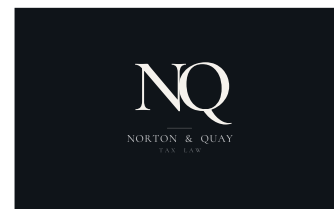


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Our reference Trusts minimum tax consultation



This submission is not confidential and may be published.

31 July 2026

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Dear Assistant Secretary

Minimum tax on discretionary trusts - submission on the Consultation Paper of 8 July 2026

A. Introduction

1. This submission responds to the consultation paper [*Minimum tax on discretionary trusts*](#) released on 8 July 2026 (the **Paper**). The Paper seeks views on the implementation of the 30 per cent minimum tax on discretionary trusts announced in the 2026-27 Budget, to commence on 1 July 2028.
2. Norton & Quay Tax Law (the **firm**) is a specialist tax law firm in Sydney. The firm acts for private groups, businesses, families and their professional advisers. A substantial part of its practice concerns dealing with all aspects of trusts including the establishment, administration, restructuring and taxation of trusts. This submission was prepared by Arda Ahmed, the firm's Principal. It is not confidential and may be published.
3. We consider that, judged against the objectives the Government has itself articulated, the minimum tax fails for the following reasons:
 - (a) it bears most heavily on the beneficiaries the wage earner comparison is intended to protect;
 - (b) it collects more tax than the wage earner selected as its benchmark;
 - (c) it taxes income flowing to corporate beneficiaries at rates no employee faces; and
 - (d) it rests on a definitional foundation the Paper itself leaves unsettled.
4. In the firm's opinion the measure should be withdrawn.
5. For that reason the submission does not respond to the seventeen discussion questions *seriatim*. Where a measure does not achieve its objective, refinement of its implementation cannot repair it. In this document:
 - (a) Section B summarises the argument;
 - (b) Section C sets out the Government's objectives in its own words;
 - (c) Section D measures the announced settings against them;

- (d) Section E examines how comparable jurisdictions confront the same problem; and
 - (e) Section F proposes an alternative.
6. The firm has prepared a detailed analysis of each discussion question and would provide a further submission on any of them at Treasury's request.
 7. Unless otherwise indicated, legislative references are to the *Income Tax Assessment Act 1936* (Cth) (the **ITAA 1936**) or the *Income Tax Assessment Act 1997* (Cth) (the **ITAA 1997**).

B. Executive summary

The burden falls where the rationale says it should not

8. The offset returned to beneficiaries cannot be refunded, cannot be carried forward and cannot be applied against the Medicare levy.¹
9. A beneficiary whose average rate on their total taxable income is at or above 30 per cent is generally unaffected. The whole of the net burden is borne by beneficiaries below that level: the retiree, the carer and the adult child studying. A retiree whose only income is a \$30,000 distribution presently bears \$1,652 of income tax before offsets, against \$9,000 payable by the trustee under the measure, without any avoidance being involved.²

The measure collects more than its own benchmark and taxes companies twice

10. On the Paper's cameo, \$200,000 of trust income distributed to a single beneficiary bears \$64,000 in tax, against \$59,602 on the same income earned directly.³ For corporate beneficiaries the trustee's 30 per cent is followed by company tax of 30 per cent: 60 per cent on the Paper's own cameo before any amount reaches a shareholder.⁴ The top marginal rate, including the Medicare levy, is 47 per cent. Denying the offset is not integrity. It is double taxation as policy.

The scope of the tax is unsettled

11. Liability turns on the Schedule 2F fixed trust test, which requires vested and indefeasible interests. Whether a particular unit trust satisfies that test turns on contestable questions of construction. Since *Colonial First State* many trustees have proceeded on the footing of the Commissioner's discretion and its published compliance approach.⁵
12. The Paper records stakeholder feedback that relying on the existing definition "may result in the scope of discretionary trusts for minimum tax purposes being broader than intended".
13. The Paper states that consideration will be given to how a discretionary trust should be defined.

¹ Ibid 5–6: the minimum tax offset "will not be able to be refunded or carried forward" and cannot be used to reduce the Medicare levy; where a trustee beneficiary is itself a discretionary trust in scope, any excess is not passed on (the Paper, page 7).

² At legislated 2028–29 rates, income tax of \$1,652 on \$30,000 before the low income tax offset and any seniors and pensioners tax offset, against trustee minimum tax of \$9,000. Where those offsets apply, a larger part of the minimum tax offset is stranded.

³ The Paper (n 1) 6: on \$200,000 distributed wholly to Individual A the trustee pays \$60,000 and \$4,398 of the offset is stranded; with the \$4,000 Medicare levy the total is \$64,000. The same income earned directly bears \$55,602 of income tax plus the \$4,000 Medicare levy: \$59,602.

