Submission on Exposure Draft legislation for the minimum 30% tax on discretionary trusts

Grant Thornton Australia Ltd

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Assistant Secretary
Individuals and Indirect Tax and Superannuation Division
The Treasury
Langton Crescent
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Via: Treasury consultation hub

Dear Assistant Secretary

Grant Thornton Australia welcomes the opportunity to make a submission to the Exposure Draft legislation for the minimum 30% tax on discretionary trusts, specifically:

- *Treasury Laws Amendment Bill 2026: Minimum tax on discretionary trusts* ('TLAB26 MToDT')
- *Income Tax Rates Amendment (Minimum Tax on Discretionary Trusts) Bill 2026*
- *Treasury Laws Amendment Bill 2026: Minimum tax on discretionary trusts—roll-over relief* ('TLAB26 RoR')
- *Treasury Laws Amendment Bill 2026: minimum tax on discretionary trusts – electable regime* ('TLAB26 ER')

This policy proposal is significant in that it would have far-reaching consequences for privately held businesses, wealth and other interests. Accordingly, a number of matters warrant attention.

Please contact me if you have any queries or would like to discuss anything in our submission.

Yours sincerely

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1. Reconsider policy

2026-27 Budget

The proposals announced in the 2026-27 Federal Budget, and for which draft legislation has now been released, include a fundamental and far-reaching change to our tax and transfer system. Such fundamental changes should not be implemented without extensive consultation to appraise the broad impact, as it will impact all aspects of our society.

Capital vs Labour

There is a long history of policy settings supporting the investment of risky capital. Accordingly, the stated policy goal of "…better align(ing) the tax rate on trust income with the tax rates paid by workers" misunderstands the difference between capital and labour.

Capital – more specifically, capital that is put at risk – is what underpins the employment of labour in the private sector. Accordingly, seeking to equate the two reflects a failure to recognise that returns from capital involve taking on risks that do not arise with labour.

Further, small-to-medium businesses and private groups will incur significant unproductive costs in dealing with the complexities and compliance issues arising under this policy, diverting resources away from productive commercial activities. This can only come at the cost of jobs and economic growth.

Policy is treating symptoms

In addition, the minimum tax on discretionary trusts is essentially treating symptoms instead of the underlying cause. The underlying cause is our well-known over-reliance on income tax (and under-reliance on less economically damaging taxes such as the GST). That manifests in perceived excessive use of trusts in income tax planning – i.e., the symptom – relative to all the non-tax reasons for their existence.

If the underlying cause of Australia's unbalanced tax mix is addressed, trusts would feature far less in tax planning and there would be much less use of corporate beneficiaries. The reason for that is that there would be much less perceived need in the first place for the kind of tax planning for which trusts are used.

As will be shown, the proposed legislation will create punitive outcomes, inflexibility, complexity, conflicts with other legislation, and other anomalies for the small-to-medium business sector and private groups.

This often is the outcome when treating symptoms instead of the underlying cause.

Recommendations

- Withdraw this policy.
- Undertake genuine, holistic tax reform, including the ultimate ideal of tax-mix reform. This would address the many underlying causes of disfunction in our tax system, from which the symptoms would greatly diminish.

  There would then be less need for this misdirected attention to those symptoms.

Recommended reading

- *Mixed Fortunes: A History of Tax Reform in Australia*, by Paul Tilley.
- *Tax Wars: The bluster, bulldust and bedlam behind Australia's tax reform gridlock*, by David Montani.

The remainder of this submission responds to matters arising from the draft legislation without accepting that it presents a valid approach.

2. Definition of fixed trust

We welcome the expanded definition of 'fixed trust' in section 272-65 TLAB26 MToDT. We note the following matters:

1. Avoid need to amend trust instruments

Many trust instruments may contain clauses setting out powers that would not satisfy subsection 272-65(2)(b). It would follow that there are material discretionary elements, and thus the trust would not be a fixed trust under paragraph 275-65(1)(b).

However, in many cases, the abovementioned clauses are 'off the shelf' clauses in relatively standardised trust instruments where there is no intention to apply the powers set out in them, and they never have been applied.

Although these trust instruments could be amended to remove those clauses, that would come at a cost and inconvenience.

Recommendations

- Include a provision to the effect that where a trust instrument includes powers set out in paragraph 272-65(2)(b) that could be exercised to significantly vary existing entitlements, the trust will be taken to have no material discretionary elements where any such powers *have never been exercised*.

