18 September 2026

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

BY ELECTRONIC LODGEMENT

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – MINIMUM TAX ON DISCRETIONARY TRUSTS – EXPOSURE DRAFT LEGISLATION

The SMSF Association welcomes the opportunity to provide this submission in response to the Government's proposed minimum tax on discretionary trusts. Our submission is limited to those elements which may impact the investments and trust structures used by superannuation fund trustees to invest members funds. Such investments may include MITS, AMITs, widely held trusts, as well as closely held fixed and unit trusts. Other legislative provisions require the use of bare trusts.

It is therefore vitally important that the drafting of these provisions is clear, practicable, and stands on its own. Supplementation by Ministerial legislative instruments should limited to addressing anomalies where a timely remedy is needed. The drafting of the core definitional elements must be precise and not be so broad as to cause uncertainty or policy creep.

If you have any questions about our submission, please do not hesitate to contact Tracey Scotchbrook, Head of Policy and Advocacy via email traceyscotchbrook@smsfassociation.com

Yours sincerely,

Tracey Scotchbrook

Tracey Scotchbrook
Head of Policy and Advocacy

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.

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Minimum tax on discretionary trusts – exposure draft legislation

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Minimum Tax Trusts

Minimum Tax Trusts – Definition

The proposed legislation relies on defining a *minimum tax trust* (MTT) through the use of definition by exclusion. A clear, practical definition is needed here of what is intended to be classed as a *MTT,* the target of this policy and legislative reform. The *MTT* definition can then be enhanced and complimented with the inclusion of relevant exclusions, and clear explanation of the policy intention and operation of the provisions in the explanatory memorandum.

The exposure draft legislation places a greater reliance on the use Ministerial legislative instruments to state what is not a *MTT.* Commissioner of Taxation determinations and any associated rulings or guidance will be needed to address the practical application of the new law. While these are important instruments, and have a role to play, they should not act as the primary law or seek to address defects in legislative design. They should act as interpretative tools, supplementing the core legislation. An over reliance on other instruments risks adding further and unnecessary complexity to the operation and interpretation of the proposed provisions. Examples of this can be found in other areas of the law.[1]

Clear definitions and frameworks are essential in avoiding regulatory creep and unintended consequences, deliver law that is clear and practical, which can be clearly interpreted and applied.

Minimum Tax Trusts - Exclusions

Very few examples of trust structures have been directly referenced in the primary legislation as being excluded from the being a *MTT.* This is despite a range of trust structures being included in the explanatory memorandum[2]. The reason given is that their inclusion is not necessary as these forms of trusts meet the definition of a 'fixed trust'. It is our recommendation that these express exclusions, being examples of fixed trusts are included in the primary law. The definition of a fixed trust should include but not be limited to these prescribed forms of trust.

Bare Trusts

The explanatory memorandum references 'bare trusts' as being a kind of trust that would be excluded from the definition of a *MTT*[3]. These types of trusts are defined here as being solicitor and accountant trust accounts. While these are examples of bare trusts, a bare trust can arise in other circumstances.

In the context of a superannuation fund, a bare trust arises through the operation of the limited recourse borrowing arrangement.[4] Here, a regulated superannuation fund can maintain a borrowing

[1] Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Final Report No 141, November 2023) 71 [2.68]-[270]: *Judges have variously described provisions of corporations and financial services legislation as 'porridge', 'tortuous', 'exceptionally complex', labyrinthine, and as needing to be deciphered, not merely interpreted; Piecing together the primary legislation and hundreds of legislative instruments carries substantial costs.*
[2] Explanatory Memorandum, Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026; Treasury Laws Amendment (Tax Reform No. 4) Bill 2026 [1.22].
[3] Ibid.
[4] *Superannuation Industry (Supervision) Act 1993* (Cth) s 67A.

to acquire an asset[5] that is held on trust for the superannuation fund trustee which acquires a beneficial interest in the asset.[6]

As noted above, bare trusts are not expressly listed as an excluded trust in the primary law. Rather, reliance has been placed on the content of the explanatory memorandum.

A definition of a bare trust should state the form and substance of a bare trust, supported by examples, including solicitor and accountant trust accounts, limited resource borrowing arrangements, and any other relevant examples to provide a fulsome definition.

A clear exclusion of such arrangements from the definition of the *MTT* is essential in preserving and protecting existing arrangements and the operation of other aspects of the law that are not the intended target of these provisions.

Fixed Trust – Definition

The definition of a fixed trust in proposed in section 272-65 refers to a trust where 'there are no '*material discretionary elements.'* This term is not defined, and a heavy reliance is placed on the explanatory memorandum for context. The explanatory memorandum references 'draw[ing] upon existing Australian Taxation Office (ATO) guidance and "safe harbour" provisions.[7] This would appear to be referencing ATO PCG 2016/16.[8] Notably, this PCG sets out the factors to be considered by the Commissioner when deciding to exercise their discretion to treat a trust as a fixed trust under the trust loss provisions and other specified tax provisions.[9] Critically, these measures include Commissioner discretion, and this power should also be included in the new law to ensure reasonable and proportionate outcomes.

We do have concerns on the limited guidance and examples provided. Alongside the limited definition, these provisions are challenging for practitioners and trustees alike to interpret and apply reasonably in practice. In line with our previous comments, we note that the examples of fixed trusts included in the explanatory memorandum should be included in the primary law, to expand and provide context to the definition of a fixed trust.