⁴ Daniel Smedley, 'The Minimum Tax on Discretionary Trusts: Bucket Companies Are Worse than You Think', *Sladen Legal* (Web Page, 14 May 2026): an all-in rate of up to 69.72 per cent once the after-tax amount is distributed, on a top-rate shareholder.

⁵ *Colonial First State Investments Ltd v Commissioner of Taxation* [2011] FCA 16; Australian Taxation Office, Practical Compliance Guideline PCG 2016/16.



The idea has been examined and rejected before

14. The entity taxation draft of 2000 was withdrawn as “*not workable*”.⁶
15. The Board of Taxation concluded in 2002 that there are “no compelling arguments for broad-based reform to more closely align the tax treatment of discretionary trusts and companies”.⁷
16. The Henry Review recommended that the trust provisions be rewritten.⁸

The revenue is fragile and the complexity is permanent

17. Of the \$4.5 billion booked over the five years from 2025–26, effectively the whole of it, \$4,470.0 million, falls in 2029–30, the first year in which more than a rounding amount is booked, and no later year is published. That year falls within the rollover window running to 30 June 2030, whose purpose is to move taxpayers out of discretionary trust structures.⁹ New Zealand’s experience indicates the scale of the timing behaviour such announcements produce.¹⁰ The measure should be withdrawn in favour of the alternative in section F.

C. The Government’s objectives, in its own words

18. The Paper and its companion documents state the objective of the measure in four ways, each of which this submission takes at face value:
 - (a) *“In the 2026–27 Budget, the Government announced that it will introduce a 30 per cent minimum tax on discretionary trusts from 1 July 2028, to better align the tax rate on trust income with the tax rates paid by workers.”*
 - (b) *“These arrangements can result in high-income and high-wealth taxpayers who structure their affairs using discretionary trusts, paying less tax relative to salary and wage earners on similar income levels, or paying similar tax relative to salary and wage earners on lower income levels. This reduces the progressivity of the tax system.”*
 - (c) *“The underlying basis on which trusts are taxed will remain unchanged.”*¹¹
 - (d) *“The minimum tax on discretionary trusts won’t change or limit the use of trusts for legitimate reasons, but will more closely align the tax rates for trusts with the tax rates paid by workers and families who earn a living from wages.”*¹²
19. Alignment with wage earners, protection of progressivity, continuity of the basis on which trusts are taxed, no burden on legitimate use. Each objective is coherent. The announced settings achieve none of them.

⁶ Peter Costello, [‘Entity Taxation’](#) (Media Release, 27 February 2001): submissions raised “technical problems ... that meant that the draft legislation is not workable”.

⁷ Board of Taxation, [Taxation of Discretionary Trusts](#) (Report, November 2002) rec 1: the report also recorded ATO advice that non-compliance with the trust integrity provisions was “not considered to be a significant concern”.

⁸ Australia’s Future Tax System Review, [Final Report](#) (December 2009, released May 2010) rec 36 (‘Henry Review’).

⁹ Australian Government, *Budget Paper No 2: Budget Measures 2026–27* (12 May 2026) (‘BP2’): \$4.5 billion over the five years from 2025–26, of which \$4,470.0 million falls in 2029–30, with \$66.0 million of ATO administration funding.

¹⁰ Inland Revenue (NZ), [Trusts and Estates Statistics \(IR6\)](#) (Dataset, 8 October 2025): dividends received by trusts rose 194 per cent and trustee income 167.5 per cent in the 2024 tax year, ahead of the 1 April 2024 rate change.

¹¹ The Paper (n 1) 2: the first three statements are drawn from this page.

¹² Jim Chalmers, [‘Consultation on Discretionary Trusts Reform Implementation’](#) (Media Release, 8 July 2026).



D. The measure does not achieve those objectives

The incidence falls on the wrong taxpayers

20. The trustee pays 30 per cent of the trust's taxable income unless higher rates or exclusions apply. Each non-corporate beneficiary receives an offset for their share of that tax, capped at their own liability.
21. It follows as a matter of arithmetic that the floor binds only where a beneficiary's average rate is below 30 per cent. The detriment is generated by the tax-free threshold and the 14 per cent bracket, and is borne in full, \$9,748 per beneficiary per year, at every level of trust income between \$45,000 and \$135,000. For beneficiaries above the Medicare levy thresholds the effective floor is in substance 32 per cent.¹³
22. A measure aimed, in the Paper's words, at "*high-income and high-wealth taxpayers*" collects \$4,398 from the Paper's own beneficiary on \$200,000, and \$9,748 from a beneficiary anywhere between \$45,000 and \$135,000. The burden is heaviest below the top of the 30 per cent bracket. The same Budget raises the effective tax-free threshold for wage income to \$19,985 through an offset funded in part by this measure.¹⁴ A carer whose trust income bears 30 per cent from the first dollar receives none of it because her income is not derived from work.

