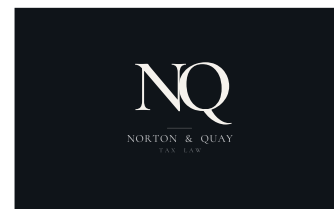


Principal      Arda Ahmed  
Writer        Arda Ahmed  
Email         arda@nortonquaytaxlaw.com.au  
Our reference    Trusts minimum tax consultation



***This submission is not confidential and may be published.***

18 September 2026

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

Email: [mintaxtrusts@treasury.gov.au](mailto:mintaxtrusts@treasury.gov.au)

Dear Assistant Secretary

## Minimum tax on discretionary trusts - submission on the exposure draft legislation of 3 September 2026

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### A. Introduction

1. This submission responds to the exposure draft legislation and explanatory materials released on 3 September 2026 to implement the 30 per cent minimum tax on discretionary trusts announced in the 2026-27 Budget (together, the **Exposure Draft**).<sup>1</sup>
2. The Exposure Draft comprises:
  - (a) inserts for a Treasury Laws Amendment Bill 2026 imposing the minimum tax (the **Minimum Tax Draft**);
  - (b) inserts providing an electable regime for discretionary trusts (the **Election Draft**);
  - (c) inserts providing roll-over relief (the **Roll-over Draft**);
  - (d) an Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026;
  - (e) three sets of explanatory materials (the **Minimum Tax EM**, the **Election EM** and the **Roll-over EM**); and
  - (f) a fact sheet (the **Fact Sheet**).
3. 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 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.
4. On 31 July 2026 the Firm lodged a submission on the consultation paper of 8 July 2026 (the

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<sup>1</sup> Treasury, *Minimum tax on discretionary trusts - exposure draft legislation* (Consultation c2026-799771, 3 to 18 September 2026). Paragraph references to explanatory materials are to the paragraph numbering used in each document.

**July Submission** and the **Paper**).<sup>2</sup> The July Submission concluded that the minimum tax should be withdrawn. That remains the Firm's position. The Exposure Draft has not answered the reasons given in July. Sections B and C develop the two that matter most.

5. This submission is confined to the Exposure Draft. Sections B and C deal with the minimum tax itself. The balance of the submission deals principally with the electable regime in proposed Division 6F of Part III of the ITAA 1936 (the **Election Regime**). The Firm concentrates on the Election Regime for two reasons. It is the only path out of the minimum tax that the Exposure Draft offers to a trust holding land or other dutiable property, because the roll-over leaves State and Territory duty untouched.<sup>3</sup> And it is the part of the Exposure Draft that most directly engages the law of trusts, on which the explanatory materials say least.
6. In summary:
  - (a) the Election Regime asks a trustee to do what equity says a trustee cannot do, which is to commit in advance to the manner in which it will exercise a dispositive discretion in every future year. It then attaches to the trustee's compliance with its duties a charge of 47 per cent on the whole of the year's net income;
  - (b) because the trustee's discretion survives the election, as the Election EM concedes, every duty attached to that discretion survives with it. A trustee that follows the nomination without *real and genuine consideration* each year is in breach of trust;
  - (c) the only trustee that can lawfully promise what the election requires is one that has varied its deed to give the nominees fixed entitlements and to entrench them against later variation. That trust is a fixed trust outside the minimum tax without any election;
  - (d) the terms of the Election Draft are unworkable as drafted in the respects identified in section F; and
  - (e) the minimum tax itself answers **no** mischief that section 100A, Division 6AA, section 99A, family trust distribution tax and Part IVA do **not** already answer. **Among individuals it collects only from those whose own income tax is less than 30 per cent of what the trust gives them** (namely, the retired parent, the carer, the adult child with a disability and the family in the first years of a business). The Election Regime does **not** soften that outcome. The regime should be rejected with the measure it serves.
7. In this document:
  - (a) Section B asks what mischief the minimum tax is meant to cure;
  - (b) Section C identifies who pays it;
  - (c) Section D describes what a discretionary trust is and what the Exposure Draft assumes it is;
  - (d) Section E explains why the Election Regime **cannot** be operated by a trustee acting in accordance with its duties;
  - (e) Section F examines the terms of the Election Draft;

<sup>2</sup> Norton & Quay Tax Law, *Minimum tax on discretionary trusts - submission on the Consultation Paper of 8 July 2026* (31 July 2026).

<sup>3</sup> Roll-over EM 1.64: "Goods and services tax, fringe benefits tax, state and territory duties and other taxes continue to apply according to their ordinary operation." The Fact Sheet, page 1, states that the election "would not require a restructure and is not expected to result in state and territory stamp duties".



- (f) Section G sets out, if the Election Regime proceeds at all, the *least* that **must** change;
  - (g) Section H deals briefly with other matters in the Exposure Draft; and
  - (h) Section I provides a conclusion.
8. Unless otherwise indicated, legislative references are to:
- (a) the *Income Tax Assessment Act 1936* (Cth) (the **ITAA 1936**); or
  - (b) the *Income Tax Assessment Act 1997* (Cth) (the **ITAA 1997**).

References to proposed provisions are to the provisions as they appear in the Exposure Draft.

## B. What is the mischief?

9. The Paper states the mischief in one sentence:

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.<sup>4</sup>

10. The Treasury factsheet issued with the Budget (the **Budget Explainer**) states it: trustees allocate income “*to others who have a lower marginal tax rate, while often retaining the income*”.<sup>5</sup>
11. The Firm asks Treasury to read the second statement again. A trustee that appoints income to a beneficiary on a lower rate while the income is retained for someone else has entered into a reimbursement agreement. **Section 100A has taxed that arrangement in the trustee’s hands, at the top rate, since 1979.**<sup>6</sup>
12. Section 100A stops where a family’s ordinary dealings begin. An agreement “*entered into in the course of ordinary family or commercial dealing*” is not a reimbursement agreement.<sup>7</sup> The exclusion is not a loophole. It is the line Parliament drew in 1979. On one side is trust stripping, in which a beneficiary exempt from tax was introduced to a trust and the income passed back, in a tax-free form, to the people the trust was meant to benefit.<sup>8</sup> On the other is the way a family has always used a trust, which is to provide for its own members.
13. A parent who provides for an adult child and an adult child who meets a retired parent’s living costs are not avoiding tax. They are doing what families do. The law of trusts exists to let them do it. The Firm’s Principal has argued elsewhere that the exclusion is best understood by asking whether a dealing is artificial, contrived or convoluted and that section 100A, with its unlimited amendment period, was meant for the serious case.<sup>9</sup> The Exposure Draft does not say that the Government disagrees. It does something else. It takes the ordinary family dealing that Parliament excluded from an anti-avoidance provision in 1979 and taxes it at 30 per cent. The dealing the law leaves alone as ordinary is the dealing the Government now calls the mischief.

