Australian Council of Social Service

Treasury consultation on minimum tax on discretionary trusts

ACOSS submission August 2026

About ACOSS

The Australian Council of Social Service (ACOSS) is a national voice in support of people affected by poverty, disadvantage and inequality and the peak body for the community services and civil society sector.

ACOSS consists of a network of approximately 4000 organisations and individuals across Australia in metropolitan, regional and remote areas.

Our vision is an end to poverty in all its forms; economies that are fair, sustainable and resilient; and communities that are just, peaceful and inclusive.

Summary

Discretionary trusts are widely used to avoid and evade personal income tax

Discretionary trusts and associated entities such as companies and other trusts are widely used by those who control them to avoid or evade their personal income tax responsibilities. Due to their flow-through tax treatment (so that tax payments are deferred and tax preferences accrue to beneficiaries) and the broad discretionary powers of trustees to decide what trust income each beneficiary should receive, they are marketed as the ideal structure to avoid or evade tax by tax advisors.

Investors and small business owners have been advised to use these complex, costly and opaque structures when simpler arrangements (such as sole proprietor or simpler private company arrangements) are better suited to their needs.

Discretionary trusts are akin to a washing machine – assets, liabilities and income are tumbled together inside them and emerge looking different to their original form and ownership. They are used by people with high incomes to avoid or evade tax in many ways including:

- Distributing income to beneficiaries with the lowest tax rates, including to take advantage of the tax-free threshold of low-income beneficiaries;
- Distributing capital gains to beneficiaries with access to the CGT concessions or with capital losses that can be applied to reduce the taxable gain;
- Distributing franking credits to beneficiaries that can derive greatest tax benefit from them, to reduce tax or receive a tax refund if the credits exceed tax liability;
- Taking advantage of discrepancies between trust income (defined by the trust deed) and taxable income (defined by legislation);
- Revaluations of trust assets to facilitate untaxed distributions;
- Shifting income to beneficiaries 'on paper' but transferring the economic benefits to others; and
- Shuffling assets, liabilities and income between multiple connected private trusts and companies.

The outcomes are that:

- Many people who should be paying tax at 47% end up paying much less:
  - Almost two thirds (63%) of all trust and partnership income in 2022-23 (totalling around $40 billion) accrued to the highest 10% of income earners, whose average income was over $250,000.
- Substantial resources – at least $4 billion annually - are wasted on a tax avoidance industry that markets and administers complex tax avoidance structures:
  - Australia now has more than one million trusts, of which roughly 840,000 (around 80%) are discretionary trusts.

Australia is one of few common law Anglophone countries which does not impose an up-front tax on the income of discretionary trusts

Australia is one of few common law Anglophone countries which does not impose an up-front tax on the income of discretionary trusts. Further, Australia departs from overseas practice by using the opaque trust law concept of *'present entitlement to (a share of) the income of the trust estate'* (rather than distributions of the taxable income of the trust) to determine the annual income tax liability of the beneficiaries of closely held trusts. The Attachment to this submission compares how the income of discretionary trusts and distributions of income to beneficiaries are defined and taxed in Australia, the United States, Canada, the United Kingdom and Ireland.

ACOSS strongly supports the proposed 30% minimum tax on trust income and denial of a tax offset to corporate beneficiaries ('bucket companies')

ACOSS strongly supports the Government's reforms to introduce a 30% minimum tax on taxable discretionary trust income from 1 July 2028. The 30% tax rate helps to better align the taxation of trust income with the taxation of labour income, though the 30% tax rate is still below the top 47% tax rate on personal income. Importantly, it applies 'upfront' to trust income rather than waiting for that income to be distributed to beneficiaries, reducing tax avoidance opportunities.

ACOSS also strongly supports the decision to deny the tax offsets to corporate beneficiaries as a critical integrity measure. This renders 'bucket company' strategies ineffective.

The reforms should be strictly implemented to preserve their intent and prevent new tax loopholes from opening up

To ensure the reforms work as intended to curb tax avoidance and evasion, exemptions to the 30% upfront tax should be kept to a minimum, and access to the 30% tax offset should be denied where transfers are made to beneficiaries as part of a tax avoidance strategy:

- Discretionary trusts should be defined using existing legal concepts;
- Assessable trust income should be broadly defined including capital gains;
- The proposed 30% tax offset should only be available once beneficiary entitlements are paid (as distinct from unpaid present entitlements);
- The 30% tax offset should be denied to beneficiaries where tax is avoided through circular or non-arm's length transactions that benefit others;
- Excess franking credits must not be used to circumvent the 30% minimum tax;
- The exemption for testamentary trusts should not extend across multiple generations, and minor beneficiaries with a living parent should be taxed at the standard 47% rate on investment income.