It exceeds the benchmark it selects

23. On the Paper's cameo, \$200,000 distributed wholly to one beneficiary bears \$64,000 including the Medicare levy, against \$59,602 on the identical income earned directly by one individual. A taxpayer requires taxable income of \$229,320 before their average income tax rate reaches 30 per cent.¹⁵ The measure does not restore the wage earner's position. It exceeds it. That is a surcharge on the trust form itself, not a floor beneath avoidance.

Corporate beneficiaries are taxed twice, deliberately

24. Under the current law, company tax on a trust distribution is a staging post: it generates franking credits and shareholders are ultimately taxed at their own rates. Under the measure, the trustee's 30 per cent generates no franking credit, no offset and no refund. The Paper's cameo produces \$60,000 of tax on \$100,000 of income before any amount reaches a shareholder. One published practitioner estimate puts the all-in rate at up to 69.72 per cent for a top-rate shareholder; the figure varies with the base assumed and the shareholder's own rate.
25. The Paper describes denial as "*the simplest mechanism to prevent the minimum tax being undermined by interposing a company between the trust and the ultimate beneficiary, without changing the imputation system*". A narrower course is available: allow the corporate beneficiary the offset and provide that tax discharged by the offset does not generate franking credits. The firm accepts that this requires a targeted imputation amendment. It is a proportionate price for not taxing the same income twice. Simplicity for the drafter is not a tax policy.

¹³ Income tax on \$45,000 at 2028–29 rates is \$3,752 against a 30 per cent floor of \$13,500. The 32 per cent figure is the 30 per cent floor plus the 2 per cent Medicare levy, which the minimum tax offset cannot reduce.

¹⁴ BP2 (n 10): the trust and CGT measures are identified as funding the Working Australians Tax Offset, which lifts the effective tax-free threshold for wage income to \$19,985, or up to \$24,985 with the low income tax offset.

¹⁵ At 2028–29 rates, income tax on taxable income of \$229,320 is \$68,796, an average rate of 30.0 per cent excluding the Medicare levy; at \$229,000 the average rate is 29.98 per cent.



The perimeter is not drawn

26. The Paper does not propose a bespoke definition of a discretionary trust. It records that the current framework does so by exclusion, as any trust that is not a “*fixed trust*”, a test requiring “*vested and indefeasible*” interests. The Paper asks how the term should be defined.¹⁶ The application of that test to unit trusts has been contested since *Colonial First State*, where the interests of members of a registered scheme were held defeasible because the members could modify the constitution, or repeal and replace it, by special resolution. For a private unit trust the same question arises under the amendment machinery of the deed itself. A deed for a new trust can be drafted with a view to satisfying the test, by entrenching the entitlements to income and capital against variation without the consent of each affected unitholder and by confining issues and redemptions to net asset value, to which the saving in s 272-5(2) applies. For existing trusts that course is often unavailable, because an amendment of that kind may exceed the amendment power, may raise resettlement questions and may attract State duty. Reliance is commonly placed instead on the Commissioner’s discretion.¹⁷
27. The consequence is that ordinary family unit trusts, property syndicates and joint venture trusts, arrangements not ordinarily described as discretionary, may fall within the measure according to the terms of the particular deed. The Paper records stakeholder feedback to similar effect, framed by reference to modern commercial trusts. The firm does not suggest that the boundary cannot be drawn. The submission is that it has not been drawn. A liability rule of this reach should identify its subjects in the legislation rather than leave them to contestable questions of construction or to the exercise of a discretion.

The conclusions are not novel

28. The entity taxation exposure draft of 2000, which would have taxed trusts as companies, was withdrawn on the Board of Taxation’s advice, the Treasurer recording problems “*in relation to distinguishing the source of different distributions, and valuation and compliance issues*” that meant it was “*not workable*”. The firm accepts that a floor computed on the net income of the trust does not raise those particular problems.
29. The Board’s 2002 report concluded that “*there are no compelling arguments for broad-based reform to more closely align the tax treatment of discretionary trusts and companies*”, warning that the transitional costs would fall most heavily on small businesses and farmers. The Henry Review recommended that the trust provisions be “*updated and rewritten*”. The Explainer invokes five decades of reviews in support of the measure, yet its table does not note the 2002 report, which reached the contrary conclusion.¹⁸

The revenue is not durable

30. The Budget estimates \$4.5 billion over the five years from 2025-26, of which \$4,470.0 million is attributed to 2029-30, a year which itself falls within the rollover window ending 30 June 2030. The estimate therefore depends on behaviour in a single year.

