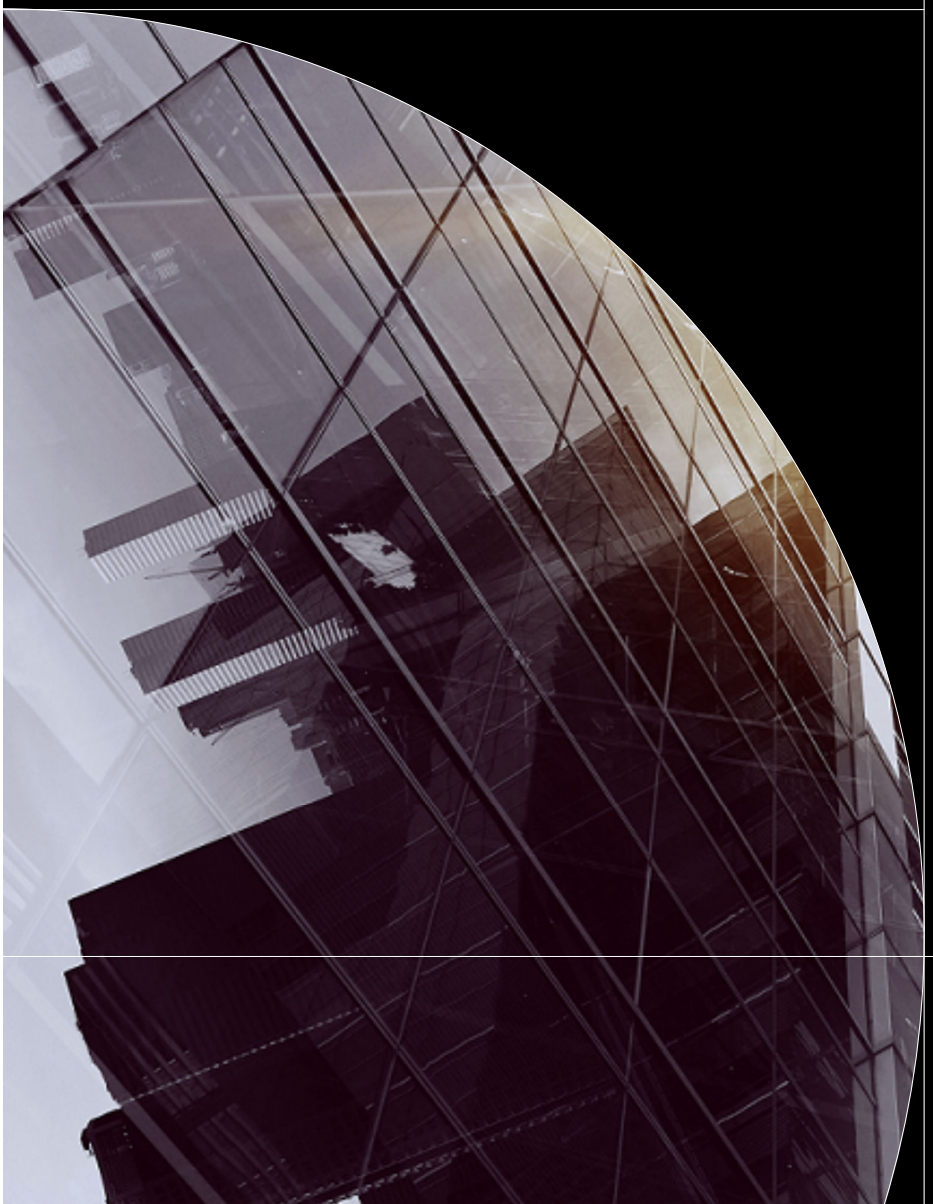
Minimum tax on discretionary trusts – exposure draft legislation

September 2026



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1. Executive summary

The Business Council of Australia (BCA) thanks Treasury for the opportunity to provide feedback on the exposure draft legislation to implement a minimum 30 per cent tax on discretionary trusts.

The BCA represents over 120 of Australia's largest employers. We develop and advocate for policy that raises living standards for all Australians.

Australia has an urgent task to lift productivity, grow real wages and improve living standards, but the proposed 30 per cent minimum tax on discretionary trusts will not deliver on this need.