Donations from trusts to Deductible Gift Recipients should be treated in the same way as direct donations from individual taxpayers

To ensure that donations made by trusts are treated in the same way as those made directly by individual taxpayers, donations to Deductible Gift Recipients, but not other tax-exempt entities, should be exempted from the 30% tax, subject to strict trustee reporting requirements.

Further, Deductable Gift Recipient status should be modernised as recommended in the Productivity Commission's 2024 *Report on Philanthropy*.

Recommendations:

1. Define discretionary trusts using existing legal concepts.

For the purposes of the 30% minimum tax, discretionary trusts should be defined using existing legal concepts, based on the distinction between fixed and non-fixed trusts.

2. Assessable trust income should be broadly defined, including capital gains.

(i) For the purposes of the 30% minimum tax, assessable trust income should be broadly defined including capital gains and distributions from other trusts.

(ii) The 30% tax offset should be denied to beneficiaries in respect of capital gains distributed to them (for example from asset revaluation reserves) which have not been taxed upfront in the hands of the trustee.

(iii) Where a discretionary trust receives a transfer from another discretionary trust or private company pursuant to a circular trust distribution strategy, the transfer should attract the 30% minimum tax and the recipient trust should be denied the 30% tax offset.

3. Restrict the 30% tax offset to distributions that are paid.

The proposed 30% tax offset should only be available to a beneficiary in respect of a distribution of income to them from a trust (as distinct from an unpaid present entitlement) made within each tax year or up to two months afterwards (by 31 August).

4. Curb value-shifting through reimbursement agreements and circular distributions.

(i) The 30% tax offset should be denied to beneficiaries in cases where its value is shifted to another individual or entity in a non-arm's length transaction.

(ii) Where such transactions occur beyond the tax year in which the offset was claimed, the penalty tax at 47% should apply.

5. Ensure that excess franking credits are not used to undermine the 30% minimum tax

(i) Trustees that receive franked dividends should be required to use their franking credits to offset their tax liabilities as a trustee in the first instance.

(ii) For any excess franking credits received by the trustee after offsetting its tax liabilities, integrity measures should apply to prevent further distribution or offsetting of credits against future tax liabilities in a way that achieves an overall effective tax rate below 30%.

6. Ensure that donations to Deductible Gift Recipients from trusts have the same tax treatment as donations from individual taxpayers.

(i) Donations by trusts to DGRs should be deducted from the assessable income of the trust before the 30% minimum trusts tax is applied.

(ii) Trustees should report to the ATO in timely fashion the name and financial account details of the DGR, and the timing and amount of the donation.

(iii) Donations to other income tax exempt organisations that are not DGRs should not be exempted from the 30% upfront tax, and they should not be eligible for the related tax offset.

7. Modernise the definitions and scope of deductible gift recipient status.

DGR status should be extended to all charities that are registered with the ACNC, except those whose purposes and activities are solely for the advancement of religion, or the advancement of education through childcare and primary and secondary education (unless the activity is sufficiently related to advancing another charitable purpose).

8. Ensure that any carve-out for testamentary trusts is not exploited to avoid tax by distributing investment income to minors or across multiple generations.

(i) If testamentary trusts are exempted from the minimum 30% tax, then at the least such exemption should be time limited (for example, until the youngest direct descendant reaches 18 years).

(ii) Investment income distributed by the trustee of a testamentary trust to minors should be taxed at the standard rate of 47% unless the child is an 'excepted person' (e.g. has a disability or is orphaned) or the income is 'excepted income (e.g. from loss of parental support or personal injury).

Two further reforms are needed to ensure that people with high incomes and wealth cannot use private trusts and companies to avoid their tax obligations

(1) Undistributed income of private trusts and companies should be taxed at 47% rather than 30% or 25%.

The proposed minimum 30% tax would help ensure that trust income is taxed in a timely way, removing many opportunities to avoid or evade tax. However, this is still 17 percentage points below the top marginal rate of personal income tax (plus Medicare Levy) so a major avoidance opportunity remains for trust controllers with high incomes.

