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The wait is over… or is it? The 30% minimum tax exposure draft legislation provides answers, but questions remain

On 3 September 2026, the Treasury released the much-anticipated exposure draft legislation and explanatory materials implementing the core components of the 30% minimum tax on discretionary trusts, which was announced as part of the 2026-27 Budget (Exposure Draft). If nothing else, the Exposure Draft provides more certainty for taxpayers who have been grappling with the question of whether to restructure. However, it is clear that no single solution has emerged for taxpayers affected by the proposed changes.

Summary

The Exposure Draft comprises three schedules covering:

1. the minimum tax imposition and new fixed trust definition;
2. the electable regime for discretionary trusts; and
3. rollover relief for restructuring.

Submissions on the Exposure Draft are open until 18 September 2026, giving stakeholders a sense of déjà vu, with another short consultation period to respond to complex proposals that we are seeing for the first time.

In this Insight, we unpack the specific details within the schedules comprising the Exposure Draft, with a specific focus on what has and hasn't changed as a result of the consultation process undertaken between 8 July and 31 July 2026 and what it means for taxpayers.

This is the latest of our insights on the taxation of trust measures (see our earlier insight *Treasury releases consultation paper on 30% minimum tax for discretionary trusts, with major questions still to answer*).

Our overarching observations on the Exposure Draft following our review include:

The Exposure Draft legislation takes into account stakeholder feedback received in response to the Treasury consultation paper released in July 2026. Key developments include:

- **Election regime:** the introduction of a new election allowing discretionary trusts to nominate fixed distribution entitlements for specified beneficiaries, preventing the 30% minimum tax from applying and resulting in the trust becoming a 'non-minimum tax trust'. This may be a welcome alternative to restructuring for some taxpayers, but, in our view, this isn't the ultimate solution for all discretionary trusts. The election requires a trustee to nominate, from 1 July 2028, the specific beneficiaries and their fixed percentage to annual distributions. The underlying detail within the election regime is more restrictive than it may seem at first glance. Specifically:
    - if the election is not made by an existing trust in relation to the 30 June 2029 income year, it cannot be made in a later income year. No wait and see option for trustees to adopt.
    - from the Treasury's perspective, the trustee still maintains discretion as to its powers of distribution, but distributions outside of the fixed allocations by using that discretion have severe tax consequences.
    - if a trustee deviates from those predetermined beneficiaries and/or the allocated percentages, the election is automatically revoked and cannot be made again resulting in the trustee being liable for tax on the net

income of the trust at the highest marginal rate.
    - there are very limited circumstances where the election can be varied, limited to death and relationship breakdowns. This prevents future children or grandchildren being able to benefit from the trust until a nominated beneficiary passes away. It could also create State land tax and duty surcharge exposure if a specified beneficiary were to move overseas.
    - there is an overarching trust law overlay as a discretionary trust is established with the fundamental element of discretion at the centre. Trust deeds will need to be reviewed to determine whether the trustee has power to make the determinations required under the election regime. If an amendment is required to the trust deed, this may cause resettlement issues for the trust which could give rise to stamp duty implications in many Australian states and territories. At present, there is no suggestion that there will be any stamp duty concessions if such a resettlement was to occur. This raises an obvious question: if the election regime was intended to provide an alternative where restructuring was not feasible, has it simply recreated the same problem in another form?
- **Definition of fixed trust:** a new definition of 'fixed trust' has been proposed which extends the meaning to encompass 'no material discretionary elements' test that applies across the whole tax law. This reduces the complexity associated with current attempts to classify a fixed trust under the ATO's PCG 2016/16.
- **Double taxation of corporate beneficiaries:** as expected, this continues to be the outcome where a trust does not elect in to the 'election regime' and becomes subject to the 30% minimum tax with the offset not capable of being passed through to a corporate beneficiary.
- **Trust to trust offset:** helpfully, the Explanatory Draft confirms that a trust can distribute the non-refundable non-carried forward offset to another discretionary trust which can use the offset against its own liability, including its own minimum tax, and pass a corresponding offset to its beneficiaries. This was a big theme during consultation, so it is a relief to see this position affirmed.
- **CGT rollover relief:** more structured guidance on the rollover mechanics is helpful for taxpayers. We now know that we didn't know before:
    - **No mention of stamp duty concessions:** the Exposure Draft for this particular item expressly notes that all state and territory taxes will continue to apply in their ordinary operation. In our view, given the reference in the election regime that the fixed election provides an alternative to restructuring and concerns regarding state and territory implications, we don't believe there will be state and federal alignment on this matter.
    - **Progressive asset transfer:** it is permissible to gradually transfer the assets of a trust to a new entity (such as a company), provided all non-excluded assets have been transferred out by 30 June 2030. There are limited exemptions for assets such as primary production assets which can remain in the trust.
    - **Claw back:** there will be a four-year claw back period' whereby any changes to membership interests which result in any discretionary element being introduced into the shareholding of the newly created entity within that period will result in the rollover ceasing to have effect and capital gains tax applying. The reference in the announcement to 'arm's length unrelated transactions' being exempt from the membership changes doesn't appear to have flowed through to the Exposure Draft.
    - **Interaction with the trust election regime:** if a trustee elects into the new election regime to be treated as a 'non-minimum tax trust', the trustee cannot later change their mind and seek to apply the restructuring rollover to obtain capital gains tax relief.