Instead, the proposal will increase tax complexity, compliance costs and uncertainty, including for commercial trust structures that have no capacity for income splitting. While the revised proposal addresses some concerns raised in the previous consultation, significant issues remain.

The consultation period of 15 days for this measure is inadequate for changes of this complexity – particularly given the substantial changes since the previous consultation. Insufficient consultation increases the risk of unintended consequences, higher compliance costs and further legislative amendments. The BCA recommends that all future consultations on the trust tax measures run for at least 30 days.

The expanded definition of a fixed trust could address some of the concerns raised in submissions, but its use of undefined terms such as "material" and "significantly" still involves uncertainty. The proposed treatment of trust deed amendments and trustee discretions could also bring managed funds and employee share trusts within the minimum tax, despite the stated intention to exclude them. The scale of superannuation investment through trusts makes certainty about the treatment of these structures particularly important.

The legislation should give clear effect to the exclusions described in the explanatory material, including by expressly excluding managed investment trusts, registered schemes, employee share trusts and foreign resident trusts. Ministerial discretion should be limited, with exclusions specified in primary legislation wherever possible, and the discretion, where retained, should promote certainty.

The BCA also recommends several changes to ensure the legislation meets the policy goals, including payments which are untaxed by policy design should be excluded from the minimum tax and punitive taxation should be removed from listed or public companies.

Effective transition arrangements are essential. The Government should continue negotiating the broadest possible state and territory stamp duty relief for restructures. The frameworks for rollover and Excluded Election Trusts should be in place at the same time so taxpayers can make informed decisions about these mutually exclusive and irrevocable options. Further clarity is also needed around the potential stamp duty and trustee-duty implications of electing into the Excluded Election Trusts regime.

Finally, serious consideration should be given to replacing the minimum tax with a withholding tax approach, which may achieve the policy objectives with less complexity and fewer consequential interactions. If this alternative is not supported, the reasons should be explained in detail as part of the policy's Impact Analysis.

2. Key recommendations

Recommendation 1.

The BCA recommends all future consultations on the trust tax measures should last for at least 30 days, and ideally 60 days, given the complexity and in line with government commitments.

Recommendation 2.

The BCA recommends:

- The legislation and explanatory material retain the certainty that the minimum tax will not apply to various forms of trusts including widely held trusts, MITs, employee share trusts and worker entitlement funds (as stated in the EM at 1.9 and the start of 1.22).
- The legislation state specifically that MITs, registered schemes, employee share trusts and foreign resident trusts are not minimum tax trusts.
  - If there are concerns that this might limit the main definition, this should be addressed through appropriate legislative drafting.
- The test relating to "significantly vary entitlements or rights" be amended so it is clear that this test only applies to economic rights and not, for example, administrative rights.
- The Ministerial discretions be limited, with as much as possible specified in legislation.
- To the extent the Ministerial discretion is retained, it be amended so the Minister can identify factors that indicate or specify a trust has no discretionary elements (rather than indicating factors that "suggest" a trust has no discretionary elements).

Recommendation 3.

The BCA recommends trust payments that are untaxed or exempt from withholding tax by tax policy design be removed from the scope of the minimum tax.

Recommendation 4.

The BCA recommends that the double tax element not apply to listed or public companies. If the Government decides (or has decided) to reject this approach, a detailed explanation of this decision should be provided as part of the policy's Impact Analysis.

Recommendation 5.

The BCA recommends an exemption be provided in legislation for trusts where all the units or interests in the trust are held directly or indirectly by any or all of the following: widely held fixed trusts; listed trusts; listed public companies; or complying superannuation funds.

Recommendation 6.

The BCA recommends the Government continue to negotiate the broadest possible relief from state and territory stamp duty for rollovers from trusts to other structures.

Recommendation 7.

The BCA recommends:

- The framework for the rollover regime be in place at the same time as the Excluded Election Trusts regime.
- If the EET regime is designed so that electing into the regime should not cause a stamp duty liability or breach of trustee duties, the Government should clarify this, for example in explanatory materials.

Recommendation 8.

The BCA recommends the Government consider replacing the minimum tax with a withholding tax alternative. If the Government decides (or has decided) to reject this approach, a detailed explanation of this decision should be provided as part of the policy's Impact Analysis.