The reforms are likely to encourage people to transition to a private company structure, in which income is also taxed up-front at 30% (or 25% for smaller active businesses).

The solution to this problem – both for private companies and discretionary trusts – is to tax retained income (income that is not distributed to shareholders or beneficiaries each year) at 47% (the top marginal rate of personal income tax) rather than the proposed 30% rate.

This higher tax rate for retained company profits was in place for many years before the company and top personal tax rates were briefly aligned in the late 1980s. Business owners could choose whether to pay this tax rate on company income up-front or – if their personal tax rate was less than the top marginal rate - to distribute company income to themselves through wages or dividends.

Recommendation 9: Tax income retained in private trusts and companies at a higher rate than 30%

Income retained in private companies or discretionary trusts throughout a tax year, apart from a reinvestment allowance for those engaged in active business (comprising a fixed proportion of the active assets of the company), should be taxed at the top marginal rate of personal income tax plus Medicare Levy rather than the 30% rate that will apply once the trust reforms are implemented.

(2) A public register of beneficial ownership of private trusts should be established by the ATO to improve transparency and help prevent tax evasion, money laundering and terrorism financing

Tax integrity reforms are only as effective as the capacity of the authorities to enforce them.

Private trusts (both fixed and discretionary, though especially the latter) are opaque financial arrangements. Unlike companies, there is no public register revealing who operates the trust and who benefits from it. Trustees are required to submit tax returns to the ATO but not financial accounts. This means they are well suited to the purpose of avoiding tax as well as illegal activities such as tax evasion, money laundering and terrorism financing. It is especially hard for the authorities to trace movements of income and assets between multiple interconnected private trusts and companies – income that often ends up in tax havens such as the Cayman Islands or Bermuda.

The Government's commitment to a public register of beneficial ownership of private companies should extend to private trusts. The ATO should collect and publish beneficial ownership and financial information regarding closely held trusts. The privacy of beneficiaries of family trusts registered as such could be protected by exempting them from the public register, but not from requirements to disclose this information to the ATO.

Recommendation 10: Ensure transparency of beneficial ownership and accounts of private trusts

A public register should be established by the ATO to hold the following information in regard to trusts that are required to lodge tax returns: the names and tax file numbers of the trustee, controller, any beneficiaries that are not natural persons (for example other trusts or companies), annual financial statements, and (where the trust is not a family trust) all other beneficiaries together with a declaration from the trustee identifying all beneficial owners.

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1. ACOSS's position on reform of the taxation or trusts and private companies

In this part of the submission we outline the problem the reform intends to solve – the use of discretionary trusts and associated private companies to avoid and evade tax – and our support for the reform.

A plain English description of the operation of discretionary trusts, their exponential growth over the last four decades, and their use to avoid and evade income tax, is available in our recently published briefing paper on the taxation of private trusts.[1]

Discretionary trusts are widely used to avoid and evade personal income tax

Discretionary trusts and associated entities such as companies and other trusts are widely used by the individuals who control them to avoid and evade their personal income tax liabilities. Key reasons for this include flow-through tax treatment (so that tax payments are deferred and tax preferences accrue to beneficiaries) and the broad discretionary powers of trustees to decide which beneficiaries should receive trust income (so that tax liabilities and preferences are shifted to beneficiaries who can best minimise/take advantage of them).

Discretionary trusts are akin to a washing machine – assets, liabilities and income are tumbled together inside them and emerge looking different to their original form and ownership.

Discretionary trusts are used, mainly by people with high incomes, to avoid or evade tax by:

- Distributing income to beneficiaries with the lowest tax rates, including for example to take advantage of the tax-free threshold of low-income beneficiaries;
- Distributing capital gains to beneficiaries with access to the CGT concessions or with capital losses that can be applied to reduce the taxable gain;
- Taking advantage of discrepancies between trust income (defined by the trust deed) and taxable income (defined by legislation);
- Shifting income to beneficiaries 'on paper' but transferring the economic benefits to others;
- Distributing franking credits to beneficiaries that can derive greatest tax benefit from them, to reduce tax or receive a tax refund if the credits exceed tax liability; and
- Shuffling assets, liabilities and income between multiple connected private trusts and companies;
- and in various other ways.