Below, we examine some of the more detailed aspects of the Exposure Draft.

New definition of fixed trust

A big issue raised during the consultation process was the difficulty faced by taxpayers in applying the fixed trust definition in the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) due to its limited application to many trusts. The Exposure Draft proposed amendments to this definition help resolve this difficulty which is a welcome addition for taxpayers.

The Exposure Draft proposes to repeal section 272-65 of Schedule 2F to the ITAA 1936 and introduces a new statutory definition applying across the income tax law. A trust is fixed if beneficiaries have fixed entitlements to all income and capital, ***or*** if there are no material discretionary elements affecting their entitlements or rights.

A trust may be a fixed trust where the following indicators are present:

- clearly defined, specific and enforceable beneficiary entitlements;
- no powers to significantly vary existing entitlements or rights or significantly affect their value; and
- any power to vary the trust instrument requiring the consent of all beneficiaries.

The new definition includes a power for the Minister to determine, by legislative instrument, any additional matters that determine there are no material discretionary elements. The Exposure Draft indicates that the definition is intended to ensure that bare trusts, managed investment trusts, employee share trusts and widely held trusts are not captured by the minimum tax.

The election regime

The Exposure Draft provides details on the new election regime for the purpose of a minimum tax trust electing to be treated as a ‘non-minimum tax trust’ and therefore outside the scope of the 30% minimum tax. Trustees of minimum tax trusts in existence on 1 July 2028 can make an excluded election trust (**EET**) election in the 2028-29 income year to apply the election to the trust in that income year and all future income years.

The election is a one-time election and cannot be made year by year.

Eligible beneficiaries

The key requirement for making an EET election is that the trustee must also make an EET nomination, specifying the beneficiaries that the trustee intends to make presently entitled to the income and capital of the trust for each income year that the EET election is in place. This, in essence, is what results in the trust being a fixed trust.

In making the EET, a trustee can only include:

- individuals that are already capable of benefiting under the trust deed as at 1 July 2028. Any amendments made to trust deeds after 1 July 2028 to bring additional beneficiaries into the scope of benefiting under the trust deed are not eligible to be listed as a beneficiary under an EET election
- eligible companies with no material discretionary elements (e.g. no preference shares or different classes of shares) that are objects of the trust and in existence on 1 July 2028
- trusts that are objects of the trust and in existence at that date and income tax-exempt entities.

There is no limit on the number of nominees. Entities such as complying superannuation entities, partnerships and non-eligible companies (e.g. those with discretionary elements) are excluded.

Each year, the trustee must actually distribute in accordance with the nomination. If it fails to do so, the election is automatically revoked and beneficiaries are treated as never having been presently entitled. The trustee would then pay tax on all net income at the highest marginal rate plus Medicare levy under section 99A, and in future years the trust is subject to the minimum tax.

Changing or revoking the election

Importantly, where the election is revoked either voluntarily or automatically, the election cannot be reinstated or remade in relation to the same trust.

An EET election may be revoked either:

- Voluntarily: this can occur at any time, but once revoked it cannot be reinstated or remade in respect of that trust
- Involuntarily: occurs where the trustee fails to distribute in accordance with the nomination, a nominated trust beneficiary vests or is wound up, or a nominated company beneficiary is wound up, deregistered, no longer an eligible company or has an impermissible shareholder change

The EET nomination can be varied only in very limited circumstances where:

1. a specified beneficiary passes away: that share can be reallocated to existing nominees or to other beneficiaries capable of benefiting under the trust deed. However, the allocation can only be to beneficiaries of the deceased’s estate; or
2. two specified beneficiaries experience a relationship breakdown and there is either a court order or a binding financial arrangement in place.