Further, the current framing risks treating otherwise fixed arrangements as discretionary. The focus should be on the form and substance of income classification, allocation and distribution to beneficiaries. Such as that which has been applied in the SMSF context and on the interpretation and application of the non-arm's length income rules on trust income entitlements other than from a fixed entitlement.[10]

Essential administrative powers should not act to render a fixed trust discretionary. For example, in the event of a deadlock on a vote, many trust deeds will include a clause granting a casting vote.

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[5] Ibid sub-s 67A(1)(a).
[6] Ibid sub-s 67A(1)(b).
[7] Ibid, n2 [1.74].
[8] Australian Taxation Office, *Practical Compliance Guidelines: Fixed entitlements and fixed trusts* (PCG 2016/16, 4 July 2018).
[9] Ibid: See attachment A
[10] *Income Tax Assessment Act 1997* (Cth) s 295-550(4); Also refer to: 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, 7 December 2011).

Administratively for closely held trusts and unit trusts that do not meet the definition of widely held, this is essential for the operation of the trust and is not intended to render the trust discretionary. The current wording lacks clarity on the intent of this element and risks the disproportionate application of these provisions.

We are concerned that compliant fixed and unit trust arrangements in which regulated superannuation funds are invested under the current law and policy settings could be captured by these proposed changes. That concern arises especially in the context of investments in small, private, or closely held unit trust structures. These are not widely held trusts or managed investment schemes. They may have a single beneficiary or more and unit holders may include related and/or unrelated parties, depending on the nature of the arrangement.

Superannuation Funds Utilising Trust Investment Structures

Superannuation funds, including SMSFs invest through unit trust and fixed trust structures for legitimate commercial, investment, 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 superannuation fund. 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.

The proposed legislation must ensure that superannuation fund 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 and broader superannuation sector is the potential emergence of two separate and inconsistent tests for determining when trust income should receive concessional superannuation taxation treatment.

A trust may be classified as a minimum tax trust because it does not satisfy the existing fixed trust concepts derived from Schedule 2F. However, superannuation fund taxation outcomes under section 295-550 are based on a separate question: whether the fund holds a ‘fixed entitlement’ to trust income for the purposes of the non-arm’s length income (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[11] has set out the guiding principles for the past 20 years on what constitutes a ‘fixed entitlement’[12] and as such has been heavily relied

[11] 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).
[12] Ibid [205]-[209].

upon by the SMSF sector. It has continued in force despite the repeal of the original *special income*[13] provisions and replaced by the *non-arm's length income*[14] regime.

Any departure from this longstanding interpretation could result in widespread and unintended changes to the taxation outcomes of established superannuation and SMSF investment structures. A trust could be classified as discretionary for the purposes of the minimum tax regime while a superannuation fund simultaneously holds a fixed entitlement for the purposes of section 295-550.

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 tax imposed on a minimum tax trust may effectively become the minimum tax rate borne by a superannuation fund investor on its trust investment income, even where the fund would otherwise be taxed at 15 per cent or tax exempt on receipt of exempt current pension income.

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.

The proposed non-refundable offset may be incapable of preserving existing superannuation taxation outcomes. It could result in compliant superannuation fund investments being subject to a higher effective rate of tax than would otherwise apply.

Consequently, a trust could be classified as a minimum tax trust, while a superannuation fund 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 superannuation fund may not derive NALI;
- the income may nevertheless be prevented from accessing ordinary superannuation taxation outcomes:
    - General income tax rate: 15%;
    - Exempt current pension income (retirement income streams) income tax rate: 0%.

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

The exposure draft does not provide appropriate tax offsets to affected superannuation funds. Further, the EM is silent and provides no guidance, clarity or remedy.

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[13] *Income Tax Assessment Act 1936* (Cth) s 273 (repealed).
[14] *Income Tax Assessment Act 1997* (Cth) s 295-550.

Recommendation

To provide certainty, all superannuation funds should be entitled to a tax offset on any trust distributions received that are impacted by the minimum trust tax regime. This must be stated in the primary law and in the EM.

No advantage is gained and this would act to ensure that fund is placed on the correct tax footing. There is no opportunity for aggressive tax structuring to minimise taxation, as the existing non-arm's length income rules operate as an anti-avoidance and tax integrity measure.

Interaction with Tax Compliance Measures – Non-Arm's Length Income

Non-arm's length income (NALI)[15] 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 operate to 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.[16] The definition of what constitutes a fixed trust and a unit trust versus a discretionary trust are therefore of critical importance.

Uplift in Penalty Tax Should be Avoided

Where trust income is 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:

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[15] Ibid.

[16] Ibid, 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.

- 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.

Recommendation

The drafting of these provisions should be explicit, removing the interpretive and administrative risk arising with regards to NALI. This should be supported through clear statements and an express example in the EM involving an SMSF beneficiary. The example should make clear that that the non-arm's length income provisions are tax integrity and anti-avoidance measures and therefore punitive in their operation. A tax offset must be permitted to the extent that the effective rate of tax applied aligns with the applicable rate of tax, avoiding multiple layers of taxation through tax stacking.

Further, a note should be included at section 272-65 stating that the definition of a fixed trust does not change the meaning or operation of a "fixed entitlement" in section 295-550(4). This should also be clearly articulated in the EM.