<sup>4</sup> The Paper 2.

<sup>5</sup> Treasury, *Minimum Tax on Discretionary Trusts* (Budget Factsheet, May 2026) 1.

<sup>6</sup> Section 100A was inserted by the *Income Tax Assessment Amendment Act 1979* (Cth) (No 12 of 1979). Where it applies, the beneficiary is taken not to be presently entitled and the trustee is assessed under section 99A.

<sup>7</sup> Subsection 100A(13).

<sup>8</sup> A Ahmed and C Marston, *The use of trusts in the 21st century - is the complexity worth it?* (Paper, The Tax Institute NSW Tax Forum, 22 May 2025) (the **Ahmed and Marston Paper**) 40, quoting the explanatory memorandum to the Bill that inserted section 100A.

<sup>9</sup> Ahmed and Marston Paper 44-45; ITAA 1936 s 170(10), table item 17.



14. The other things the Paper could mean by splitting are already dealt with too:
  - (a) Income appointed to a minor is, subject to limited exceptions, taxed at the top rate under Division 6AA.
  - (b) Income the trustee accumulates is taxed at 45 per cent under section 99A.<sup>10</sup>
  - (c) A distribution outside the family group of a family trust attracts family trust distribution tax.<sup>11</sup>
  - (d) A scheme entered into for the dominant purpose of obtaining a tax benefit is caught by Part IVA.
15. **These provisions are not dormant.**
16. In *Guardian* the Full Court found no reimbursement agreement on the facts and applied Part IVA to the 2013 year instead.<sup>12</sup>
17. In *BBlood* the Commissioner succeeded under section 100A at first instance and on appeal.<sup>13</sup> The Commissioner administers section 100A under a public ruling and a compliance guideline.<sup>14</sup>
18. What remains, once those provisions have done their work, is a distribution to a family member who receives the income and keeps it. That person pays tax on it at the rates Parliament has set for a person with that income, because it is that person's income.
19. The wage-earner comparison in the Paper is therefore not a comparison between a beneficiary and a worker. It is a comparison between one worker's income and the combined income of a family, taxed as though the family were one person.
20. The Budget Explainer's own cameo makes the point. Steven's three relatives "*who have no other income*" each receive \$50,000.<sup>15</sup> Either they:
  - (a) receive it, in which case each is taxed exactly as a worker on \$50,000 is taxed and there is **no** mischief; or
  - (b) do **not** receive it, in which case section 100A applies today and the trustee is assessed at the top rate. There is no third case. **The minimum tax cures a mischief that Parliament cured in 1979 and that the courts enforce.**

## C. Who pays

21. The Government's floor collects nothing from the people the Paper names.
22. The Budget Explainer says so:

where a trust is already distributing to non-corporate beneficiaries with a tax rate of 30 per cent or higher there will be no overall increase in tax paid.<sup>16</sup>

<sup>10</sup> *Income Tax Rates Act 1986* (Cth) s 12(9).

<sup>11</sup> Section 271-15 of Schedule 2F.

<sup>12</sup> *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* [2023] FCAFC 3 (**Guardian**); Australian Taxation Office, Decision Impact Statement, *Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust* (24 April 2023).

<sup>13</sup> *BBlood Enterprises Pty Ltd v Commissioner of Taxation* [2022] FCA 1112 (Thawley J) (**BBlood**); *B&F Investments Pty Ltd as trustee for the Illuka Park Trust v Commissioner of Taxation* [2023] FCAFC 89.

<sup>14</sup> Taxation Ruling TR 2022/4; Practical Compliance Guideline PCG 2022/2.

<sup>15</sup> Budget Explainer 5.

<sup>16</sup> Budget Explainer 3.



23. An individual's average rate reaches 30 per cent at a taxable income of \$229,320.<sup>17</sup> A beneficiary above that pays nothing more.
24. A corporate beneficiary already pays 25 or 30 per cent on every dollar it receives, which is the floor the Government says it wants; the Minimum Tax Draft responds by denying the company any offset, so that the same dollar bears 30 per cent in the trustee's hands and 25 or 30 per cent again in the company's.<sup>18</sup>
25. The high-income taxpayer of the Paper's rationale is, on the Government's own description, untouched. Whatever this measure is, it is **not** a tax on the rich. The rich are above the floor already.
26. **The measure collects from an individual only where the tax on the whole of that individual's income is less than 30 per cent of the trust income appointed to them.** An individual whose own tax is at least 30 per cent of the trust income absorbs the offset and pays nothing more, whatever their average rate: a beneficiary with \$100,000 of wages and a \$20,000 distribution has an average rate of 21.9 per cent and pays nothing more, because the tax on the wages absorbs the offset. An individual with little or no other income cannot. For that individual the measure collects in full: 30 cents in every dollar of trust income from the first dollar, with an offset that cannot exceed the beneficiary's own tax, cannot be refunded, cannot be carried forward and cannot reduce the Medicare levy.<sup>19</sup>
27. The people in that position are the people a family trust exists to provide for. At the rates legislated for 2028-29, before the Medicare levy and before offsets, where the trust income is rent or interest and the beneficiary has no other income:<sup>20</sup>
  - (a) the retired parents - a couple in their seventies whose family trust holds the investments of a working life draw \$40,000 each. Today each pays \$3,052. Under the measure the trustee pays \$24,000, they recover \$6,104 and \$17,896 of their \$80,000 is gone;
  - (b) the carer - an adult child who left work to look after a parent with dementia receives \$40,000 a year from the family trust. Today the child pays \$3,052. Under the measure the trustee pays \$12,000, the child recovers \$3,052 and the family loses \$8,948 of the money that keeps the carer at home;
  - (c) the adult with a disability - a son or daughter of 25 with a disability, supported from the family trust with \$30,000 a year, pays \$1,652 today. Under the measure the trustee pays \$9,000 and \$7,348 is stranded. The Minimum Tax Draft excludes income for vulnerable children under 18 and for special disability trusts. It excludes nothing for that person;<sup>21</sup>
  - (d) the new business - a couple who start a business in a trust, as some 350,000 small businesses have, make \$60,000 in their first year and take \$30,000 each. Today they pay \$3,304 between them. Under the measure the trustee pays \$18,000, they recover \$3,304 and \$14,696 is gone in the year they can least afford it. A couple who earned the same \$60,000 in wages would pay \$3,304. The measure does not align the trust family with the wage-earning family. It taxes the trust family at 30 per cent and the wage-earning family at 5.5 per cent; and

<sup>17</sup> July Submission footnote 15.

<sup>18</sup> Proposed s 101AF(1)(d); July Submission [24].