Tax is also avoided using private companies as beneficiaries of discretionary trusts ('bucket companies'). Discretionary trust distributions to bucket companies allow income to be taxed upfront at company tax rates rather than at often higher rates of personal income tax.[2]

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[1] ACOSS (2026), *Briefing note on the taxation of private trusts ad companies*. Sydney.

[2] Company tax rates are 25% for smaller active businesses and 30% for larger companies and passive investment companies. The lower 25% company income rate is in theory only available to a company operating an active business, not a bucket company used to receive passive investment income. However, a company may be eligible for the lower 25% tax rate even if only 20% of its turnover is from an active business.

For decades, the Australian Tax Office (ATO) has raised concerns about the use of discretionary trusts to avoid tax. The ATOs efforts to curb tax avoidance using private trusts is akin to a 'whack-a-mole' game in which new strategies emerge as quickly as existing ones are shut down. A lack of transparency regarding beneficial ownership and trust accounts makes the ATOs job even harder. On its website it warns taxpayers and their advisers about *Trust activities that attract our attention*, which include:

- Circular trust distributions,
- Differences between distributable and net income,
- Distributions of franked dividends,
- Distributions to complying superannuation funds,
- Distributions to tax-preferred beneficiaries,
- Family trust distributions tax,
- Income recharacterisation arrangements,
- Loss trust moved into group,
- Non-lodgment,
- Non-residents' capital gains,
- Potential reimbursement agreements,
- Unitisation arrangements,
- Value extraction and corpus distributions.

Tax avoidance through discretionary trusts and private companies undermines public revenue and equity

The use of discretionary trusts and private companies to avoid and evade tax undermines equity in the tax system. It undermines horizontal equity because trust income is taxed at lower rate than wages or salary without using a trust: Treasury analysis shows that in 2022–23, families with discretionary trusts faced an average tax rate around 4 percentage points lower compared with families with similar incomes who do not use a trust.[3]

It also undermines vertical equity because people on higher incomes use trusts to avoid paying their normally higher marginal tax rates under a progressive tax system: in 2022-23 almost two thirds (63%) of all trust and partnership income paid to individuals (totalling around $40 billion) accrued to the highest 10% of income earners, whose average taxable income was over $250,000.[4]

Individuals with income above $1 million per year receive around a quarter of their income (24%) through a trust or partnership, while this comprises just 4% of that of people on more typical incomes of $60,000-$150,000.[5]

The concessional tax treatment of private trusts contributes to growing wealth inequality. Around 90% of total private trust wealth is held by the wealthiest 10% of households (who have an average net worth of above around $2.3 million).[6]

The use of discretionary trusts to avoid and evade tax also foregoes much-needed revenue to fund essential supports and services. Our fiscal pressures are primarily a revenue problem, not a spending problem. Australia is a low taxing country as a proportion of its GDP and a low

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[3] Treasury (2026) *Minimum tax on discretionary trusts*.

[4] Treasury 2025, *Tax Expenditures and Insights Statement.*

[5] Jericho G (2026), Family trust tweaks may help fight tax inequality. The Guardian 6/5/26.

[6] Treasury (2026) *Minimum tax on discretionary trusts*.

spending country compared to other OECD nations, and current growth in government expenditure is in line with long term averages.[7]

To meet the growing needs of essential supports and services, we need to raise significantly more revenue. The growing use of discretionary trusts and private companies to minimise tax undermines our revenue base. Since 2001-02 the number of discretionary trusts in Australia has doubled, exceeding the growth in companies (which have grown by 70%).[8] Australia now has more than 1 million trusts, of which roughly 840,000 (around 80%) are discretionary trusts, and discretionary trusts distributed around $142 billion in income in 2022-23 to individuals and other entities, with average annual growth in income of 7.8% since 2011–12.[9]

Of the 80,000 companies receiving distributions from trusts, 83% did not have evidence of business activity, suggesting they operate primarily for tax minimisation purposes.[10] Tightening the tax treatment of private trusts and companies could save the government billions of dollars in revenue each year, as shown by the revenue impact of the government's reforms discussed below and previous costings.[11]

ACOSS supports the 30% minimum tax on discretionary trust income and denial of tax offsets to corporate beneficiaries

ACOSS strongly supports the Government's reforms to introduce a 30% minimum tax on taxable discretionary trust income from 1 July 2028. The 30% tax rate helps to better align the taxation of trust income with the taxation of labour income, though this is still below the top 47% tax rate on personal income. Trustees will still have broad discretion to determine how trust income is distributed to beneficiaries and beneficiaries will continue to include trust income in their tax returns. This still allows for some legitimate uses of discretionary trusts, while curbing their use to defer payment of tax and reduce overall tax paid to well below 30%, undermining equity and revenue in the tax system.

