the proposed legislative response to the *Bendel* decision remains necessary, particularly in light of the proposed denial of minimum tax offsets to corporate beneficiaries and the previously mentioned expectation of an approximately 70% effective tax rate on distributions to companies. The interaction between the minimum tax and the announced but unenacted 2018-19 Budget measure to bring unpaid present entitlements within Division 7A should be considered together. If a corporate beneficiary's unpaid present entitlement is treated as an unfranked deemed dividend under a revived Division 7A measure at the same time as that beneficiary is denied a minimum tax offset, the cumulative effect could be materially punitive.
17.	Are there any other issues or implications as a result of the High Court's decision in *Bendel* that should be considered as part of the design and implementation of the revised 2018-19 Budget measure?	The Law Society is concerned that small businesses are now being required to plan around three unsettled areas of law at once: the minimum tax, rollover relief and unpaid present entitlements. It is suggested that Treasury consider settling the design of all three measures together before finalisation. If corporate beneficiaries face effective tax rates of 70% and unpaid present entitlements are also brought within Division 7A, the cumulative effect could be more severe than Treasury has contemplated.