<sup>19</sup> The Paper 5-6; proposed s 101AF(2) and its note; July Submission [8] and [21].

<sup>20</sup> Nil to \$18,200; 14 per cent from \$18,201 to \$45,000; 30 per cent from \$45,001 to \$135,000. The figures are calculated on the same basis as the July Submission.

<sup>21</sup> Proposed ss 101AB(1)(b) and 101AE(1)(b).



- (e) the Government's own family - Steven's three relatives "*who have no other income*" each receive \$50,000. The Budget Explainer says the family pays \$24,008 today and that the measure "*would bring the total tax paid on Steven's income to around the amount of tax paid by Angela*".<sup>22</sup> It does so by taking more than \$35,000 from four people who have \$50,000 each. Angela pays \$59,352 because \$200,000 is her income. If the \$200,000 is Steven's, section 100A applies today. If it is theirs, they are four people on \$50,000 and the measure taxes each of them at 30 per cent, which no worker on \$50,000 pays.
28. The Fact Sheet says that more than 95 per cent of individual taxfilers will **not** be affected. That is because only 5 per cent of taxfilers, some 810,000 adults, receive a distribution from a discretionary trust at all.<sup>23</sup>
29. The Budget Explainer expects around half of all discretionary trusts to be affected in any year.
30. Of the 350,000 small businesses that operate through a trust, it expects some 210,000 to pay more or to restructure.<sup>24</sup>
31. Its advice to those businesses is that the impact can be reduced "*by employing beneficiaries working in the business, rather than paying them a trust distribution*".<sup>25</sup> A family that has just started a business and **cannot** yet pay wages is **not** helped by that. Neither is a retired parent who does **not** work in the business or an adult child with a disability who cannot.
32. Every one of these people is taxed today at the rate Parliament set for a person with their income. The measure taxes them at 30 per cent of every dollar, the average rate Parliament has set for a person earning \$229,320. That is why the Firm offers the Government no alternative to withdrawing the minimum tax.
33. **An election designed to soften a tax that should not exist concedes that it should. The Firm makes no such concession.** Section G is not an alternative. It lists the changes the Election Draft needs if the Government proceeds regardless. They would reduce the harm. They would not cure it.

## **D. What a discretionary trust is and what the Exposure Draft assumes it is**

### ***The trust***

34. A trust is an obligation enforceable in equity which rests on a person, as the owner of specific property, to deal with that property for the benefit of others or for a purpose. It is not a contract.
35. It can arise from the unilateral act of the person who creates it and the beneficiary gives nothing for it. It is not an entity.
36. The ITAA 1997 lists a trust among the things it calls an "*entity*" and then, because "*a right or obligation cannot be conferred or imposed on an entity that is not a legal person*", deems the trustee to be the entity instead.<sup>26</sup>
37. The trust began in the medieval use. A landowner conveyed land to trusted friends to hold for the landowner's family and the Chancellor, on the petition of the family, made the friends keep

<sup>22</sup> Budget Explainer 5.

<sup>23</sup> Budget Explainer 3; Fact Sheet 1.

<sup>24</sup> Budget Explainer 3; July Submission [32].

<sup>25</sup> Budget Explainer 3.

<sup>26</sup> ITAA 1997 s 960-100(1)(f) and (2) and note 1 to s 960-100(2).



faith. Nothing in that has changed. The whole of the law of trusts is the working out of one idea that a person who holds property for others must answer for it in conscience, to them and to a court. That idea has since carried charity, superannuation, managed investment, the solicitor's trust account and provision for those who cannot provide for themselves.

### ***The discretionary trust***

38. In a discretionary trust the objects of the trustee's discretion have **no** interest in the trust property.
39. What each has is "*a right to be considered as a potential recipient of benefit by the trustees*" and a right to have that interest protected by a court of equity.<sup>27</sup> As Lord Reid put it in the same case:  
  
If the trustees do decide to pay you something you do not get it by reason of having the right to have your case considered: you get it only because the trustees have decided to give it to you.<sup>28</sup>
40. The correlative of the object's right to be considered is the trustee's duty to consider. That duty is what makes the trust discretionary. The discretion is **not** a freedom conferred on the trustee for the trustee's convenience, rather **it is a burden held for the objects**.
41. A trustee of a discretionary power "*is still a trustee*"<sup>29</sup> and "*in the exercise of its fiduciary discretions is under constraints that do not apply to adult individuals disposing of their own property*".<sup>30</sup>
42. The discretion **must** be exercised "*in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred*".<sup>31</sup>
43. The trustee must "*consider periodically whether or not he should exercise the power*", must "*consider the range of objects of the power*" and must "*consider the appropriateness of individual appointments*".<sup>32</sup> It must inform itself of the circumstances of the objects, which in a family trust means their "*differing circumstances, needs and desires*".<sup>33</sup>
44. From that duty follows the rule that matters here.
45. **A trustee cannot decide in advance.** "*Speaking generally, a trustee is not entitled to fetter the exercise of discretionary power ... in advance*"; a resolution to that effect "*will be unenforceable*" and an agreement to that effect "*will not be enforced*".<sup>34</sup>
46. Equity's rule, in the terms Chesterman J adopted in *Dagenmont*, is that "*a fiduciary cannot effectively bind himself as to the manner in which he will exercise a discretion in the future*", whether by an antecedent resolution or by contract with a third party or a beneficiary.<sup>35</sup> "*Any fetter is of no effect.*"<sup>36</sup>

<sup>27</sup> *Gartside v Inland Revenue Commissioners* [1968] AC 553, 617-618 (Lord Wilberforce) (**Gartside**).

<sup>28</sup> *Gartside* 607 (Lord Reid).

<sup>29</sup> *McPhail v Doulton* [1971] AC 424, 449 (Lord Wilberforce).

<sup>30</sup> *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [82] (**Owies**), citing *Pitt v Holt* [2013] UKSC 26, [10].

<sup>31</sup> *Karger v Paul* [1984] VR 161, 163-164 (McGarvie J), quoted in *Owies* [85]; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 99-100 [7], adopted in *Owies* [87].

<sup>32</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 210 (Megarry V-C).

<sup>33</sup> *Owies* [111]; see also [93] and [115].

<sup>34</sup> *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2001] FCA 1628, [121] (Finkelstein J), as quoted in *Dagenmont Pty Ltd v Lugton* [2007] QSC 272, [17] (Chesterman J) (**Dagenmont**).

<sup>35</sup> *Dagenmont* [16], adopting P D Finn, *Fiduciary Obligations* (Law Book Co, 1977) [51].

<sup>36</sup> *Dagenmont* [14], adopting *Underhill and Hayton: Law Relating to Trusts and Trustees* (16th ed) 690.