Importantly, the proposed minimum tax is applied upfront to trust income and paid by the trustee. This simplifies administration and reduces opportunities to delay and avoid tax that occur if (as in the present tax treatment of trusts) the taxing point is the transfer from the trustee to beneficiaries.

Australia's tax treatment of discretionary trusts is unusually generous compared with other common law countries.

Australia is one of few common law Anglophone countries which does not impose an up-front tax on the income of discretionary trusts. Further, Australia departs from overseas practice by using the opaque trust law concept of *'present entitlement to (a share of) the income of the trust estate'* (rather than distributions of the taxable income of the trust) to determine the annual income tax liability of the beneficiaries of closely held trusts. The Attachment to this

[7] ACOSS (2025) Taxing income less and consumption more: the case against; ACOSS (2025) Budget expenditure trends.

[8] Treasury (2026) Minimum tax on discretionary trusts.

[9] Ibid.

[10] Ibid.

[11] ACOSS (2026) Budget Priorities Statement; PBO 2015, A 30% tax on trusts.

submission compares how the income of discretionary trusts and distributions of income to beneficiaries are defined and taxed in Australia, the United States, Canada, the United Kingdom and Ireland. Australia is an outlier in the way we tax trusts.

ACOSS also strongly supports the decision to deny the tax offsets to corporate beneficiaries as a critical integrity measure. The reform allows non-corporate beneficiaries to receive a non-refundable tax offset, recognising tax already paid by the trustee, which preserves some legitimate uses of discretionary trusts. By denying the tax offset to corporate beneficiaries, the reform will curb the use of 'bucket companies' as a tax avoidance strategy to limit the rate of tax paid by high-income trust controllers to 25% or 30%.

Further, allowing corporate beneficiaries to receive the minimum tax offset would substantially undermine the reform. Corporate beneficiaries could convert the benefit of the offset into franking credits, which could then be distributed and recreate tax advantages the reform is intended to address. Excluding corporate beneficiaries from the offset is a simple and effective means of preventing the interposition of companies between trusts and ultimate beneficiaries used to avoid the minimum tax.

The proposed reforms are estimated to raise approximately $4.5 billion by their second year of operation, with the revenue impact concentrated among higher-income households that currently derive the greatest benefit from discretionary trust arrangements.[12] The reforms therefore make an important contribution to strengthening the revenue base required to fund essential public services and supports while improving fairness within the personal income tax system.

Unlike the 30% minimum tax on capital gains, which is part of a wider set of reforms to the taxation of capital gains and negative gearing arrangements, the 30% tax on discretionary trust income is the core element of the proposed reform of taxation of trusts. To the extent that the scope and impact of the 30% tax is diminished, the reform is weakened. Therefore, exceptions to the 30% tax should be kept to a minimum.

2. Implementation of the 2026 Budget measures

In this part of the submission we make recommendations on the implementation of the proposed 30% minimum tax on discretionary trust income and associated tax offset.

Discretionary trusts should be defined using existing legislative concepts

The proposed reforms should define discretionary trusts in a way that best meets the policy objective of addressing the tax advantages that arise from a trustee's ability to determine the beneficiaries that receive income and how much income is distributed to them.

ACOSS considers that the well-established existing approach of defining discretionary trusts by reference to trusts that are not fixed trusts is an appropriate starting point.[13] This is because that definitional approach focuses on the key distinguishing feature of discretionary trusts as the absence of fixed and guaranteed beneficiary entitlements, which is what allows

[12] Ibid.

[13] Treasury (2026) *Minimum tax on discretionary trusts: consultation paper*, 3.

trustees to vary beneficiaries and the income they receive from the trust, facilitating income-splitting and other tax avoidance opportunities.

For example, in [Section 272-65 of Schedule 2F] of the Income Tax Assessment Act, a fixed trust is defined as follows: *'A trust is a fixed trust if persons have fixed entitlements to all of the income and capital of the trust.'* Existing statutory definitions have a long history of judicial interpretation that confirms their meaning.