3. General comments

The BCA remains concerned that the added uncertainty and cost from the trust tax changes will not assist with Australia's major and urgent need to address falling productivity, low business investment outside of data centres, negative real wages growth, high inflation and the rising cost of living.

Australia's taxes on business are already highly uncompetitive by international standards, as demonstrated by the OECD's *Corporate Tax Statistics 2026*.[1] The *BCA Global Investment Competitiveness Index*, released earlier in 2026, found Australia's business taxation settings rank 38th out of 42 countries.[2] Australia's reliance on total income taxes for companies and individuals is also uncompetitively high by OECD standards.[3]

The BCA also remains concerned the proposal adds complexity and uncertainty for a wide range of trust structures that have no capacity for income splitting, including managed funds and trusts used by companies for employee benefits, dispute resolution and securitisation.

Instead of prioritising changes that increase the tax burden and increase tax complexity, the priority should be tax settings that remove disincentives for the business investment necessary to lift productivity, grow real wages and increase living standards.

The amendments to the policy from the previous draft to the current draft will reduce the harms of the measure, but these adverse impacts remain. The changes in the current draft also indicate that the rules as previously announced were unnecessarily burdensome and poorly targeted.

3.1 Consultation timeframes

The Budget tax changes were announced as the largest tax changes in 25 years. Yet the consultation periods available for most of the components of the changes have been manifestly inadequate.

In this context, the BCA is very concerned that this is another consultation with inadequate timeframes, with 15 calendar days provided for consultation on an issue of considerable complexity. This is well below the recommended minimum timeframes of 30 days for simpler matters and 60 days for more complex issues.[4] While this is a second consultation around the broader policy proposal, the substantive changes and complexity mean this is effectively consultation on a new policy proposal.

This is one of a long list of consultations with inadequate timeframes (see details in Appendix A). Partway through this trust consultation, Treasury released five tax consultations, all with insufficient response timeframes of a little over two weeks.

Some of the recent consultations (including the current one) are about changes to previously announced policies. One reason for these changes is inadequate consultation on the original measures. Longer consultation timeframes would allow stakeholders to make much more informed submissions on the issues. Poor consultation and poor policy go hand in hand.

As it is, the insufficient timeframe for this consultation increases the risk that many issues with the legislation will not be identified and addressed. This is likely to require further changes in the future, increase taxpayer compliance costs, cause unintended consequences, and require excessive time from Government and Parliament to fix the issues. All these risks would be much lower with proper consultation timeframes.

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[1] Compared with the OECD, Australia has the third highest ratio of company tax to GDP; fourth highest headline company tax rate; second highest average tax rate and third highest marginal tax rate (which is the tax rate applying to new investment).
[2] See: https://www.bca.com.au/bca-global-investment-competitiveness-index/
[3] Australia derived 62.1 per cent of total tax revenue from taxes on income, profits and capital gains in 2023, the second-highest share in the OECD. OECD, Revenue Statistics 2025: Australia. Country Note, 9 December 2025. https://www.oecd.org/en/publications/revenue-statistics-2025_b1943459-en/australia_1a298160-en.html
[4] See page 7 of Best Practice Consultation guidance note.

The BCA continues to monitor Treasury's overall adherence to principles of best practice consultation.

Recommendation 1.

The BCA recommends all future consultations on the trust tax measures should last for at least 30 days, and ideally 60 days, given the complexity and in line with government commitments.

4. Definition of fixed trust

The expanded definition of fixed trusts in the draft legislation could help address some of the issues with the minimum tax that were raised by the BCA and others in the previous consultation round, including the excessive reliance on the Commissioner's discretion to determine fixed trust status.

However, the expanded definition of a fixed trust relies on the undefined phrases "no material discretionary elements" and "significantly vary existing entitlements or rights". This could easily replace one uncertainty (about the Commissioner's exercise of discretion) with other uncertainties (the legal meaning of these undefined terms, alongside scope for Ministerial discretion).