47. In 2022 the Victorian Court of Appeal stated the rule in terms that could have been written for the Election Regime:

in each case, the discretion must be exercised as and when it arises. A trustee may not divest itself of the continuing responsibility of consideration by adopting a universal rule or by acting under the dictates of another.<sup>37</sup>

48. The rule is **not** a technicality. It exists because the objects' circumstances change and the trustee is the person the settlor chose to respond to the change. The student becomes the high earner and the high earner becomes the bankrupt. The spouse becomes the widow or widower. The grandchild is born. The child who was well falls ill.
49. A trustee that has bound itself in advance cannot respond. **A trust whose trustee cannot respond is no longer the instrument the settlor created.**

***What the Exposure Draft assumes***

50. None of this appears in the Exposure Draft.
51. The Minimum Tax EM describes the discretion in one way only, as "*flexibility*" that "*can allow trust income to be distributed to beneficiaries subject to lower marginal tax rates*".<sup>38</sup>
52. Three explanatory memoranda, sixty-three pages in all, do **not** mention the duty that governs that discretion.<sup>39</sup>
53. The Paper had described the fixed trust concept as "*grounded on equitable principles and trust law jurisprudence*"<sup>40</sup> and had asked, in its eighth discussion question, what "*practical or legal considerations would arise*" from an election, "*including their interaction with trust law and trustees' obligations*".<sup>41</sup>
54. The Exposure Draft's answer is three sentences.
55. One tells the trustee to consider:
- whether the requirements of the election can be met in line with permitted actions under the trust deed.<sup>42</sup>
56. The other two assert that the nomination "*does not restrict the trustee's discretion*" and that the trustee "*continues to have unrestricted capacity*" to decide who is made presently entitled.<sup>43</sup>
57. The Firm accepts those two sentences as accurate. Section E explains why they are fatal to the regime.
58. The vocabulary of the Exposure Draft is that of the *Corporations Act 2001* (Cth).
59. The new fixed trust definition and the eligible company test speak of "*governance*", of powers to "*issue new interests*" and of "*the instrument establishing the trust*", as though a trust were a company with a constitution and a register of members.<sup>44</sup>
60. Tax law has never needed that vocabulary, because Division 6 takes the general law of trusts as

<sup>37</sup> *Owies* [98].

<sup>38</sup> Minimum Tax EM 1.3; see also 1.18.

<sup>39</sup> Roll-over EM 1.15: "*Trustees must consider the terms of the trust deed and their duties under general trust law before transferring trust property.*" That is the only reference to trustees' duties in the three explanatory memoranda and it concerns a transfer of trust property under the roll-over, not the exercise of the dispositive discretion.

<sup>40</sup> The Paper 3.

<sup>41</sup> The Paper 11.

<sup>42</sup> Election EM 1.12.

<sup>43</sup> Election EM 1.21.

<sup>44</sup> Proposed s 272-65(2) of Schedule 2F; proposed s 102UYC(2). The Roll-over Draft describes a discretionary trust as a "*discretion-based trust structure*": proposed s 126-430(1)(a) of the *Income Tax (Transitional Provisions) Act 1997* (Cth).



it finds it.

61. The High Court has said so twice since 2010.
62. The income of the trust estate “*has a content found in the general law of trusts, upon which Div 6 then operates*”. And “*the language of present entitlement is that of the general law of trusts, but adapted to the operation of the 1936 Act upon distinct years of income*”.<sup>45</sup>
63. Section 101 deems “*a beneficiary in whose favour the trustee exercises the trustee’s discretion to be presently entitled*”.
64. Family trust distribution tax taxes a distribution outside the family group, it does not forbid one.<sup>46</sup>
65. Division 6 takes the trustee’s decision as it finds it and attaches a tax consequence to it. Proposed subsection 102UYD(2) is different in kind. It provides:

If the trustee decides the EET election in respect of a trust is to be in force for a year of income, the trustee must confer present entitlements to shares of the income and capital of the trust in accordance with the EET nomination.<sup>47</sup>

66. It is a direction to a trustee about the exercise of a dispositive power, made subject to a decision the trustee must make every year.

### **Conclusion**

67. Treasury has legislated for an institution it has **not** described.
68. Three explanatory memoranda explain:
  - (a) how the minimum tax is calculated;
  - (b) how the election is made; and
  - (c) how the roll-over works.
69. None explains:
  - (a) what a trustee is;
  - (b) what a discretion is; or
  - (c) what the law requires of the person who holds one.
70. The Paper asked in July how an election would interact with trust law and trustees’ obligations. Treasury has **not** answered its own question.
71. What Treasury is doing instead is taking the vocabulary of company law and applying it to a creature of equity: “*governance*”, “*issue new interests*”, “*the instrument establishing the trust*”, a nomination that operates like a share register and a direction that the trustee “*must confer*” entitlements as though it were a board resolving to pay a dividend.<sup>48</sup> Division 6 has never worked that way. It takes the trustee’s decision as the general law leaves it and attaches a tax consequence to it. Division 6F directs the decision.

<sup>45</sup> *Commissioner of Taxation v Bamford* [2010] HCA 10, [36]-[37] (**Bamford**); *Commissioner of Taxation v Carter* [2022] HCA 10, [19] and [30] (**Carter**).

<sup>46</sup> Section 271-15 of Schedule 2F.

<sup>47</sup> Proposed s 102UYD(2).

<sup>48</sup> Proposed s 272-65(2) of Schedule 2F; proposed ss 102UYC(2) and 102UYD(2).



72. What Treasury should do is plain.
73. It should withdraw the minimum tax and Division 6F with it.
74. If it will not, then before a Bill is introduced it should obtain advice from lawyers who practise in the law of trusts on whether a trustee can comply with Division 6F consistently with its duties, publish that advice and answer the question the Paper asked. It should remove every provision that directs a trustee how to exercise a dispositive discretion, because **no** such provision can be complied with by a trustee acting in accordance with its duties. Section E explains why.