¹⁶ The Paper (n 1) 2–3, citing ITAA 1936 s 102UC(4) and sch 2F s 272-5; ‘fixed trust’ is defined in sch 2F s 272-65. The Paper does not identify which existing definition of a widely held trust is intended.

¹⁷ ITAA 1936 sch 2F s 272-5(3), under which the Commissioner may treat an interest as a fixed entitlement having regard to the circumstances in which the entitlement is capable of not vesting or the defeasance can happen, the likelihood of that occurring and the nature of the trust; Australian Taxation Office, Practical Compliance Guideline PCG 2016/16.

¹⁸ Treasury (Cth), [Minimum Tax on Discretionary Trusts](#) (Budget Factsheet, May 2026) (the **Explainer**); Table 1 lists Asprey (1975), the Review of Business Taxation (1999), Australia’s Future Tax System (2009) and Re:think (2015).



31. A company with turnover below \$50 million and no more than 80 per cent passive income pays 25 per cent, with franking credits refundable to individuals. The rollover relieves an immediate capital gains tax cost, though not State duty. Chartered Accountants ANZ has cited estimates, drawing on assumptions it attributes to the Parliamentary Budget Office, that roughly a quarter of the projected revenue may not materialise as distributions are re-routed into salaries and dividends.¹⁹ New Zealand's data records dividends received by trusts rising 194 per cent in the year before a smaller change commenced, which is timing behaviour rather than permanent erosion, and, as at the date of this submission, Inland Revenue has not published data for the first year at the new rate.
32. Against that uncertain collection stand certain costs: on the Explainer's figures around 350,000 active small businesses operate through a discretionary trust, of which Treasury expects 140,000 not to pay additional tax or need to restructure in a given year, leaving some 210,000 that will either pay additional tax or need to restructure, with reported restructure costs of \$15,000 to \$50,000 for those that restructure, against \$66.0 million provided to the ATO.²⁰

E. No comparable jurisdiction applies a general minimum rate to trust income assessed to a beneficiary

33. Each of the four jurisdictions the firm has examined confronts the same two risks: accumulation at a favourable rate and splitting to members on lower rates. In each, the general structure is the same: retained income taxed at a high rate, income assessed to a beneficiary taxed at that beneficiary's own rate, and targeted rules for abuse.

Jurisdiction	Retained income	Distributed income	Targeted integrity
New Zealand	39 per cent trustee rate (from 1 April 2024), NZ\$10,000 de minimis	Beneficiary's own marginal rates, subject to the rules opposite	Minor beneficiary and close company rules
United Kingdom	45 per cent trust rate (39.35 per cent dividends)	45 per cent credit, reclaimable by low and nil-rate beneficiaries	Settlements and parental settlement rules
United States	Compressed brackets to 37 per cent, on retained income only	Distribution deduction: taxed once, at beneficiary rates	Grantor trust rules and kiddie tax
Canada	Top marginal rate on retained income	Section 104(6) deduction: taxed at beneficiary rates	Tax on split income (TOSI) and attribution rules
Australia (proposed)	45 per cent flat (s 99A) plus Medicare levy, unchanged	30 per cent non-refundable floor, even on income distributed to low-rate beneficiaries	s 100A, Div 6AA, Part IVA retained, plus the floor

¹⁹ Chartered Accountants Australia and New Zealand, *Federal Budget 2026–27: Proposed Changes to Trust Distributions* (May 2026), drawing on assumptions attributed to the Parliamentary Budget Office.

²⁰ Council of Small Business Organisations Australia, Media Statement (6 July 2026): reported restructure costs of \$15,000 to \$50,000 per business.

