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Assistant Secretary
Individuals and Indirect Tax and Superannuation Division
The Treasury

via email: mintaxtrusts@treasury.gov.au

To whom it may concern,

Submission on the Treasury Consultation Paper: Minimum tax on discretionary trusts

We welcome the opportunity to make a submission on the consultation paper released on 8 July 2026 concerning a proposed minimum 30% tax on discretionary trusts from 1 July 2028 (the **Consultation Paper**).

RSM Australia (**RSM**) is a national accounting firm with over 100 years of history working closely with family businesses across Australia. This submission has been prepared with the benefit of our experience working with private groups and family businesses, many of whom have operated through discretionary trust structures across multiple generations for reasons that are substantially unrelated to tax.

Our primary position is that the proposed minimum tax should not proceed as presently contemplated, because it:

- Represents a significant and unnecessary departure from horizontal equity;
- Abandons arguably the single most important architectural principle of Australian business taxation – imputation – penalising taxpayers by reference to legal form; and
- Offers 'rollover relief' that relieves only federal income tax and fails to appropriately consider potential state and territory duty implications along with the broader costs and complexities of unnecessary restructuring.

The Government's stated concern about income splitting mischaracterises discretionary trusts as novel tax-planning arrangements, without regard for their genuine and lawful role in private groups that are risking family capital to generate a return for the family.

If, notwithstanding this submission, the Government proceeds with the measure, it should only do so in a form that corrects the specific design issues identified below — most importantly preventing unrelieved double taxation, addressing the potential duty, cost and practical complexity of restructuring, preserving the refundability of excess franking credits and excluding distributions to tax-exempt entities from the new tax.

We also record our concern, shared by professional bodies, that consultation period of barely three weeks — falling immediately after the end of the financial year and across the winter school holidays — is not adequate for a measure of this complexity and reach, estimated to affect in the order of 840,000 discretionary trusts. We would welcome a longer period for engagement before exposure draft legislation is settled, as well as a much-needed broader review of trust taxation (including the unintended implications of archaic family trust distribution tax laws), rather than a single freestanding revenue measure layered on an already complex framework.

Our submission is set out in two parts:

- Section 1 sets out our key recommendations; and
- Section 2 responds to each of the Paper's 17 discussion questions.

We would welcome the opportunity to discuss any aspect of this submission with Treasury.

Yours sincerely,

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Section 1: RSM recommendations

Primary recommendation (1)

Recommendation 1: The minimum tax should not proceed, and Treasury should instead undertake a genuinely comprehensive review of trust taxation and extend the consultation period.

The proposal interacts with Division 6, the *Bamford* principles, the family trust election regime, Division 7A and section 100A — already among the most complex areas of taxation law.

A three-week consultation window, falling across the end of the financial year and the winter school holidays, does not allow the depth of engagement a measure of this reach requires. There should be genuine consultation with practitioners, trustees, businesses, and families who will be impacted by the practical consequences of any change. Such consultation must extend to general trust law.

Treasury is also requested to meaningfully consider the submissions made earlier this calendar year by the professional accounting and tax bodies on the archaic family trust distribution tax rules, which are having significant unintended consequences for multi-generational families and may affect the viability of a sizable number of family businesses. We are able to assist Treasury with real and practical examples of impacts that need to be addressed with urgency.

Recommendations (2-3) providing more equitable and simplified alternatives

Recommendation 2: Do not adopt a minimum tax on trusts; instead, adopt a minimum tax on individual beneficiaries who receive discretionary trust distributions

The proposed minimum tax on discretionary trusts is unnecessarily complex and causes a variety of issues in respect of trust-to-trust distributions and distributions to corporate beneficiaries. Many privately owned Australian businesses operate as an economic group through multiple trusts and corporate entities established for legitimate asset protection and risk mitigation purposes. Disrupting these existing structures which have been lawfully established, to implement a minimum tax on individual beneficiaries who receive trust income is unnecessary, costly to implement, and will cause significant disruption to privately owned businesses across Australia.

The Government's policy objective — a minimum tax rate on income derived by individual beneficiaries from discretionary trusts — can be met by imposing the minimum tax at the individual beneficiary level, without imposing tax on the trust or providing a non-refundable credit mechanism. Implementing the minimum tax at the individual beneficiary level would simplify the proposed changes whilst ensuring the Government's policy objective is met, consistent with the original policy position put forward in 2019 in the form of commitment *PER 404*.