We note concerns[5] that the term "significant", and the similar term "substantial", have been subject to the vagaries of ATO interpretation:

- The ATO's view of "substantial" in relation to school building funds under TR 2013/2 was rejected by a court as being too narrow, and the ATO expanded the meaning in revisions released in October 2024.[6]
- In the rules relating to equity-funded dividends, the ATO initially argued an issue of new shares funded a "substantial" part of a dividend if it was more than 5 per cent of the dividend but later amended this to 20 per cent.
- In the thin capitalisation context, "minor or insignificant" refers not to a percentage but to a nominal amount.

These concerns show the potential uncertainty for taxpayers about the meaning of "significant".

Other concerns with the proposed definition include:

- The proposal to permit trust deed amendments requires the amendments to have the consent of all beneficiaries (see the Explanatory Material (EM) at paragraph 1.78). This will create issues for managed funds that are registered schemes. Section 601GC of the Corporations Act permits a registered scheme to amend its constitution (which typically serves as its trust deed) by special resolution, which requires a 75 per cent vote, not a 100 per cent vote. As a result, a registered scheme would likely not be able to access the exemption relating to trust deed amendments.[7]
  - This also raises concerns that the statement in the EM (at 1.22) that Managed Investment Trusts (MITs) would generally meet the definition of a fixed trust may not be correct. This is discussed further below.
  - The ATO has also stated the 75 per cent vote rule is relevant to unregistered schemes (see LCR 2015/4), so this issue may apply more broadly than registered schemes alone.
- There is an asymmetry in proposed s 272-65(4). Under paragraph (a), the Minister can make an instrument that "suggests" there are no discretionary elements; but under paragraph (b) the Minister can make an instrument that "means" there are discretionary elements. As a result, the Minister can definitively include a type of trust in the minimum tax, but can only suggest a type of trust is excluded. The reasoning for this asymmetry is not explained.
- In addition, the legislation uses a list of factors that "may suggest" there are no material discretionary elements (s 272-65(2)) and the Minister can make legislative instruments specifying matters that "suggest" there are no material discretionary elements. The legislation does not state any of these factors "must" be considered. This creates uncertainty. It is open to the ATO or a court to argue that a matter is not determinative or is not to be considered even though it is in the legislation or legislative instrument.

[5] See: https://www.hsfkramer.com/notes/taxaustralia/2026-posts/federal-budget-2026-back-to-the-future/minimum-ta-on-disretionary-trusts

[6] See: https://www.moores.com.au/broader-eligibility-for-tax-deductible-school-building-funds/

[7] https://www.hsfkramer.com/notes/taxaustralia/2026-posts/federal-budget-2026-back-to-the-future/minimum-ta-on-disretionary-trusts

- Other parts of tax legislation state factors that must be taken into account, such as the similar business test in subsection 165-211(2) and the discretion to treat a scheme as a debt interest in s 974-65(2).

- Managed funds can have trust deeds with many different trustee discretions, including about the calculation of trust income, the classification of income and expenses, the allocation of costs, the calculation of issue and redemption prices, the attribution of amounts to redeeming investors, minor adjustments between investors, the mechanics of distribution and the treatment of reserves. It is unclear if these would pass or fail the "significantly vary" test.
- The "significantly vary entitlements or rights" test could cause issues for deeds that permit major variations of administrative rights such as the right to convene meetings or amend procedures. If a trust deed were amended to address this issue, this could risk the imposition of state duty due to resettlement. This therefore suggests the "significantly vary" test should only cover the variation of economic rights, such as the rights to capital and income.
- Employee share trusts can have deeds stating potential beneficiaries include all past, present and future employees of a corporate group, and the trustee may have discretionary powers in relation to unallocated trust property. This could easily mean these trusts are not classified as fixed trusts, even though the EM states (at 1.22) these trusts would generally meet the definition of a fixed trust.[8]

4.1 Approach to providing exclusions

The EM states various trusts are "already excluded by operation of law" (1.22) and this statement occurs without qualification (that is, the EM does not state that these trusts are "likely" or "expected" to be excluded). However, later in this same paragraph the EM states various types of trusts, including MITs, are "generally expected" or "intended" to be excluded, with various qualifications, rather than the certainty expressed at the start of that paragraph. Conversely, the EM states the minimum tax "will not" apply to widely held trusts (EM at 1.9), without qualification.