34. New Zealand, which on the Explainer's figures uses trusts more intensively than Australia,²¹ applies its 39 per cent rate to trustee income and taxes beneficiary income at the beneficiary's own rates, subject to targeted rules for minors and for close companies connected with the trust or its settlor²² and it added a NZ\$10,000 de minimis when submissions showed low-income trusts would be over-taxed.²³ Canada has taxed split income since 2000 and extended the rule from minors to adults in 2018, rather than taxing every trust in the country.²⁴
35. In none of the four jurisdictions the firm has examined is a general, non-refundable floor applied to trust income distributed to, and assessed in the hands of, a beneficiary on a lower rate. Several impose entity-level charges of other kinds, or higher rates on defined categories of distributed income.
36. What the firm has not identified is a floor of general application. Australia already has the elements of that model: net income of a resident trust estate that is neither assessed to a beneficiary under section 97 nor to the trustee under section 98 is taxed to the trustee under section 99A at a flat 45 per cent. Division 6 assesses the beneficiary presently entitled on a corresponding share of the trust's net income at their own rate, with the trustee assessed under section 98 in defined cases. Section 100A, Division 6AA and Part IVA are directed at defined mischiefs, tested in *Guardian* and *BBlood*.²⁵

F. A workable alternative

37. If the Parliament concludes that directing passive income to low-rate adult family members warrants a legislative response, the response should be aimed at that conduct. The firm proposes a targeted split income rule on the Canadian model, though at a floor rate rather than Canada's top marginal rate: distributions of investment or business income to an adult beneficiary who neither works in the relevant enterprise nor contributed its capital would be taxed at that rate, subject to exclusions for regular engagement in the business, taken to be satisfied at an average of 20 hours a week, reasonable returns on contributed property and, where the beneficiary's spouse has attained the age of 64 before the year, amounts that would have been excluded in that spouse's hands. A de minimis threshold, as in New Zealand, would leave the retiree, the carer and the adult child studying taxed on the ordinary scale. The exclusions in the Paper for special disability trusts, vulnerable minors and primary production income should be preserved.
38. The rule attaches to the character of the receipt rather than to the vehicle. It requires no statutory definition of "*discretionary trust*", no restructuring, no rollover and no State duty. It reaches equivalent splitting through partnerships and private companies, which the minimum tax does not, and it leaves the spouse who works in the business, or the beneficiary who contributed the capital, where the rate scale places them.

²¹ The Explainer (n 19): around 40 trusts per 1,000 people in Australia against around 44 per 1,000 in New Zealand.

²² Inland Revenue (NZ), [Special Report: 39% Trustee Tax Rate](#) (April 2024); *Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Act 2024* (NZ).

²³ Nicola Willis and Simon Watts, '[Trustee Tax Change Welcomed](#)' (Media Release, 11 March 2024): trusts with trustee income of NZ\$10,000 or less remain at 33 per cent, relieving a further 27,000 trusts, alongside carve-outs for deceased estates and disabled beneficiary trusts.

²⁴ *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 104(6), 104(13), 120.4; Canada Revenue Agency, '[Income Sprinkling](#)': the top marginal rate applies to the split income of specified individuals, with exclusions for regular engagement in the business (20 hours per week), reasonable returns on contributed property and, where the spouse has attained the age of 64 before the year, amounts that would have been excluded for that spouse.

²⁵ ITAA 1936 ss 99A, 100A, pt III div 6AA; [Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust \[2023\] FCAFC 3](#); [BBlood Enterprises Pty Ltd v Commissioner of Taxation \[2022\] FCA 1112](#); ATO, TR 2022/4 and PCG 2022/2, administrative positions rather than law.



39. The remaining elements of a coherent response can be stated at a high level. First, retained income requires no new rule: section 99A already taxes accumulation at 45 per cent. Secondly, the deferral concern attaching to corporate beneficiaries belongs in Division 7A: the announced 2018-19 measure should be enacted prospectively from Royal Assent, with Subdivision EA recast so that the outcome is a single charge, leaving the income taxed at the recipient's rate with credit for company tax already borne rather than as an unfranked deemed dividend. In *Bendel* a majority of the High Court held that an unpaid present entitlement is not, without more, a loan within section 109D(3), observing that the facts broadly correspond with the circumstances to which Subdivision EA is addressed.²⁶
40. Thirdly, the Paper records a stakeholder proposal for an irrevocable election to be treated and taxed as a fixed trust, and seeks views on its interaction with trust law and trustees' obligations. That approach merits development, because it can deliver fixed and transparent outcomes without a conveyance. The firm would assist with the questions it raises. Fourthly, the rewrite of Division 6 recommended by the Henry Review and commenced in 2011 should be completed on a legislated timetable.

G. Conclusion

41. A consultation period of 23 days, spanning school holidays, is not commensurate with a change of this significance to the taxation of trust income. The Paper acknowledges that its principles "*have not received Government approval and are not yet law*". The firm respectfully urges that they remain so. The alternative in section F achieves the Government's objective at a fraction of the cost. We commend it.

Yours sincerely

Arda Ahmed

Principal

Norton & Quay Tax Law

²⁶ [Commissioner of Taxation v Bendel \[2026\] HCA 18](#); the Paper (n 1) 17.