The new minimum tax on discretionary trust distributions could be legislated in the same manner as the recently legislated minimum tax on capital gains. We recommend that the amount to which the minimum tax applies be calculated on an *adjusted basis*, so beneficiaries can benefit, in the same way as salary and wage earners, from tax-deductible donations and concessional superannuation contributions. The adjusted amount to which the minimum tax would apply could be calculated as follows:

- total assessable trust distributions from discretionary trusts (including capital gains and franked dividends)
- less capital gains included in the assessable trust distributions, as they will be subject to their own minimum tax regime
- less primary production income included in the assessable trust distributions, to ensure primary producers can continue to access averaging and farm management deposits
- less concessional superannuation contributions made by the individual
- less donations made by the individual to a deductible gift recipient

- equals, ***adjusted discretionary trust distribution income*** to which the minimum tax applies.

There would be no change to the general refundability of franking credits to individuals; rather, the minimum tax would prevent franking credits from being refundable to the extent of the new minimum tax.

The company tax rate applicable to discretionary trust distributions received by a corporate beneficiary would remain unchanged from the existing law, which allows base rate entities to adopt the lower 25% company tax rate. This is justifiable on productivity grounds, given that those base rate entities will either operate a small or medium business of their own or be integrated with a family group in which a trust operates such a business.

Integrity aspects

We understand Treasury are concerned that the minimum tax could be sidestepped by a distribution to a corporate beneficiary, which then allows the dividends to be paid to individual shareholders without application of the minimum tax to the individual shareholder. We do not share the view that this is a material revenue risk deserving of added complexity. We note that:

- if a discretionary trust has made a family trust election, it will not in most cases be able to distribute to a corporate beneficiary with shares carrying discretionary dividend access rights without the incidence of family trust distribution tax;

- if the shares in the corporate beneficiary do not carry discretionary dividend access rights and are held by a discretionary trust, as would normally be the case for asset protection and estate planning purposes, the dividend when flowing through the second discretionary trust would itself give rise to the minimum tax when received by an individual beneficiary; and

- if the shares in the corporate beneficiary do not carry discretionary dividend access rights and are held by individual shareholders, this should not present any material revenue concern, as the same position could be achieved if the trust assets were transferred to the company under the proposed roll-over relief.

However, if Treasury considers there is a material revenue risk, a separate class franking account could be adopted by any corporate beneficiary that receives trust income from a discretionary trust. To prevent 'recovery' of the minimum tax at the individual shareholder level through refundable franking credits, the franking credits within that account would be non-refundable when dividends sourced from a discretionary trust distribution are declared to shareholders. Appropriate ordering or proportioning rules would also be needed to determine the extent to which dividends are sourced from that account.

Recommendation 3: Income splitting between spouses is better addressed through longer term reforms that allows tax to be calculated with reference to the family economic unit

A targeted, well-designed spousal income equalisation tax offset would address the Government's stated concern directly by allowing all families, whether salary and wage earners, business operators, or discretionary trust beneficiaries, to access two marginal rate tax thresholds. This would give spouses greater flexibility around work and care decisions without imposing a blanket entity-level tax on the very large number of discretionary trusts where no income-splitting concern arises.

The spousal income equalisation tax offset would retain the individual assessment basis of our tax system, while allowing the higher-income spouse to claim the offset where both spouses elect for that treatment.

Further recommendations (4-12) to address specific design issues with the proposed minimum tax on trusts, if it proceeds as outlined in the Consultation Paper

Recommendation 4: Coordinate with the States and Territories through the Council on Federal Financial Relations or National Cabinet

The rollover as described relieves Commonwealth income tax only. Transfer duty, landholder duty and foreign surcharge duty may still apply in full to a restructure rendering the very notion of relief illusory. By failing to consider duty, the Consultation Paper offers many taxpayers a choice: pay an uncredited 30% minimum tax indefinitely, or immediately pay up to 5.7% (plus surcharge where applicable) of the value of certain assets to a State or Territory revenue authority.

Treasury should engage the states and territories, through the Council on Federal Financial Relations or National Cabinet, to secure coordinated relief before the measure is finalised. Other potential consequences at the State and Territory level such as land aggregation should also be considered as part of this process.

Recommendation 5: Permit the immediate deductibility of restructuring costs

Restructuring out of a discretionary trust will necessitate various incremental costs such as legal and accounting fees, revised employment contracts, leases and supplier agreements, refinancing, and the diversion of time away from operating family businesses. Such costs may be regarded as outgoings of capital or of a capital nature on the basis they are referable to the profit-yielding structure and therefore non-deductible or only deductible over time. To minimise the real cost for affected taxpayers, such costs should be made specifically deductible for income tax purposes.