It is unclear how the legislation delivers on the firm and unqualified statements in paragraph 1.9 and the start of 1.22. In relation to paragraph 1.9, a widely held trust could allow substantial discretion to trustees – it is unclear how such a trust would satisfy the fixed trust definition even though it might be widely held.

The BCA does not support the issues above being addressed by expanding the EM's uncertainty. We do not support, for example, the EM at 1.9 being amended so that it states the minimum tax "might not" or "should not" apply to widely held trusts. This would expand the legislative uncertainty rather than reducing it.

Rather, we consider the certainty should be increased, so it is clear the relevant trust types will not be covered by the minimum tax.

While this could be done through Ministerial determination, this does not provide adequate certainty for taxpayers, particularly because – as noted above – the determination only allows the Minister to determine points that "suggest" exclusion rather than points that definitively exclude the trusts from the minimum tax.

Instead, the BCA supports exclusions being included in the primary legislation, which has the following benefits:

- Greater certainty for taxpayers as legislation is potentially changed less frequently than regulations.[9]
- A much greater level of Parliamentary scrutiny. The number of disallowable instruments potentially before Parliament can be large, and the instruments can be complex, so the ability of Parliament to meaningfully review individual instruments is reduced.[10]

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[8] https://www.hsfkramer.com/notes/taxaustralia/2026-posts/federal-budget-2026-back-to-the-future/minimum-ta-on-disretionary-trusts

[9] The ease of changing regulations is sometimes put as an advantage because it enables flexibility and responsiveness. However, this can operate in both directions, with the flexibility also facilitating excessive use of Ministerial discretion as noted in the main text.

[10] The 2024 Annual Report of the Senate Standing Committee for the Scrutiny of Delegated Legislation stated the Committee reviewed 1,607 instruments in 2023 and about 1,276 in 2024. The Senate disallowable instruments list as at 14 September 2026 has 14 pages.

- Parliament can amend or split Bills, or defer their consideration. By contrast, and in broad terms, legislative instruments cannot be amended, and consideration cannot be deferred beyond tight statutory deadlines.
- Lower risk of excessive use of Ministerial discretion. The existing approach, for example, might allow a future Government to greatly expand the exemption from the tax by legislative instrument alone.
- Moving exclusions into the primary legislation would reduce the extensive use of legislative instruments. The legislation already includes many provisions for the use of legislative instruments, as noted in Appendix B, and it would be preferable to reduce this.
- Compliance and administrative costs can be lower because the necessary rules are in one place (the primary legislation) rather than two or more (legislation plus regulations).

We understand there is a concern that including exemptions in the primary legislation may mean the exemptions are read as being an exhaustive list (that is, the exemption list might imply there are no further exemptions beyond the list). This should be able to be addressed by using terms such as "without limiting the meaning" or similar before the exemptions list.

- The legislation already provides specific exemptions for special disability trusts, trust estates of deceased persons, and complying superannuation entities (see draft section 101AB(1)). So the existing draft legislation already raises this risk – if this risk were real and genuine, the drafting would not already include a list of specific exemptions.

We also note the EM specifically contemplates (at 1.24) the Ministerial discretion could be used to ensure the minimum tax does not apply to foreign resident trusts. Given this exclusion is already identified and specific, it would clearly be better for it to be included in the legislation.

Recommendation 2.

The BCA recommends:

- The legislation and explanatory material retain the certainty that the minimum tax will not apply to various forms of trusts including widely held trusts, MITs, employee share trusts and worker entitlement funds (as stated in the EM at 1.9 and the start of 1.22).
- The legislation state specifically that MITs, registered schemes, employee share trusts and foreign resident trusts are not minimum tax trusts.
  - If there are concerns that this might limit the main definition, this should be addressed through appropriate legislative drafting.
- The test relating to "significantly vary entitlements or rights" be amended so it is clear that this test only applies to economic rights and not, for example, administrative rights.
- The Ministerial discretions be limited, with as much as possible specified in legislation.
- To the extent the Ministerial discretion is retained, it be amended so the Minister can identify factors that indicate or specify a trust has no discretionary elements (rather than indicating factors that "suggest" a trust has no discretionary elements).

4.2 Impact on superannuation industry

The impact on superannuation funds of the minimum tax could be significant.