  The above will achieve the intended policy outcome without those trusts having to incur the costs and inconvenience of amending the trust instrument to remove those clauses.

- Include a provision to the effect that where any of the abovementioned powers is exercised for the first time, the trust ceases to satisfy paragraph 272-65(1)(b) from the beginning of the income year in which that first exercise happens. That is, the trust's status as a fixed trust up to the end of the previous income year is undisturbed.

3. Minimum tax income

1. Exclusions from minimum tax income – testamentary trusts

Section 101AD TLAB26 MToDT excludes that part of a trust's net income that is derived from certain types of assessable income. In most cases, a trust's net income under section 95 of the *Income Tax Assessment Act 1936* ('ITAA36') is the same as taxable income.

It is unclear to what extent allowable deductions are to be allocated to the abovementioned types of assessable income to arrive at that part of net (taxable) income that is derived from them.

Recommendation

- Include a provision to the effect that the part of net (taxable) income that is derived from a particular type of assessable income is determined as follows:

    a. The amount of the type of assessable income;

    b. Less allowable deductions directly related to deriving the above income;

    c. Less a reasonable portion of allowable deductions for the income year that do not relate directly to any particular type of assessable income.

2. Testamentary trusts

Subsection 101AD(1)(c) TLAB26 MToDT refers to testamentary trusts "established on or after 1 July 2028". There is uncertainty over when a testamentary trust is in fact established. It is not necessarily the date of death, as no trust property has yet been settled upon the testamentary trust – a fundamental requirement under trust law.

Recommendation

- To provide a practical certainty, include a provision to the effect that, for the purposes of section 101AD, a testamentary trust is taken to be established on the deceased's date of death.

4. EET election regime

Under TLAB26 ER, where a trustee makes an Excluded Election Trust ('EET') election under section 102UYB, the trust is taken not to be a minimum tax trust. Accordingly, the minimum 30% tax will not apply to that trust. This is touted as an alternative to restructuring assets and businesses out of a trust, thereby avoiding the significant costs of restructuring that otherwise would arise.

A trustee making an EET election must nominate beneficiaries and a respective single percentage share of both income and capital in respect of each beneficiary. If the trustee subsequently confers a present entitlement to trust income or capital not in accordance with the nominated beneficiaries and percentages, the EET election is automatically revoked. A trustee may also voluntarily revoke an EET election.

Where an EET election is revoked, the effect under section 102UYG is that the trust's net income for that income year is subject to a 47% tax rate, and the minimum 30% tax regime applies from the following income year.

The effective 'locking in' of a set distribution pattern causes a number of issues to arise:

1. Trustee's obligations

As confirmed in *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, a trustee exercising a discretionary power of distribution must give real and genuine consideration to all relevant beneficiaries and their circumstances, acting in good faith and for the purposes for which the power was conferred. A trustee cannot simply favour certain beneficiaries by habit, family preference, or personal animosity without proper consideration of others. Failure to genuinely consider relevant beneficiaries may constitute a breach of trust, rendering distribution decisions voidable and potentially justifying removal of the trustee.

A trustee who makes an EET election must then make distribution decisions year after year in accordance with the fixed nominated beneficiaries and percentages, so as not to trigger an automatic revocation. The trustee may well be exposing themselves to a claim by one or more beneficiaries to be in violation of their obligations as set out above.

Accordingly, there is a potential conflict between maintaining an EET election in force and a trustee's fiduciary obligations.

The above matters are in the jurisdiction of the states and territories rather than the federal level.

Recommendation

- Consult with state and territory governments on amending relevant laws to provide protection to trustees making distribution decisions in accordance with an EET election.

2. Same percentage for both income and capital unreasonably restrictive

Paragraph 102UYB(2)(b) TLAB26 ER requires a trustee to specify the same share for both income and capital for a nominated beneficiary. Trust income and trust capital serve different legal and economic functions. Income reflects annual returns, while capital represents the trust fund itself. Beneficiaries' entitlements and needs may differ between each, making it unreasonable to require a trustee to distribute income and capital in identical proportions.

Recommendation

- Allow the respective shares of income and capital for nominated beneficiaries to be different.

3. Permanently fixed distribution pattern detrimental to business agility

To succeed and prosper, a business must be agile in adapting to changing circumstances, whether in their market, their own business, and, for family businesses, their own family.