## **E. The Election Regime cannot be operated by a trustee acting in accordance with its duties**

### ***The regime in outline***

75. The trustee of a minimum tax trust in existence on 1 July 2028 may, in the 2028-29 income year only, elect that the trust is an excluded election trust.<sup>49</sup>
76. The election must be accompanied by a nomination specifying each beneficiary to whom the trustee may confer a present entitlement to a share of both the income and the capital of the trust “*for each year of income*”, each beneficiary’s share of income, a share of capital equal to it and shares totalling 100 per cent.<sup>50</sup>
77. No beneficiary may be nominated who **was** not capable of benefiting under the trust on 1 July 2028.<sup>51</sup>
78. In each year in which the trustee decides that the election is to be in force, it “*must confer present entitlements*” in accordance with the nomination.<sup>52</sup>
79. The nomination **cannot** be varied except in two cases:
- (a) on the death of a nominated individual, when the share may pass only to individuals who are beneficiaries of the deceased’s estate; and
  - (b) on the breakdown of a relationship between two nominated individuals.<sup>53</sup>
80. If the trustee “*decides not to confer present entitlements*” in accordance with the nomination, the election is automatically revoked.<sup>54</sup>
81. In the year of revocation every beneficiary made presently entitled is “*taken not to be, and taken never to have been, presently entitled*” and the trustee is assessed under section 99A on the whole of the net income at 45 per cent plus the Medicare levy.<sup>55</sup> The trust can never elect again<sup>56</sup> and, having elected, can never choose the roll-over.<sup>57</sup>

### ***The nomination is, in trust law, a nullity***

82. The nomination is a statement by the trustee, made in 2028-29, of the shares in which it will exercise a dispositive discretion in every later year for as long as the trust and the election last.

<sup>49</sup> Proposed ss 102UYA, 102UYB(1) and (4).

<sup>50</sup> Proposed s 102UYB(2).

<sup>51</sup> Proposed s 102UYB(3)(a).

<sup>52</sup> Proposed s 102UYD(2).

<sup>53</sup> Proposed s 102UYE.

<sup>54</sup> Proposed s 102UYF(2)(a).

<sup>55</sup> Proposed s 102UYG(3) and (4); *Income Tax Rates Act 1986* (Cth) s 12(9); Election EM 1.66 (“*the top marginal tax rate plus Medicare levy*”).

<sup>56</sup> Proposed s 102UYB(6)(a).

<sup>57</sup> Proposed s 126-431(3) of the *Income Tax (Transitional Provisions) Act 1997* (Cth).



83. In the law that governs the trustee, that is an antecedent resolution as to the future exercise of a fiduciary power. It binds no one. It is “*of no effect*”.<sup>58</sup> The Election EM agrees: the discretion is “*unrestricted*”.<sup>59</sup> The Election Regime is therefore built on a document that the law governing the trustee treats as a nullity. From that there are only two ways forward and the Government must choose between them.
84. The first is that proposed subsection 102UYD(2) means what it says. If “*must*” imposes an obligation, the Commonwealth has varied the beneficial interests under every electing trust by statute. The nominated objects hold, in substance, fixed entitlements to income and capital. Every other object has lost any prospect of benefit for the life of the election. That would be a variation of trusts without the consent of a single beneficiary and without the court. Under the general law the alteration of beneficial interests requires a power in the instrument, the consent of every beneficiary of full age and capacity or an order of the court. Where the court acts on behalf of a minor, an unborn or an unascertained beneficiary, it does so under statute, it looks to that person’s benefit and it has refused to approve an arrangement that reduced the interests of unborn beneficiaries to admit a class the settlor had omitted.<sup>60</sup> On this reading the Election EM is wrong and the Election Regime does by tax form what a court of equity would refuse to do by order. The obligation is conditional: it arises only where the trustee “*decides the EET election in respect of a trust is to be in force for a year of income*”. The condition does not help Treasury. It means that in every year the trustee must decide whether to keep the election, knowing what that decision commits it to. That decision is itself an exercise of the dispositive discretion and must be made on real and genuine consideration. The balance of this section is about what follows from that.
85. The second, which the Election EM adopts, is that the trustee’s discretion is untouched. Then every duty attached to the discretion is untouched too. In each year of the election the trustee must “*turn its mind to whether to exercise the power*”, the discretion “*must be exercised as and when it arises*” and the trustee “*may not divest itself of the continuing responsibility of consideration by adopting a universal rule*”.<sup>61</sup>
86. The nomination is a universal rule. The Election EM itself describes each year’s act as an exercise of discretion: the election is revoked “*if the trustee does not exercise its discretion to make the beneficiaries specified in the EET nomination presently entitled*”.<sup>62</sup> In every year of the election, therefore, one of three things must happen:
- (a) The trustee may give **real and genuine consideration** to every object, including those it did **not** nominate and those it could **not** nominate. It may then conclude that the nominated shares are the right exercise of the power for that year.
  - (b) Or it may conclude otherwise: a nominee has become bankrupt or has fallen ill or has no need, or a grandchild has been born. It then has two choices:
    - (i) to act on its conclusion and forfeit 47 per cent of the year’s net income together with the election; or
    - (ii) to suppress it.
  - (c) Or the trustee may **not** consider at all and may confer the nominated shares because the nomination says so.

<sup>58</sup> *Dagenmont* [14]–[17] and the authorities there collected.

<sup>59</sup> Election EM 1.21.

<sup>60</sup> *Trustee Act 1958* (Vic) s 63A; *Trustee Act 1925* (NSW) ss 86A and 86B; *Re Tinker’s Settlement* [1960] 1 WLR 1011 (Russell J).

<sup>61</sup> *Owies* [98].

<sup>62</sup> Election EM 1.63; see also 1.67.

87. Only the first course is both lawful and tax-effective. It cannot be assumed in any one year and cannot be relied on for the life of an election. A trustee that reaches the same answer every year without inquiry has not considered: in *Owies* the first of the matters that established the trustee's failure was that it "*made no enquiries*" of two of the objects.<sup>63</sup> The third course is a breach of trust. The appointments are voidable<sup>64</sup> and the trustee is exposed to removal, which is the relief the Court of Appeal granted.<sup>65</sup> The second course is the one the regime exists to deter.
88. The result is a fetter in substance imposed by the one instrument the general law cannot reach.
89. Equity cannot stop Parliament from attaching a tax consequence to a real and genuine exercise of a discretion. It can only continue to require that the discretion be exercised.
90. The Election Regime does **not** suspend the trustee's duty to decide.
91. **It prices it, at 47 cents in every dollar of the year's net income, whatever the amount of the departure and whatever the reason for it. A consideration that admits of only one outcome is not weighed. It dictates.**
92. The Paper asked how an election would interact "*with trust law and trustees' obligations*". The interaction is this: the only way to be sure of keeping the election is a breach of trust.