APRA data indicates large super funds invested $718.8 billion in wholesale trusts as at June 2026.[11] These are the trusts most likely to be caught by the measure. The investment in all trusts by superannuation funds was $1.32 trillion.

This indicates the importance of ensuring managed investment trusts are excluded from the minimum tax.

[11] See Table 9b of APRA's quarterly superannuation industry publication.

5. Other issues

5.1 Exempt income

The draft proposes an exemption from the minimum tax for payments to foreign residents that are subject to withholding taxes (EM at 1.35). This leaves it unclear what happens with conduit foreign income or other amounts which are exempt from withholding tax or untaxed as a deliberate policy decision. This issue should be considered in a future tranche of legislation.

Recommendation 3.

The BCA recommends trust payments that are untaxed or exempt from withholding tax by tax policy design be removed from the scope of the minimum tax.

5.2 Corporate double tax

The BCA notes the draft retains the deliberate double taxation of distributions from discretionary trusts to companies. This is punitive by design. The EM and Consultation Paper indicate this approach was adopted to address concerns that the minimum tax could be avoided by interposing a company, effectively allowing the minimum tax to be converted to a refundable franking credit (EM at 1.50 and 1.56, Consultation Paper at page 6).

However, this issue is really only relevant for closely held companies. It is not clear why this approach applies to companies more broadly, including public or widely held companies. There is no policy mischief where a distribution is made to an unrelated corporate entity. As noted in our previous submission, company investment in trusts was at least $117 billion as at December 2023,[12] so the potential impact is large if even a small proportion of these investments are punitively taxed.

The proposed approach is overly broad and disproportionate.[13]

Given this, the BCA recommends that the Government comprehensively consider removing the double tax element and permitting the refundability of tax for distributions to listed or public companies. If the Government decides (or has decided) to reject this approach, a detailed explanation of this decision should be provided.

Recommendation 4.

The BCA recommends that the double tax element not apply to listed or public companies. If the Government decides (or has decided) to reject this approach, a detailed explanation of this decision should be provided as part of the policy's Impact Analysis.

5.3 Exclusion for certain controlled trusts

There is no clear reason for the measure to apply to trusts with interests that are exclusively held by widely held fixed trusts, superannuation funds, listed trusts, and listed public companies. There is no potential for a trust to be used for tax planning or minimisation in those situations. There is also no need for this type of trust to face the uncertainty over whether the trust faces the minimum tax. The uncertainty would serve no policy purpose, only adding compliance and administrative costs while deterring investment in the funds management industry. It would also deter the use of efficient investment structures for no tax policy benefit.

[12] As at December 2023, life insurer investment into managed funds was $38.6 billion, general insurance investment was $50.7 billion, and other company investment was $28.2 billion, for a total of $117.5 billion. Source: ABS Managed Funds, Table 9.
[13] See Pitcher Partners submission.

As noted in the previous section, companies hold significant interests in trusts; and as noted in Section 4.2, superannuation funds hold even larger interests in trusts. There are therefore considerable potential benefits from reducing this uncertainty.

We therefore recommend there should be an exemption from the minimum tax for the relevant trusts, and this exemption should be provided in primary legislation – rather than in a Ministerial determination – for reasons given in Section 4.1.

Recommendation 5.

The BCA recommends an exemption be provided in legislation for trusts where all the units or interests in the trust are held directly or indirectly by any or all of the following: widely held fixed trusts; listed trusts; listed public companies; or complying superannuation funds.

5.4 Rollover relief

The BCA appreciates the Government providing additional details of the proposed rollover relief. We note, however, that the imposition of state and territory stamp duty still needs to be addressed. This issue will likely act as a major barrier to the rollover of many trusts, given the substantial restrictions on the use of the Excluded Election Trust alternative.

As noted in our previous submission, the comparisons with the Corporate Collective Investment Vehicle (CCIV) are broadly illustrative – it appears that no existing managed funds have converted into a CCIV structure, despite the acknowledged benefits of these structures. It is very likely that the lack of detailed rollover relief is the cause of this outcome, demonstrating that tax barriers can materially influence rollover decisions.

Recommendation 6.

The BCA recommends the Government continue to negotiate the broadest possible relief from state and territory stamp duty for rollovers from trusts to other structures.