The limited instances available for variation raises a serious issue for private groups and for trusts that are created with the intention of providing benefits for lineal descendants far into the future. While unborn descendants may not be permitted to be directly added, if they become entitled to benefit under the trust deed and they are beneficiaries of a former nominee’s deceased estate, the question remains whether they can then be added albeit they would not otherwise be capable of being added in their own right.

As private groups shift and change with time it will be an ongoing compliance obligation on the trustee to ensure that EET nominations are carefully complied with so as not to inadvertently expose the trust to 30% minimum tax into the future.

Resettlement issues

The Exposure Draft sets out that an EET election “would not require a restructure and is not expected to result in state and territory stamp duties”, but that seems to be only to the extent that it is not a restructure. There is no specific reference to stamp duty or CGT implications arising from a resettlement of a trust.

Fundamental changes to the objects (such as the beneficiaries) of and their interest in the assets of a trust can constitute a resettlement for income tax and stamp duty purposes.

Whether a trust resettlement would occur requires a deeper inquiry into whether such an election would affect for instance, the substratum of the trust, or indefeasible interests of beneficiaries. At present, there is no suggestion that there will be any stamp duty concessions if such a resettlement was to occur. This begs the question – the EET regime was intended to provide a solution where restructuring wasn’t a feasible option. But, have we created the same issue but just in another form?

Trustees should consider their alternative options before jumping into the EET regime. If a trustee makes a decision to consider this option, they should consider seeking certainty in the form of a private binding ruling from the ATO or SRO in relation to the implications of the nomination under the EET nomination.

Refund of excess franking credits

We raised in our first publication on this topic a question regarding how excess franking credits may be treated. The Exposure Draft helpfully confirms that excess franking credits after the trustee offsets its income tax liability may be refunded to the trustee. There remains the requirement to still use franking credits to offset their tax liability.

The treatment of franking credits reduces the ability of a trust to stream franking credits to beneficiaries where the underlying dividend is subject to the minimum 30% tax. The Exposure Draft does indicate that the treatment of corporate distributions flowing through trusts that do not relate to income subject to the minimum tax will be unaffected. In our view, this suggests that where a trust receives non-assessable non-exempt dividend from a foreign entity, these may still be streamed out to a beneficiary and retain their character as non-assessable non-exempt.

Rollover relief – membership interests and amendment period

Our earlier Insight covered the scope of the rollover relief proposed to be introduced and that has broadly remained unchanged under the Exposure Draft. The rollover is still based on the small business restructure rollover, subject to the express expansion to cover all assets and trusts impacted by the minimum tax.

We do have helpful guidance on the gaps that were present when the rollover was first announced:

- **Gradual rollover:** Assets can be gradually transferred, but all required assets must be transferred, subject to limited exceptions for primary production assets, assets not capable of transfer, assets needed to discharge liabilities or pay winding-up costs, and assets costing $1,000 or less. All required assets must be transferred by 30 June 2030 to retain the benefit of the rollover.
- **Changes in membership:** The rollover has a four-year claw back period running from the day of the last transfer of a required asset to the end of the fourth income year after the income year in which that transfer occurs. If material discretionary elements are present or introduced during that period, the Commissioner may amend assessments to reverse the relief. In our earlier Insight we highlighted the stated intention to exclude injections or sales to genuine third parties from the clawback. That exclusion has not been expressly reflected in the Exposure Draft.
- **Cost base transfers:** Where new shares, units or other membership interests are issued as consideration, the cost base of each new interest is calculated by adding the rollover costs of the transferred assets, subtracting liabilities the transferee assumes, and dividing the result by the number of new interests. This preserves the historic tax costs of the underlying assets.
- **Other items of note:**
  - capital losses connected with the restructure are disregarded;
  - the transferor’s ownership period for the 15-year small business CGT exemption carries through;
  - an election by both the trust and the transferee entity must be made in writing.

Looking ahead

While the Exposure Draft provides much-needed answers on several key issues raised during consultation, taxpayers hoping for complete certainty will still be left wanting more. The two-week period for feedback on some pretty complex matters is, in our view, too short a period to cover everything.

Administrative and integrity arrangements have been flagged for future legislation, so we wait with anticipation for those announcements.

We will continue to monitor developments and provide updates as the legislation progresses.

In the meantime, please reach out if you would like to discuss how any of these proposals may impact on you or your business.