5 August 2026

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

Email: mintaxtrusts@treasury.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – MINIMUM TAX ON DISCRETIONARY TRUSTS

The SMSF Association welcomes the opportunity to provide this submission in response to the Minimum Tax on Discretionary Trusts consultation paper.

It is critical that any measure designed to target discretionary trust income splitting is carefully confined to that objective. In particular, legislative changes affecting the classification of discretionary, fixed and unit trusts have the potential to extend well beyond the operation of the proposed 30 per cent minimum tax and impact existing superannuation taxation settings.

While the consultation paper states that complying superannuation funds are excluded from the proposed minimum tax regime, the design of the measure could nevertheless have significant consequences for SMSFs that invest through otherwise compliant trust structures.

Our primary concern is that the proposal may inadvertently impose a 30 per cent minimum tax burden on compliant SMSF investments that are neither discretionary trust distributions nor non-arm's length income (NALI).

This outcome could arise where a trust is treated as a discretionary trust for the purposes of the proposed minimum tax regime, but the SMSF nevertheless holds a fixed entitlement under the existing NALI framework.

If this occurs, an SMSF could lose access to its ordinary superannuation taxation outcomes, including the 15 per cent accumulation phase rate and retirement-phase tax exemptions.

SMSF investment structures – Not the target of proposed reforms

Many SMSFs invest through unit trust and fixed trust structures for legitimate commercial and superannuation purposes.

These arrangements are commonly used to pool investor capital, facilitate co-investment, hold business real property and separate legal ownership of assets from the SMSF. Income is distributed in accordance with the investors' economic interests and does not depend upon trustee discretion.

As such, these arrangements are fundamentally different from discretionary trust income-splitting arrangements.

Legislative design should therefore ensure that SMSF investments in fixed entitlement trust structures are not indirectly subjected to a minimum 30 per cent tax merely because a trust does not satisfy a separate fixed trust definition adopted for the purposes of the minimum tax regime

Avoid creating dual fixed trust concepts

A significant concern for the SMSF sector is the potential emergence of two separate and inconsistent tests for determining when trust income should receive concessional superannuation taxation treatment.

Treasury's consultation paper contemplates the possibility that a trust may be classified as a discretionary trust because it does not satisfy the existing fixed trust concepts derived from Schedule 2F.

However, SMSF taxation outcomes under section 295-550 are based on a separate question: whether the SMSF holds a fixed entitlement to trust income for the purposes of the NALI provisions.

As recognised by existing ATO guidance, these are not necessarily the same tests.

The Commissioner of Taxation's Taxation Ruling TR 2006/7[1] has set out the guiding principles for the past 20 years on what constitutes a 'fixed entitlement'[2] and as such has been heavily relied upon by the SMSF sector. It has continued in force despite the repeal of the original *special income*[3] provisions and replaced by the *non-arm's length income*[4] regime.

Any departure from this longstanding interpretation could result in widespread and unintended changes to the taxation outcomes of established SMSF investment structures.

Consequently, a trust could be classified as discretionary for the purposes of the minimum tax regime while an SMSF simultaneously holds a fixed entitlement for the purposes of section 295-550.

In these circumstances:

- the trust may be subject to the proposed 30 per cent minimum tax;
- the SMSF may not derive NALI;
- the income may nevertheless be prevented from accessing ordinary superannuation taxation outcomes.

This outcome would extend the proposed measure beyond discretionary trust income splitting and into the taxation of compliant SMSF investment structures.

[1] Australian Taxation Office, *Income tax: special income derived by a complying superannuation fund, a complying approved deposit fund or a pooled superannuation trust in relation to the year of income* (TR 2006/7, 2 August 2006).
[2] Ibid [205]-[209].
[3] *Income Tax Assessment Act 1936* (Cth) s 273.
[4] *Income Tax Assessment Act 1997* (Cth) s 295-550.

Care must be taken to ensure that any tax law amendments do not fundamentally change the interpretation or operation of the NALI rules. Any deviation from the current interpretation of a unit trust and fixed entitlements could have catastrophic consequences for the sector.

Preservation of Existing Superannuation Taxation Outcomes

Excluding complying superannuation funds from the proposed measure does not, of itself, preserve existing superannuation tax settings.