***The general law knows only two forms of such a commitment***

93. *Dagenmont* shows why no drafting can cure this.
94. The trustee of a discretionary trust had agreed, to settle a family dispute, to pay one beneficiary \$150,000 a year, indexed, for life. Chesterman J held that "*to the extent that the trustee complies with that obligation*" its discretion "*is restricted, or fettered*" and that "*during Mr Lugton's life, the trustee must choose, in each year, to pay the agreed amount*".<sup>66</sup> The agreement survived only because the deeds, which the court described as "*in nature documents recording a commercial transaction*", could be construed either as an exercise of the deed's power of variation (so that the trust itself now required the payment) or as a release of the power under a clause permitting release.<sup>67</sup> The general law therefore knows a standing commitment to distribute in fixed shares in two forms only: a variation of the trust that gives the beneficiaries fixed entitlements or a fetter that is of no effect. There is no third.
95. The Exposure Draft attempts to create a third: a commitment that is not binding but is enforced by tax. The attempt fails at both ends. A trustee that takes the *Dagenmont* route and varies its deed so that the nominees hold fixed entitlements to all of the income and capital, entrenched against later variation, has created a fixed trust within proposed section 272-65 and is outside the minimum tax without any election.<sup>68</sup> Whether that variation is within the power in the deed, whether it resettles the trust and whether it attracts duty are exactly the costs the Election Regime was introduced to avoid.<sup>69</sup> A trustee that does not vary its deed keeps the discretion and, with it, the duties described in paragraph 85. The Election Regime therefore serves only the trustee that keeps its discretion. That trustee cannot lawfully promise what the election requires.

<sup>63</sup> *Owies* [115].

<sup>64</sup> *Owies* [140], applying *Pitt v Holt* [2013] UKSC 26.

<sup>65</sup> *Owies* [165] and [168].

<sup>66</sup> *Dagenmont* [18].

<sup>67</sup> *Dagenmont* [34]-[37], [44] and [45], citing *Muir v Inland Revenue Commissioners* [1966] 1 WLR 1269, 1283.

<sup>68</sup> Proposed s 272-65(1)(a), (2)(b) and (c) of Schedule 2F and the note to subsection (2).

<sup>69</sup> Election EM 1.4.



### ***The decision to elect is itself a fiduciary act***

96. The Exposure Draft treats the election as a choice for the trustee, like a choice of accounting method. **It is not.**
97. A nomination determines who may benefit from the trust for the rest of its life. It is a decision that must be made on ***real and genuine consideration*** of every object: those to be nominated, those to be left out and those who cannot be nominated, being every descendant born after 1 July 2028, who can enter the nomination only through the death of a nominee whose estate they take.<sup>70</sup>
98. The Election EM says nothing about it beyond the single sentence at paragraph 1.12. An object left out of the nomination remains an object. The trustee must consider that object every year. Every year it will decline to appoint to that object for one reason, which is that the election would otherwise be lost. That is a trustee “*acting under the dictates of another*”,<sup>71</sup> the other being the Commonwealth.

### ***The Government’s own test***

99. On 8 July 2026 the Treasurer said that the minimum tax “*won’t change or limit the use of trusts for legitimate reasons*”.<sup>72</sup> The Election Regime limits every one of them:
- (a) provision according to need: a nominee’s illness, incapacity or misfortune cannot alter the nominated share;
  - (b) protection from creditors: a nominee’s bankruptcy cannot alter the share. The share that must continue to be conferred is recoverable by the nominee’s trustee in bankruptcy;<sup>73</sup>
  - (c) provision for the next generation: a child born after 1 July 2028 cannot be nominated except through the death of a nominee whose estate the child takes. Until then a single distribution to that child ends the election;
  - (d) retention in the business: the nomination “*cannot specify a proportion of the income and capital of the trust to be retained by the trustee*”,<sup>74</sup> so a trading trust that elects can never accumulate a dollar of working capital except as an unpaid present entitlement, with, where the nominee is a company, the consequences the Government has separately announced for unpaid present entitlements;<sup>75</sup> and
  - (e) succession: on a nominee’s death the share may pass only to individuals who are beneficiaries of the deceased’s estate,<sup>76</sup> so that the future pattern of benefit is determined by the deceased’s will or by the rules of intestacy and not by the trustee’s judgment. Where the estate passes to a charity or to a person who is not an object, the share cannot be reallocated at all and the nomination can no longer be met.

<sup>70</sup> Proposed ss 102UYB(3)(a) and 102UYE(2)(b); Election EM 1.22.

<sup>71</sup> *Owies* [98].

<sup>72</sup> Jim Chalmers, ‘Consultation on Discretionary Trusts Reform Implementation’ (Media Release, 8 July 2026).

<sup>73</sup> *Trustee of the property of Diamond v Diamond Family Investments Pty Ltd, in the matter of Diamond (Bankrupt)* [2024] FCA 18 (Meagher J), where summary judgment was entered for \$301,562.01 of unpaid trust distributions owing to a bankrupt beneficiary; *Bankruptcy Act 1966* (Cth) ss 58 and 116.

<sup>74</sup> Election EM 1.20.

<sup>75</sup> Jim Chalmers, ‘Exposure Draft Legislation - Minimum Tax on Discretionary Trusts’ (Media Release, 3 September 2026): “*Legislation to address implementation of the 2018 Budget measure on unpaid present entitlements that was announced but not enacted by the previous Government will be progressed separately.*”

<sup>76</sup> Proposed s 102UYE(2)(b).



### Conclusion

100. The Election Regime asks a trustee to promise in 2028-29, how it will exercise a discretion in every later year for as long as the election lasts. **Equity does not enforce that promise.** It treats it as of **no** effect.<sup>77</sup> The Election EM agrees that the promise binds no one. Treasury has therefore built a regime on a document that its own explanatory memorandum says does **not** restrict the trustee and has attached, on its own reading of the text, to any departure from it a charge of 47 per cent of the whole of a year's net income.
101. Treasury has **not** asked what a trustee may lawfully do. **It should have.** A trustee may **not** bind itself in advance, may **not** adopt a universal rule and may not act under the dictates of another.<sup>78</sup> Division 6F asks for all three. A trustee that confers the nominated shares because the nomination says so is in breach of trust and its appointments are voidable.<sup>79</sup> A trustee that performs its duty and departs from the nomination loses the election and 47 per cent of the year's net income. No drafting change alters that, because the defect is the design: a commitment that is not binding but is enforced by tax.
102. **What Treasury should do is withdraw proposed Division 6F.**
103. It should not put before Parliament a regime in which the lawful course and the tax-effective course can diverge and a trustee is left to choose between its duties and a 47 per cent charge. **The Treasurer said the minimum tax would not limit the use of trusts for legitimate reasons.** Division 6F limits every one of them. **It should go.**

### F. The terms of the Election Draft

104. Even on its own premises, the Election Draft does **not** work as drafted. The Firm identifies the following.

#### ***“Must”***

105. Proposed subsection 102UYD(2) says the trustee “*must*” confer entitlements in accordance with the nomination. The heading above it says the trustee “*may act in accordance with EET nomination*”. The note to the subsection and the Election EM treat the provision as a condition, non-compliance with which revokes the election.<sup>80</sup> A provision cannot be all three. If it is a condition, it should be drafted as one. If it is an obligation, paragraph 84 applies.