We are not persuaded that modern commercial trusts, where trustees typically retain powers to add beneficiaries and change entitlements, should be excluded from the definition of discretionary trusts merely because the relevant discretionary powers are rarely exercised. If a trust permits the changing of beneficiaries and their entitlements, then the trust retains the essential characteristic of a discretionary trust and the starting point should be that it remains within the scope of the minimum tax. It is the existence of those discretionary powers, rather than the frequency with which they are exercised, that creates the opportunity for tax planning that the reform is intended to address.

ACOSS does not support replacement of the existing approach with a new positive definition of a discretionary trust. This risks creating unintended consequences and uncertainty about the treatment of trust arrangements elsewhere in the tax system. Retaining the current well-understood distinction between fixed and non-fixed trusts would provide greater certainty and better support the integrity objectives of the reform.

That some trustees have no practical intention of exercising discretionary powers to vary beneficiaries and entitlements is not an appropriate reason alone to exclude them from the definition of discretionary trust to which the reforms apply. Rather, those entities should be able to access the proposed rollover relief and restructure into arrangements with genuinely fixed economic entitlements. This would be consistent with the policy objective of encouraging structures that do not permit discretionary allocation of income and preserving the integrity of the minimum tax reforms.

Recommendation 1:

For the purposes of the 30% minimum tax, discretionary trusts should be defined using existing legal concepts, based on the distinction between fixed and non-fixed trusts.

For the purpose of the 30% minimum tax, assessable trust income should be broadly defined including capital gains and distributions from other trusts

Three structural weaknesses in the tax treatment of capital gains within discretionary trusts give rise to complexity and tax avoidance opportunities.

The first weakness is discrepancies in the characterisation of income - as capital gains or other forms of income attracting higher rates of tax - between trust deed and tax law definitions (discussed in more detail later). This allows trustees to blur the boundaries between capital gains and other income to take advantage of the concessional tax treatment of capital gains.

The second weakness is the ability of trustees to stream capital gains to beneficiaries whose CGT liability will be zero or very low (for example tax-exempt beneficiaries and those with capital losses) and other income to 'income' beneficiaries, including where both forms of income are derived from the same asset.

The third weakness is that the interest of a discretionary beneficiary in a trust is not recognised as an asset which can be subject to CGT.[14]

Relevant tax avoidance strategies identified by the ATO include Income re-characterisation arrangements and Differences between distributable and net income, and Value extraction and corpus distributions.

The proposed 30% minimum tax on trust income reduces the tax benefits of exploiting the first two weaknesses described above (discrepancies between trust income and taxable income and the streaming of capital gains). The minimum tax is aligned with the recently legislated 30% minimum tax on capital gains, so in theory they work together to ensure that capital gains attract at least a tax rate of 30%.

For this goal to be achieved, capital gains must be fully included in the assessable income of trusts, taking account of relevant realisation events including:

- Event A1 – Disposal of a CGT asset, triggered when the trustee disposes of a trust asset; and
- Event E2 – Transferring a CGT asset to an existing trust, triggered when an asset is transferred into an already-existing trust.[15]

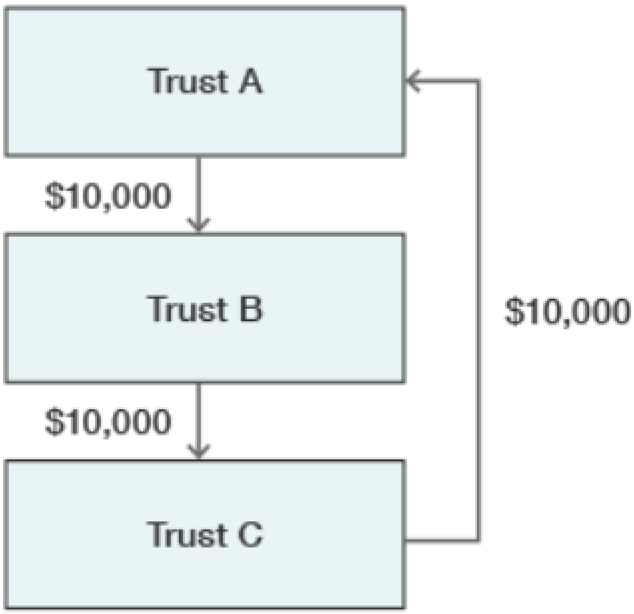
Further, the 30% tax offset should be denied to beneficiaries in respect of capital gains distributed to them (for example from asset revaluation reserves) which have not been taxed upfront in the hands of the trustee.