Businesses grow and change over time – and so do their owners behind them. A business started by someone in their thirties will likely look very different by the time they reach their fifties, as too will their family. Effectively locking a trust into a fixed distribution pattern to pre-nominated beneficiaries may become detrimental, for reasons such as a profit reinvestment rate falling to as low as 53 cents in the dollar, causing difficulties in managing working capital and servicing debt.

This puts small-to-medium and family-owned businesses at a disadvantage compared to larger corporate groups, who can reinvest profits at 70 or 75 cents in the dollar.

4. Permanently fixed distribution patterns may be harmful to certain beneficiaries

It is inevitable that some beneficiaries will experience personal difficulties such that continuing to distribute to them may be harmful to either them or the trust's interests. Examples include beneficiaries experiencing drug or gambling addiction, becoming bankrupt or being subjected to coercive control.

A trustee's only resolution avenue in the above situations is to revoke the EET election, which will trigger the punitive consequences noted above, putting the trustee in a conflicted position. This is not a picture of flexibility.

Recommendations

In view of the matters noted in paragraphs 2, 3 and 4, we make the following recommendations:

- Allow for the distribution percentage to nominated beneficiaries to change (up or down) each year by up to 20 percentage points from that stated in the EET election. Of course, this cannot go below 0% or above 100% for any beneficiary.

  For example, a trustee makes an EET election for the 2028-29 income year, specifying three beneficiaries and the following percentages:

Beneficiary	%
Beneficiary 1	40%
Beneficiary 2	40%
Beneficiary 3	20%
Total	100%

  The above percentages in the EET election are the anchor-point from which future distributions can change. In the subsequent income years, the percentage entitlements amongst the three beneficiaries can deviate from that anchor point, within the 20 percentage-point limit.

  For example:

Distributions	2028-29	2029-30	2030-31
Beneficiary 1	40%	60%	50%
Beneficiary 2	40%	20%	50%
Beneficiary 3	20%	20%	0%
Total	100%	100%	100%

  We submit that it is reasonable to provide this amount of leeway that offers trustees some ability to mitigate the risk of a claim by a beneficiary for breaching their obligations while also keeping the policy intent intact.

- Allow a trustee to reset the beneficiaries and percentages every five years.

  The policy in its current form has the potential detrimental effects noted above, and puts smaller businesses at a competitive disadvantage compared to larger corporate groups. Allowing trustees to reset the nominated beneficiaries and percentages at certain intervals strikes a balance between the policy objective of the EET election regime and not unduly disadvantaging smaller businesses compared to their larger competitors.

5. Revocation of EET election – 47% tax

It is correct to say that a trustee can revoke an EET election at any time and free itself of the above effective lock-in. The Treasurer, The Hon Dr Jim Chalmers, stated in Parliament on 9 September that trusts "…can use the (EET) election and retain the flexibility to change their approach in the future as well."[1]

The above statement may be true, but it is only half the story. It omits that revoking an EET election has consequences, the first of which is that the trust's net income for the year of revocation incurs a tax impost at the top marginal rate plus Medicare levy of 47%. The 30% minimum tax regime then applies in subsequent years.

The Exposure Draft Explanatory Materials at paragraphs 1.66 and 1.67 covers the consequences of revocation. No explanation is given for the reason behind imposing this punitive 47% tax impost consequence. It is difficult to conceive what the policy goal is, especially as this becomes a barrier to entering into the minimum 30% tax regime.

Accordingly, the prospect of the punitive consequence of revoking an EET election dampens any flexibility to change approach in future, and punishes businesses and private groups having to deal with the matters noted at paragraphs 2 to 4 above.

Recommendation

- Do not impose 47% tax upon revocation of an EET election.

  The 47% impost is a barrier that severely diminishes any notion of flexibility. We recommend that the minimum 30% tax regime simply applies from the year of revocation, which would encourage trustees to opt into the minimum 30% tax regime where the EET election regime is no longer suitable to their circumstances.

6. Whether a trust incurring a loss triggers a revocation

Under paragraph 102UYF(2)(a), an EET election is automatically revoked if a trustee 'decides' not to confer present entitlements in accordance with the EET nomination per subsection 102UYD(2). The use of the verb 'decides' implies requiring a positive action from the trustee.