#### ***Capital***

106. The nomination must state each nominee's share of the capital of the trust “*for each year of income*” and the trustee must confer present entitlements to shares of capital accordingly.<sup>81</sup> A beneficiary is presently entitled only if it has an interest “*both vested in interest and vested in possession*” and “*a present legal right to demand and receive payment*”.<sup>82</sup>
107. Capital is **not** an annual flow. Read as written, the provision requires the trustee in the first year to vest the whole of the corpus in the nominees absolutely, after which the trust is no longer a discretionary trust of anything and the capital gains tax consequences of beneficiaries becoming absolutely entitled fall to be considered without the roll-over, which the election has

<sup>77</sup> Dagenmont [14].

<sup>78</sup> Fitzwood [121]; Owies [98].

<sup>79</sup> Owies [140].

<sup>80</sup> Note to proposed s 102UYD(2); Election EM 1.43.

<sup>81</sup> Proposed ss 102UYB(2)(a) and (b) and 102UYD(2).

<sup>82</sup> Harmer v Federal Commissioner of Taxation (1991) 173 CLR 264, 271, quoted in Bamford [37].



forfeited.<sup>83</sup>

108. The Election EM reads it both ways. In one place it requires only that capital paid or applied follow the nominated shares.<sup>84</sup> In others it repeats the text: the trustee must make each nominee presently entitled to the nominated share of the capital in each year.<sup>85</sup> The text does not say what the first explanation says. Nor does either address the streaming of capital gains and franked distributions, which Parliament legislated in 2011 on the footing that a trustee may make one beneficiary specifically entitled to a gain or a dividend and not another.<sup>86</sup> Whether a specific entitlement inconsistent with the nominated shares revokes the election is not addressed.

### **Renunciation**

109. A beneficiary may disclaim a distribution.<sup>87</sup> In *Carter* the High Court held that a disclaimer made after the end of the year does not undo the present entitlement that existed at its close, whatever the disclaimer's effect under the general law of trusts, because present entitlement is tested at the close of the year and cannot be altered by later events.<sup>88</sup> A nominee who disclaims before the end of a year is in a different position. That nominee cannot be made presently entitled in that year, the nomination cannot then be met and, on the Election EM's reading, the election ends with the consequences in proposed section 102UYG. Nothing that happens after the close of the year can repair it. Every nominee therefore holds, until the close of the year, the power to end the trust's election. In a family in which relations have broken down, which is the family in *Owies*, that is not a remote contingency.

### **Default clauses**

110. Most deeds provide that income not dealt with by the end of the year is held for default beneficiaries. A trustee that fails to resolve in time has not “*decide[d] not to confer*” entitlements within proposed paragraph 102UYF(2)(a), but nor has it conferred them “*in accordance with the EET nomination*” within proposed subsection 102UYD(2). The Election Draft does not say what follows. The Election EM says that the election is revoked whenever the nominated entitlements are not conferred.<sup>89</sup> The text revokes it only where the trustee “*decides not to confer*” them. The text and the explanation do not say the same thing. A trustee cannot tell from either what a default distribution, a late resolution or a disclaimer does to the election.

### **Death**

111. A variation on death must be notified within the period for lodging the return for the year of death.<sup>90</sup> The Election EM notes that the Commissioner may defer the time for giving the notice.<sup>91</sup> That is a discretion, not a right. The beneficiaries of an estate are often not known within that period, because probate may be contested and claims for provision out of the estate may be brought for a period after death. Where the estate passes to a testamentary trust, whether the “*beneficiaries of the deceased individual's estate*” are the trustees of that trust or its objects is not addressed. And only individuals may be added. A nominated company or trust cannot be replaced at all. The election ends if a nominated company is wound up or deregistered or if a

<sup>83</sup> ITAA 1997 s 104-75 (CGT event E5); proposed s 126-431(3) of the *Income Tax (Transitional Provisions) Act 1997* (Cth).

<sup>84</sup> Election EM 1.42.

<sup>85</sup> Election EM 1.6 and 1.7.

<sup>86</sup> ITAA 1997 ss 115-228 and 207-58, inserted by the *Tax Laws Amendment (2011 Measures No. 5) Act 2011* (Cth).

<sup>87</sup> *Carter* [30] (*Gageler, Gordon, Steward and Gleeson JJ*): the law “*presumes a donee's assent until disclaimer*”; [47] (*Edelman J*).

<sup>88</sup> *Carter* [23] and [25].

<sup>89</sup> Election EM 1.7, 1.43 and 1.63.

<sup>90</sup> Proposed s 102UYE(2)(e).

<sup>91</sup> Election EM 1.52; *Taxation Administration Act 1953* (Cth) Schedule 1 s 388-55.



share in it changes hands for any reason other than death or relationship breakdown.<sup>92</sup> The company's share register is frozen for the life of the election.

### ***Relationship breakdown***

112. The variation for relationship breakdown is available only where both parties are nominees.<sup>93</sup> A nominee whose partner was never nominated obtains no variation. An order requiring a payment out of the trust to a person who is not a nominee cannot be complied with without ending the election.

### ***The consequence is disproportionate***

113. On the Election EM's reading, any departure from the nomination, of any amount, for any reason, has the same consequence:
- (a) 45 per cent plus the Medicare levy on 100 per cent of the year's net income;
  - (b) every present entitlement of that year, including those of nominees and of any charity, deemed never to have existed;
  - (c) no further election; and
  - (d) no roll-over.
114. Proposed subsection 102UYG(4) is copied from subsection 100A(4).<sup>94</sup> A trustee that departs from a nomination in good faith, because an object's circumstances require it, is taxed exactly as a trustee that has entered into a reimbursement agreement. The Government's own model for a distribution outside a permitted class is proportionate. Family trust distribution tax is imposed on "*the amount or value of the income or capital*" distributed outside the family group and on nothing else. The family trust election continues.<sup>95</sup> There is no reason a departure from a nomination should be treated more severely than a distribution outside a family group.
115. The same consequence attaches, on the text, to a voluntary revocation. Proposed section 102UYG applies to an election "*revoked under section 102UYF*", which includes a revocation by the trustee under subsection (1) of that section.<sup>96</sup> The Election EM says in one place that a voluntary revocation "*applies to all future income years*"<sup>97</sup> and in another that in "*the income year in which the EET election is revoked*" the beneficiaries are taken never to have been presently entitled and the trustee is liable at the top rate.<sup>98</sup> If the second is intended, a trustee that does exactly what the regime invites, which is to leave it and accept the minimum tax, forfeits every present entitlement of the year in which it decides to do so. If it is **not** intended, the text must say so.