Recommendation 6: The rollover must grapple with trust law, not just tax law

A trustee restructuring trust assets into a company with a narrower shareholder base may breach fiduciary duties owed to beneficiaries excluded from that company, exposing trustees and their advisers to real dispute risk. Treasury should provide clear guidance, and ideally the ability for the same or similar trust to hold shares in the company after rollover, along with a statutory safe harbour, confirming that a trustee properly exercising the rollover in good faith does not thereby breach trust.

Recommendation 7: Extend the minimum tax offset to corporate beneficiaries

Denying the minimum tax offset to corporate beneficiaries would represent a significant and unnecessary departure from horizontal equity, which abandons the single most important architectural principle of Australian business taxation since 1987 – imputation – at the boundary between trusts and companies. Specifically, denial of the minimum tax offset to corporate beneficiaries can reasonably be expected to give rise to distinct economic pathologies, including:

- ***Classical, unrelieved economic double taxation*** of the kind deliberately abolished in 1987 would be confined to one class of taxpayer: trust income flowing to companies. The result would be total effective tax rates approaching 70% for a single family economic group;
- ***Trapped tax and franking credits*** would arise because the double entity-level tax would strip a company of the distributable profits needed to carry its credits out. A design that systematically manufactures franking account balances that cannot be distributed is a design at war with Part 3-6 of the *Income Tax Assessment Act 1997*; and
- ***Breakdown of imputation integrity***, which rests on a simple identity: one dollar of tax paid at the corporate level equals one dollar of credit in the hands of members, so that entity-level tax is the collection point, not a terminal burden.

Families earning income through a discretionary trust would bear meaningfully more tax than families earning the same income through a company, notwithstanding identical underlying risk and capital.

The historical concern about trusts using the funds of a corporate beneficiary to fund investments that benefit from the CGT discount on capital growth has already been addressed by recent changes to the CGT discount regime. It makes little sense to apply a punitive tax regime to a corporate beneficiary of a trust when a family that restructures into a company with fixed interests can access full franking credit refundability for the same economic interest.

Recommendation 8: The design should prevent cascading double taxation through a chain of discretionary trusts

As presently described, a third or subsequent trust in a chain is not entitled to a minimum tax offset for tax already paid by trusts further up the chain. That design would produce further, unintended double taxation on distributions that pass through more than one trust.

Recommendation 9: Excess franking credits should flow through to beneficiaries and remain refundable

Excess franking credits, after application to the minimum tax, attaching to a franked distribution received by a trust should flow through to presently entitled beneficiaries in the year of receipt, consistent with the existing operation of the imputation system. Refundability should be preserved for individual and tax-exempt beneficiaries.

Further, when calculating the amount of any refundable excess franking credits, beneficiaries should continue to benefit from concessional superannuation contributions and tax deductible donations, as would any salary and wage earner.

Recommendation 10: Distributions to tax-exempt entities should be excluded from the minimum tax base

Refundable franking credits should continue to flow through to endorsed charities and other tax-exempt beneficiaries unaffected, so the measure does not become, in effect, a tax on structured philanthropy.

Recommendation 11: Institute transitional rules that permit the utilisation of losses

The possibility of existing tax losses being abandoned should not be an obstacle to any actual or notional restructure. In line with current provisions under Schedule 2F, transitional rules should be instituted to permit use of tax losses within a defined group. For example, provision for the non-application of the minimum tax to amounts to a recipient trust that would be excluded from the operation of the income injection test by virtue of being within the defined family group.

Recommendation 12: Proposed collection measures should be reconsidered.

Trustees will, under trust law, resolve to distribute and subsequently pay interim distributions to beneficiaries during a year with little ability to determine the actual taxable income of the trust until after the close of financial year. The requirement for the trustee to retain part of the distribution (being 30% of the estimated taxable distribution amount, which may be higher than 30% of the actual trust income distributed) imposes a significant and practically un-administrable burden on trustees.

Further, joint and several personal liability for trustees and directors of corporate trustees risks imposing personal liability disproportionate to a trustee’s or director’s actual control over trust income.

The minimum tax should be payable by and be a liability only of the beneficiary (see our Recommendation 2).

Section 2: Response to Consultation Questions

We have responded to each of the Paper's 17 discussion questions below. Our responses should be read together with Section 1: our primary position remains that the minimum tax should not proceed. Our answers below address how the design should be improved if, notwithstanding that position, the Government proceeds with the measure.

1. How should discretionary trusts be defined to appropriately distinguish them from fixed trusts for the purposes of the minimum tax?