A trustee-level minimum tax imposed on a discretionary trust may effectively become the minimum tax rate borne by a superannuation fund investor, even where the fund would otherwise be taxed at 15 per cent or qualify for exempt current pension income treatment.

This outcome would be contrary to the longstanding policy underlying superannuation taxation. The concessional tax treatment afforded to complying superannuation funds reflects preservation restrictions and the long-term retirement savings purpose of the superannuation system.

Without careful design, the proposed non-refundable offset may be incapable of preserving existing superannuation taxation outcomes and could result in compliant superannuation fund investments being subject to a higher effective rate of tax than would otherwise apply under the superannuation tax regime.

Treasury should ensure the design of the minimum tax regime preserves existing superannuation fund tax outcomes where a fund receives trust income through an arrangement that would not otherwise produce NALI under section 295-550.

In particular, Treasury should consider circumstances where:

- a superannuation fund holds a fixed entitlement for the purposes of section 295-550;
- a superannuation fund is entitled to exempt current pension income;
- a superannuation fund possesses carried-forward capital losses; and
- trust distributions ultimately form part of an amount taxed as NALI.

Tax Compliance Measures – Non-Arm's Length Income

Non-arm's length income (NALI)[5] generally applies to the income of a superannuation fund where the income is greater than it would have received from an arrangement on arm's length terms. This is commonly considered as applying to arrangements involving related parties but can also apply where unrelated parties are involved. A penalty rate of tax applies, with NALI taxed at the highest marginal tax rate, currently 45 per cent.

The NALI rules purposely discourage superannuation funds from being the beneficiary of a discretionary trust and receiving discretionary distributions. Any discretionary trust distributions received by the fund are taxed as NALI.[6] The definition of what constitutes a fixed trust and a unit trust versus a discretionary trust are therefore of critical importance.

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[5] Income Tax Assessment Act 1997 (Cth) s 295-550

[6] *Income Tax Assessment Act 1997* (Cth) s 295-550(4): Income derived by the entity as a beneficiary of a trust, other than because of holding a fixed entitlement to the income, is *non-arm's length income* of the entity.

Uplift in penalty tax should be avoided

Where trust income is already taxed as NALI under section 295-550, Treasury should ensure that the proposed minimum tax and associated offset mechanism operate in a manner that prevents inappropriate tax stacking or anomalous outcomes.

Integrity measures should operate consistently and should not produce cumulative tax outcomes merely because multiple integrity regimes apply to the same income.

For example, a trust distribution deemed to be discretionary in nature is punitively taxed as NALI. That income should not also then be subject to an additional 30 per cent tax rate, resulting in a 75 per cent effective rate of tax.

Interaction with Existing CGT and NALI Provisions

The interaction between the CGT and NALI provisions demonstrates how integrity measures can, in certain circumstances, extend beyond the income giving rise to the concern.

Under the current law, a non-arm's length trust distribution may influence the taxation of capital gains that have no connection to the relevant trust arrangement. The SMSF Association has previously raised concerns that this can result in the effective tainting of otherwise unrelated gains.

Similar distortions should be avoided in the design of the minimum tax regime.

Treasury should carefully consider how the proposed rules interact with:

- the CGT method statement;
- capital losses;
- carried-forward capital losses;
- the operation of section 295-550; and
- the proposed minimum tax offset.

Tax outcomes should remain proportionate and confined to the income giving rise to the integrity concern rather than inadvertently contaminating unrelated gains or compliant superannuation fund investments.

Recommendations

Treasury should expressly provide that the minimum tax regime does not alter the taxation outcome for a complying superannuation fund merely because an upstream trust is classified as a discretionary trust for the purposes of the minimum tax provisions.

In particular, Treasury should ensure that:

- existing section 295-550 outcomes are preserved;
- Superannuation funds with fixed entitlements do not lose concessional superannuation taxation treatment;
- retirement phase outcomes are preserved;

- the minimum tax offset fully accommodates complying superannuation funds; and
- no additional tax burden arises for superannuation fund investments that are neither discretionary trust distributions nor NALI.

We thank you again for the opportunity to provide this submission. If you have any questions about our submission, please contact Tracey Scotchbrook, Head of Policy and Advocacy at traceyscotchbrook@smsfassociation.com

Yours sincerely,

Peter Burgess
Chief Executive Officer

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.2 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.