### ***The window and the one-way door***

116. The election may be made in the 2028-29 income year only, by a trust in existence on 1 July 2028.<sup>99</sup> A trust settled on 2 July 2028 can never elect. A trustee must therefore choose between the election and the roll-over within the first year of the tax and before any administrative guidance exists. Having elected, it can never roll over,<sup>100</sup> even where the election is later revoked

<sup>92</sup> Proposed s 102UYF(2)(b) to (d).

<sup>93</sup> Proposed s 102UYE(4)(a).

<sup>94</sup> Compare proposed s 102UYG(4) with s 100A(4).

<sup>95</sup> Section 271-15(2) of Schedule 2F.

<sup>96</sup> Proposed ss 102UYF(1) and 102UYG(1).

<sup>97</sup> Election EM 1.61.

<sup>98</sup> Election EM 1.66.

<sup>99</sup> Proposed s 102UYB(4).

<sup>100</sup> Proposed s 126-431(3) of the *Income Tax (Transitional Provisions) Act 1997* (Cth).



by an event outside its control: a nominee's death with an inconvenient will, the transfer of a share in a nominated company or a determination by the Minister, made after the election, that companies of that kind have material discretionary elements.<sup>101</sup> The roll-over window closes on 30 June 2030 in any event.<sup>102</sup>

## G. If the Election Regime proceeds

117. **The Firm's position is that the Election Regime should not proceed.** The July Submission supported an election to be "*treated, and taxed, as a fixed trust*" because, unlike a roll-over, it required no conveyance.<sup>103</sup> Section E shows that the Election Draft is not that election.
118. If the Government proceeds with it regardless, the following changes are the least the draft requires. They would reduce the harm. They would not cure the defect described in section E.
119. The changes are these:
- (a) replace proposed section 102UYG with a proportionate charge on the family trust distribution tax model: tax at the top rate on the non-conforming amount only, with the election continuing;
  - (b) confine any consequence to automatic revocation and provide the clean prospective exit that paragraph 1.61 of the Election EM describes;
  - (c) extend proposed section 102UYE to births, adoptions, bankruptcy, incapacity and cessation of residency and permit reallocation on death to any object of the trust rather than only to beneficiaries of the deceased's estate;
  - (d) permit the election to be made in any income year and by a trust settled after 1 July 2028;
  - (e) permit the roll-over to be chosen after an automatic revocation;
  - (f) replace "*must confer*" with a condition and confine the capital limb to capital actually paid or applied;
  - (g) address renunciation, default clauses, streaming and the estate-beneficiary limitation expressly; and
  - (h) provide that a determination under proposed subsection 102UYC(4)(b) does not affect an election made before it.

## H. Other matters

### *Corporate beneficiaries*

120. The Minimum Tax Draft maintains the denial of the offset to a corporate beneficiary.<sup>104</sup>
121. The Paper justified the denial as "*the simplest mechanism to prevent the minimum tax being undermined by interposing a company between the trust and the ultimate beneficiary*".<sup>105</sup>

<sup>101</sup> Proposed ss 102UYC(3) and (4) and 102UYF(2)(c)(iv). Nothing in the Election Draft confines a determination under proposed s 102UYC(4)(b) to elections made after it.

<sup>102</sup> Proposed s 126-430(1)(b) and (3) of the *Income Tax (Transitional Provisions) Act 1997* (Cth).

<sup>103</sup> The Paper 11; July Submission [40].

<sup>104</sup> Proposed s 101AF(1)(d).

<sup>105</sup> The Paper 6.



122. The Fact Sheet now states that an electing trust “*could nominate to distribute future income to an eligible company with this income taxed only as income of the company in future*”.<sup>106</sup> The interposition the Paper said had to be prevented is, once nominated, permitted without any minimum tax at all. The denial of the offset outside the election cannot be an integrity measure if the same outcome is available inside it.
123. The Firm repeats the recommendation in the July Submission: allow the offset to a corporate beneficiary and provide that tax discharged by the offset does not generate franking credits.<sup>107</sup>

### ***The fixed trust definition***

124. The Minimum Tax Draft repeals section 272-65 of Schedule 2F and the definition in subsection 995-1(1) of the ITAA 1997 and substitutes a definition with an alternative limb that turns on “*material discretionary elements*”, an expression with no statutory or judicial history, supplemented by Ministerial instrument.<sup>108</sup>
125. That definition governs the trust loss rules and every other provision of both Acts that uses the term.
126. A change of that reach should not be made inside a targeted measure on fifteen days’ consultation. It should be the subject of its own consultation and impact analysis.

### ***The roll-over***

127. The Roll-over EM confirms that State and Territory duties “*continue to apply according to their ordinary operation*”.<sup>109</sup>
128. The Firm repeats its July recommendation that duty relief be secured before the roll-over is legislated. Without it the roll-over is unavailable in practice to any trust that holds land.

### ***Process***

129. Fifteen days were allowed for four exposure drafts and three explanatory memoranda.
130. The Fact Sheet says that the draft legislation takes stakeholder feedback into account.
131. No account of that feedback has been published with the Exposure Draft and no reasons have been given for the design chosen.
132. The Paper asked, in its eighth question, how an election would interact with trust law and trustees’ obligations.
133. That question has been answered in this submission because the Exposure Draft did not answer it.
134. **The Firm recommends that Treasury obtain and publish advice on the trust law consequences of the Election Regime before a Bill is introduced.**

## **I. Conclusion**

135. The trust is the oldest device the law has for making one person answerable to another for property.
136. It began with a landowner who trusted friends to look after a family and a Chancellor who made

<sup>106</sup> Fact Sheet 1.

<sup>107</sup> July Submission [25].

<sup>108</sup> Minimum Tax Draft items 13 and 19; proposed s 272-65(1)(b) and (4) of Schedule 2F.

<sup>109</sup> Roll-over EM 1.64.



sure that they did.

137. It is **not** a contract, it is **not** a company and it is **not** a tax structure.
138. Rather, it is an ***obligation of conscience enforced by a court.***
139. The discretion the Exposure Draft treats as a ***loophole is the trustee's duty to look each year at the family as it is and to decide with care.***
140. **Division 6F asks the trustee to stop looking and taxes the trustee for looking.**
141. The Firm acts for the families these provisions will reach:
- (a) the retired parents;
  - (b) the carer;
  - (c) the son or daughter with a disability; and
  - (d) the couple in the first year of a business.
142. **The Firm asks that the minimum tax be withdrawn and the Election Regime with it. The Election Regime cannot be repaired into something a trustee can lawfully operate.**
143. **The tax it serves has no mischief to cure.**
144. If the Government proceeds regardless, the changes in section G are the least the Election Draft requires before a Bill is introduced. The Firm would be glad to meet Treasury.
145. Please do not hesitate to contact the Firm or Arda Ahmed for further information.

Yours sincerely

**Arda Ahmed**

Principal

Norton & Quay Tax Law