The concept of a 'decision' has been described thus:

> *"The making of a decision by a person is a mental process, which may be communicated orally or in writing, or be apparent from action taken or not taken."*[2]

[1] Hansard, House of Representatives, 9 September 2026, pg 56. Available here: https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/29181/toc_pdf/House%20of%20Representatives_2026_09_09.pdf;fileType=application%2Fpdf

[2] *Evans v. Friemann* (1981) 35 A.L.R. 428 at p. 431.

Where a trust incurs a loss for an income year, the trustee is incapable of conferring present entitlements because there is no trust income in the first place. That is, there is no mental process to communicate, and there is nothing from which an action, or inaction, is apparent. Thus, there is no positive action by the trustee. So, whilst present entitlements will not be conferred in accordance with the EET nomination, that does *not* arise because the trustee 'decides' so.

On that basis, paragraph 102UYF(2)(a) is not enlivened, and thus no revocation arises.

Alternatively, a trustee might resolve to confer present entitlements in accordance with an EET nomination based on a genuine belief that there is trust income, only to discover subsequently that the trust in fact incurred a loss for the income year. Again, the trustee clearly did not 'decide' to deviate from the EET nomination, and thus again is arguable that paragraph 102UYF(2)(a) is not enlivened and no revocation arises.

On the other hand, if it is your intention for a revocation to in fact happen in this situation – aside from the argument above that it does not under the draft legislation – we submit that that is unreasonable. It is difficult enough that the trust has suffered loss, but to then compound that with a revocation of the EET when a trustee has not taken any positive action to deviate from the EET nomination serves no integrity or policy purpose.

Recommendation

- Include a provision that clarifies that a revocation does not happen under paragraph 102UYF(2)(a) where present entitlements are not conferred in accordance with subjection 102UYD(2) where the trust has no trust income or no trust capital (as applicable) for an income year.

7. Distributions to charities and deductible gift recipients ('DGR')

Private groups often make contributions to registered charities and DGRs via a distribution from a discretionary trust. These are typically stand-alone decisions taken on a year-by-year basis, requiring consideration of whether funds are available and determining a suitable amount to contribute, rather than a set percentage of income contributed every year.

However, a discretionary trust making an EET election, and thus having to set a fixed distribution pattern amongst nominated beneficiaries, will now lose the above flexibility. Accordingly, out of prudence, many would likely exclude registered charities and DGRs as nominated beneficiaries in their EET election, resulting in a decrease in charitable giving.

Further, it is unlikely that a trustee would choose to break the fixed distribution pattern in order to make a distribution to a registered charity or DGR, as that will trigger the negative consequences noted above – again, reducing charitable giving.

It can be said in rebuttal that the trustee could choose not to make an EET election in the first place. This would mean that the minimum 30% tax will apply, but they retain distribution flexibility – and distributions to registered charities and DGRs will be excluded from the minimum 30% tax per paragraph 101AE(1)(d) in TLAB26 MToDT.

However, that is cold comfort as it is putting the trust between a rock and a hard place. The purported purpose of the EET election regime is to be an alternative to incurring the substantial costs of restructuring out of the discretionary trust to a new type of entity. Thus, the trust would be back to square one, having to decide between the equally unpalatable options of suffering the above-noted negative consequences of the minimum 30% tax regime or incurring crippling restructuring costs.

It is easy to see the choices that many small-to-medium business owners and private groups may make:

- Opt into the EET election regime, but registered charities and DGRs will not feature as nominated beneficiaries, and then maintain the fixed distribution pattern (i.e., no distributions to charities/DGRs).

Again, the result is that charitable giving declines.

Recommendation

- Provide that an EET election is not revoked when a trustee departs from the nominated distribution pattern due to distributing to a charity or DGR.

  Where a trustee makes an EET election, allow the election to remain in force where the trustee distributes to a registered charity or DGR in an income year, and any *remainder* distribution is made to the nominated beneficiaries and in their specified percentages as per the EET election.

8. Beneficiary ceases to be an Australian tax resident

Many discretionary trusts' deeds exclude foreign residents from being a beneficiary, so as not to incur a range of additional taxes, surcharges, FIRB charges and other costs when acquiring real property. A trustee may nominate in its EET election a person who is a beneficiary of the trust as at 1 July 2028 in accordance with section 102UYB.