We submit that defining a discretionary trust by exclusion, as any trust that is not a fixed trust on the strict "vested and indefeasible" standard, is too broad and would capture ordinary private unit trusts and other modern commercial trusts. We recommend a purpose-built definition that treats a trust as fixed where entitlements are, in substance, unit- or interest-based and proportionate, disregarding unexercised administrative or amendment powers, with an express carve-out for trusts whose members are all fixed trusts, widely-held entities or complying superannuation funds.

2. What is the appropriate minimum tax treatment for income tax-exempt entities?

Distributions to income tax-exempt entities should be excluded from the minimum tax base entirely, with refundable franking credits continuing to flow through to them unaffected. Because the minimum tax offset is proposed to be non-refundable, an exempt beneficiary would otherwise receive materially less than the amount appointed to it — converting the minimum tax, in effect, into a tax on structured philanthropy.

3. Are there any other implementation matters not addressed in this paper that should be considered in designing the minimum tax on discretionary trusts?

Please see Recommendations 1-12.

The Consultation Paper contemplates a limited exclusion for discretionary testamentary trusts. In our view the existing integrity provisions introduced in 2019 are sufficient to justify a full exclusion for all discretionary testamentary trusts. The notion that they must be confined to those with individual beneficiaries does not fit with general family structuring and estate planning, where for various reasons, including asset protection, certain individual beneficiaries may prefer that income be appointed and paid to a company they control rather than to them directly.

4. Are the proposed rollover relief arrangements appropriate?

Please see Recommendations 4-6.

5. Are existing integrity rules sufficient to address arrangements that substantially preserve discretionary economic outcomes through alternative legal structures?

Forcing family businesses into companies owned by individuals with fixed interests is not a practical commercial arrangement for family businesses. It offers no asset protection or succession and estate planning alternatives. The rollover should allow for shares to be held by the existing trust or one or more substitute discretionary or fixed trusts for the benefit of the family group.

Further, the rollover should permit multiple classes of shares with materially equivalent distribution and capital rights and governance-only differences, so that genuine family arrangements — for example, differential voting rights between generations — are not denied relief.

6. Is it appropriate that the rollover is designed to prevent FTDT from applying where a discretionary trust with an existing family trust election and/or interposed entity election(s) transfers property to an entity that is not a member of the family group?

We support switching off family trust distribution tax for the rollover transfer. We note, however, that the need for this concession demonstrates that the family trust distribution tax perimeter is misdrawn more generally: the same 47 per cent charge can arise on ordinary distributions between the trusts of parents, children and siblings within a single family.

Consistent with Recommendation 1, we recommend Treasury also undertake a broader review of family trust distribution tax in accordance with submissions made by professional accounting and tax bodies earlier this year, not only for the purposes of the rollover.

7. Are there any other matters that should be considered in finalising the design of the rollover relief?

The rollover window should run for at least **five** years from the later of 1 July 2027 and Royal Assent of the final legislation, rather than from 1 July 2027 itself, given the legislation is unlikely to be enacted before mid-to-late 2027 and taxpayers should not be expected to restructure before seeing the final law.

Noting, given the significant productivity cost of restructuring (including stamp duty costs), many families will need time to build cash reserves to afford to restructure, which may take multiple years.

The statutory ‘family unit’ test should be confirmed to include lineal descendants, their spouses, and entities wholly owned or controlled by them, and should accommodate families with existing family trust elections and interposed entity elections.

8. Are there other approaches that could reduce the need for upfront restructuring? What practical or legal considerations would arise in implementing these approaches, including their interaction with trust law and trustees’ obligations?

Yes. We support the alternative flagged in the Paper of an irrevocable election to be taxed as a fixed trust without the need to convey any asset. This avoids the CGT, duty, refinancing and trust law difficulties associated with an actual transfer of trust assets (see Recommendation 5), and should be developed as a genuine, low-friction alternative to the rollover rather than treated as a footnote to it.

9. Having regard to tax system integrity, compliance costs and administrative simplicity, should excess franking credits be refundable to the trustee? Why or why not?

We recommend excess franking credits flow through and remain refundable to presently entitled individual and tax-exempt beneficiaries, rather than carried forward. A carry-forward model does not interact with the existing ‘specific entitlement’ rules and requires the trustee to maintain a perpetual franking account and, if credits are to be linked to particular beneficiaries, to trace which beneficiary a distribution and its carried-forward credits ultimately relate to as the membership of the trust changes over time — a task that is likely to be un-administrable for most family trusts in practice.