5.5 Excluded Election Trusts

The proposed carve-out for Excluded Election Trusts (EET) could deal in part with the issues raised by stakeholders. However, given the limited consultation time available, we have not been able to assess this proposal in any detail.

The election to use rollover relief excludes the election to use EET, and vice versa. The choice to use one or the other is also irrevocable. As a result, the frameworks for both options need to be in place at the same time, so taxpayers can make a fully informed decision about which option to choose. There is a risk that if the frameworks are in place at different times, taxpayers might make an ill-informed but irrevocable decision.

Concerns have been raised that electing into the EET regime may cause a state or territory duty liability, and electing into the regime may mean a trustee is breaching duties by constraining its discretion to deal with trust income.[14] These concerns should be addressed – in particular, if there are legal reasons why these situations will not occur, then the explanatory materials should make this clear.

Recommendation 7.

The BCA recommends:

[14] See: https://www.bdo.com.au/en-au/insights/tax/articles/minimum-tax-on-discretionary-trusts-what-the-exposure-draft-means-for-taxpayers

- The framework for the rollover regime be in place at the same time as the Excluded Election Trusts regime.
- If the EET regime is designed so that electing into the regime should not cause a stamp duty liability or breach of trustee duties, the Government should clarify this, for example in explanatory materials.

5.6 An alternative – withholding tax

The Corporate Tax Association, Pitcher Partners and CPA Australia, among others, have proposed a withholding tax as an alternative, arguing:

- the minimum tax model is more complex than necessary to achieve the policy objectives;
- the mechanism for a withholding tax already exists;
- the alternative may reduce the need to use rollover relief; and
- a withholding tax has several advantages over the minimum tax proposal – including simplicity, fewer consequential interactions (Pitcher Partners), and consistency with other jurisdictions (CTA submission).

The BCA considers this alternative should receive comprehensive consideration and, if the Government decides (or has decided) to reject this approach, a detailed explanation of this decision should be provided.

Recommendation 8.

The BCA recommends the Government consider replacing the minimum tax with a withholding tax alternative. If the Government decides (or has decided) to reject this approach, a detailed explanation of this decision should be provided as part of the policy's Impact Analysis.

Appendix A
Timeframes for recent significant consultations

A select list of major consultations in 2026 impacting business generally:

- Reform to non-compete clauses and other restraints – draft legislation: 25 days
- Minimum tax on discretionary trusts – exposure draft legislation: 15 days
- Capital Gains Tax and Negative Gearing – Tranche 2 Legislation: 17 days
- Minimum tax on discretionary trusts – consultation paper: 23 days
- Capital gains tax reforms – arrangements for innovative start-ups: 22 days
- Instant tax deduction – exposure draft (this included important changes to FBT impacting business): 11 days
- Strengthening the foreign resident capital gains tax regime – draft legislation: 14 days
- Review of the Amended Unfair Contract Terms Protections: 21 days
- Unfair trading practices – exposure draft: 14 days
- Innovative Business CGT Concession – draft legislation: 17 days
- Better targeting the Research and Development Tax Incentive – draft legislation: 17 days

Appendix B
List of proposed powers to make legislative instruments

The exposure draft legislation proposes the following 10 powers to make legislative instruments:

- Other kinds of trusts that are not minimum tax trusts.
- Conditions relating to the registered charity and DGR exemption.
- Conditions relating to the entity exemption.
- Fixed trusts: Determine matters that suggest there are no material discretionary elements affecting the rights or entitlements of beneficiaries for the purpose of the fixed trust definition.
- Fixed trusts: Determine matters that mean there are one or more material discretionary elements affecting the rights or entitlements of beneficiaries for the purpose of the fixed trust definition.
- EET – eligible company definition: Determine further matters that suggest there are no material discretionary elements affecting the rights or interests of the members of a specified kind of company.
- EET – eligible company definition: Determine matters that mean there are one or more material discretionary elements affecting the rights or interests of the members of a specified kind of company.
- Rollover: Where the relevant minimum tax trust is not a family trust, determine the continuity requirements.
- Rollover – transferee: Determine matters that suggest there are no material discretionary elements affecting the rights or interests of the entity's members.
- Rollover – transferee: Determine matters that mean that material discretionary elements are present.

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