However, that beneficiary may cease to be an Australian tax resident at a future time – in which case, they cease to be a beneficiary of the trust. Accordingly, the trustee can no longer distribute to that person. Therefore, they are incapable of maintaining the fixed distribution pattern per the EET election and thus will trigger a revocation.

The beneficiary deciding to move overseas may well be outside the control of the trustee, thus thrusting them into a revocation not of their choosing.

Where an individual ceases to be a beneficiary in circumstances like the above, it often happens outside the trustee's control, and could happen many years after making an EET election. Accordingly, it is unreasonable to leave a trustee to succumb to a revocation.

Recommendations

- Allow a variation to an EET election where, in circumstances outside the trustee's control, a nominated individual ceases to be a beneficiary.
- Include the option of not nominating a replacement beneficiary, and future distributions are made to the remaining beneficiaries in proportion. For example, an EET nomination nominates three beneficiaries, one third each. One becomes a non-resident, ceasing to be a beneficiary. The trustee in future distributes one half to each of the remaining two beneficiaries, and the EET election remains in force.

We submit that allowing a trustee to nominate a replacement beneficiary with the same percentage as the ex-beneficiary, or simply distribute to the remaining nominated beneficiaries in proportion, is fair and reasonable.

9. Whether a mere change in trustee triggers revocation

An eligible company beneficiary may be nominated in the EET election. However, under subsections 102UYF(2)(d) and (3) TLAB26 ER, the election is revoked if an entity per the definition in section 960-100 of the *Income Tax Assessment Act 1997* ('ITAA97') ceases to be a shareholder in the company.

Section 960-100 includes 'a trust' as an entity. This suggests that where there a change in the trustee of a trust that holds shares in an eligible company, despite this being a change in the legal ownership of the shares, the trust as an 'entity' continues as the shareholder. Thus, there is no cessation and no revocation.

Recommendation

- To avoid doubt, include a Note after subsection 102UYF(2) that a mere change in the trustee of a trust that owns shares in an eligible company is not a cessation of ownership, as it is the trust that continues as the entity that is the shareholder.

10. Conflict with certain small business CGT concessions

The small business CGT concessions in Division 152 ITAA97 contain a number of conditions that must be satisfied in order to qualify for one or more of the concessions. For example:

- The 15-year exemption: having a significant individual for 15 individual income years, and a significant individual in the year of the relevant CGT event who satisfies paragraph 152-110(1)(d) ITAA97.
- Small business retirement exemption: satisfying the significant individual test in the year of the CGT event (paragraph 152-305(2)(b) ITAA97).

Satisfying the above – which may be a matter many years after having made an EET election – may require distributions that depart from the nominated beneficiaries and percentages in the EET election, thus triggering a revocation.

Accordingly, the restrictive nature of an EET election conflicts with the intent behind providing access to the small business CGT concessions.

Recommendation

- Provide that a revocation does not arise where distributions in an income year depart from that nominated in an EET election to the extent required to qualify for the above small business CGT concessions for a CGT event in that year.

11. Zero margin for error

The requirements to maintain an EET election in force are strict, providing no allowance for immaterial errors or minor administrative oversights. This points to the laws likely misfiring as more time passes, causing significant cost to businesses and private groups where there is no tax mischief, and in fact are just trying to comply with complex laws.

This runs a clear risk of the EET election regime becoming another Family-Trust-Distribution-Tax debacle.

Recommendation

- Provide the Commissioner of Taxation with a discretionary power to disregard the revocation of an EET election where it arises due to an immaterial error or honest mistake (akin to section 109RB ITAA36).

5. Roll-over relief

1. All assets

Subsection 126-425(3) in TLAB26 RoR requires all assets (bar some exceptions) to be transferred out of the trust in order to apply the CGT roll-over. The Exposure Draft Explanatory Materials at paragraph 1.27 states that this prevents obtaining selective relief, but does not elaborate on what problem there is with selective relief.

We submit that having to transfer all assets is unreasonably inflexible. It is also inconsistent with similar roll-overs. The existing Subdivision 122-A CGT roll-over for transferring assets from a trust to a company for example does not require this, allowing the transfer of individually selected assets. Imposing this new tax but allowing a wider CGT roll-over, only to then make the roll-over commercially unappealing is contradictory.

Recommendation

- Allow trusts to selectively transfer assets to a new structure under the expanded CGT roll-over.