10. What compliance costs or tracing requirements may arise under a carry-forward model? Could existing integrity rules adequately address these matters?

If carry-forward is nonetheless adopted, we recommend it apply without time limit, given the flat 30 per cent minimum tax already caps the Government’s revenue exposure, and that new anti-trafficking rules be developed, since the existing 45-day holding period and related integrity rules were not designed for balances carried at the trustee level.

11. Are there any other matters that should be considered when finalising the treatment of excess franking credits?

We recommend that minimum tax offsets received from other trusts be applied ahead of franking credits in working out a trustee’s liability, maximising the franking credits that remain available to be refunded or to flow through to beneficiaries.

12. What additional safeguards, administrative modifications, or beneficiary notification requirements should be considered to support the effective operation and collection of the minimum tax, particularly for arrangements involving corporate trustees?

We do not support the proposed joint and several personal liability of directors of corporate trustees for a trust’s substantive income tax liability, nor an open-ended Commissioner right of reimbursement from trust assets. Collection should instead follow the existing framework in section 254 of the ITAA 1936, with liability limited to trust assets under the trustee’s control and any director liability confined to a notice-and-defences model comparable to the existing director penalty regime, which is limited to withheld amounts, GST and the Superannuation Guarantee Charge.

13. What notification arrangements would be most effective for trustees and beneficiaries to give effect to the minimum tax in a way that minimises compliance costs?

We recommend the notification obligation be integrated into the existing distribution statement framework, with a single annual statement per beneficiary aligned to the trust’s return due date.

14. Are the complementary collection mechanisms for trustees and corporate trustees proportionate to support the effective collection of the minimum tax?

We do not object to trustee-level PAYG instalments in principle, but only if amounts paid are creditable in real time against the corresponding beneficiary's own instalment obligations on the same income, to avoid the same dollar supporting instalments, and TFN withholding, at multiple levels simultaneously.

15. Are there any other matters that should be considered in the design of the collection mechanisms?

We ask Treasury to address, expressly: the position of trustees with insufficient trust assets to meet the minimum tax; the liability of successor trustees for a predecessor's unpaid minimum tax; and the priority of any Commissioner reimbursement right against secured creditors and other beneficiaries of the trust.

16. What, if any, consequential interactions arise between the minimum tax on discretionary trusts and the revised 2018-19 Budget measure?

The minimum tax and the announced Division 7A response to Bendel proceed from opposite premises: Division 7A, as it will be restored, treats the corporate tax rate as the correct landing point for business working capital funding, while the minimum tax treats the corporate rate as inadequate and adds a further, uncredited 30 per cent on top. Combined, and on the Consultation Paper's own analysis, a trustee must find 30 per cent for its own tax while the company must also be paid its full entitlement and find a further 30 per cent for its own tax — a cash burden the underlying income may not support. We recommend the two measures be designed, and their start dates aligned, together, so the two regimes can properly co-exist.

17. Are there any other issues or implications as a result of the High Court's decision in Bendel that should be considered as part of the design and implementation of the revised 2018-19 Budget measure?

We recommend that grandfathering continue to apply for unpaid present entitlements (**UPE**) to corporate beneficiaries arising before 16 December 2009, and for post-16 December 2009 UPEs that, before legislative reform, were dealt with in good faith under the Commissioner's administrative practice and have not already been converted into Division 7A loans. Those arrangements were established in good faith and, where relevant, remain subject to Subdivision EA where the trust makes a debit balance loan to another trust or individual.

Further, statutory protections from Subdivision EA should also be legislated for the many taxpayers that had chosen to rely in good faith on the ATO's administrative practices which effectively turned off Subdivision EA and applied Division 7A directly to the unpaid present entitlement owing to a corporate beneficiary.

As noted above, we recommend grandfathering and prospective reforms to Division 7A. However, if Treasury are to bring the existing stock of UPEs within Division 7A, we recommend a clear prospective workable, statutory transition for the existing stock of UPEs — complying terms from a fixed date, with no retrospective deemed dividend exposure for groups that relied in good faith on the Commissioner's pre-Bendel administrative practice. Further, such reforms must be clearly drafted with the repeal of Subdivision EA at the same commencement of the new rules which treat UPEs as a loan, so there is certainty for taxpayers as to the application of targeted provisions.

Finally, and importantly, Treasury should engage meaningfully with the Commissioner's overreach in relation to the application of section 100A of the *Income Tax Assessment Act 1936* to UPEs within family group structures, with recent administrative practice that extends the application of the provision well beyond its original purpose and function, creating significant uncertainty for family business groups.

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