Another strategy in which economic value is diverted for tax avoidance purposes is circular trust distributions. These strategies transfer income or assets from a trust or private company back to a trust from which they originated. The diagram below illustrates this strategy.

[14] This could be solved, as ACOSS has proposed, by applying CGT to untaxed and preferentially-taxed distributions to the beneficiaries of closely held discretionary trusts, including distributions arising from asset revaluations. CGT event E4 would extend to discretionary trusts (ACOSS 2026, *Budget priorities submission.* Sydney).

[15] Since the ITAA was amended in 2009 in response to the *Bamford* decision, there is a degree of ambiguity (or at least complexity) over whether capital gains are fully included in the assessable income of a discretionary trust. Division 6E excludes capital gains, franked distributions and franking credits from the assessing provisions in Division 6 of the ITAA. Capital gains are instead assessed under Subdivision 115-C ITAA97 (net capital gains) (Walpola S 2020, *The Taxation of Capital Gains in Trusts after Bamford,* Australian Tax Forum Vol 35 No 3, p314.)

Example of a circular trust distribution



Source: ATO *Example: Round robin distribution*.

The 30% minimum tax would help curb these practices, provided it applies to income from a transfer of value to a discretionary trust that is the outcome of a circular distribution among related trusts or companies. Where a discretionary trust receives a transfer from another discretionary trust or private company pursuant to a circular trust distribution strategy, the receiving trust should also be denied the 30% tax offset.

Recommendation 2:

(i) For the purpose of the 30% minimum tax, assessable trust income should be broadly defined including capital gains and distributions from other trusts.

(ii) The 30% tax offset should be denied to beneficiaries in respect of capital gains distributed to them (for example from asset revaluation reserves) which have not been taxed upfront in the hands of the trustee.

(iii) Where a discretionary trust receives a transfer from another discretionary trust or private company pursuant to a circular trust distribution strategy, the transfer should attract the 30% minimum tax and the recipient trust should be denied the 30% tax offset.

The proposed 30% tax offset should only be paid in respect of actual distributions to beneficiaries, not 'present entitlements'

How tax is supposed to apply to trust income – when it is distributed to beneficiaries

Unlike companies, trusts benefit from 'flow-through' tax treatment. For example, tax preferences (concessions) flow through to beneficiaries. Trustees are expected to assign or distribute 'entitlements' to beneficiaries rather than retain and accumulate income in their own right. Beneficiaries are liable to pay income tax on income they receive from the trust at their own personal or corporate tax rates. In theory, the trust is treated as a conduit rather than a taxable entity.

In practice, trustees accumulate income from year to year on behalf of beneficiaries. For example, trustees may reinvest part of the income of an active business in order to grow the enterprise. They may retain income from passive investments to grow wealth on behalf of beneficiaries. Such retained income is not cashed out to beneficiaries. Instead, the trustee assigns a share of such income to those beneficiaries whom it deems 'presently entitled' and pays income tax on that share of trust income on their behalf, at the beneficiary's current tax rate.

The ability of the trustee to retain and grow income on which the beneficiaries (but not the trust) are taxed gives rise to opportunities for the controllers of a discretionary trust (usually individuals with high incomes) to delay or avoid tax, which the minimum 30% tax is intended to curtail. These opportunities extend beyond the well-known tax benefits of income-splitting with low-income beneficiaries. Payment of tax may also be delayed, or the trustee may take advantage of discrepancies between trust income and taxable income definitions.

The taxation of distributions from discretionary trusts relies on the trust law concept of 'present entitlements'.

As discussed, Australia is unusual among common law countries in not applying an upfront tax on the taxable income of discretionary trusts and using the trust law concept of *'present entitlements'* to the trust estate to determine how beneficiaries are taxed (rather than distributions of the taxable income of the trust).

'Present entitlements' are determined by trustee decisions in accordance with the trust deed (pursuant to trust law), which may or may not be consistent with tax law definitions of income. Each trust defines and categorises income (for example distinctions between capital gains and other income) and how it is to be shared among beneficiaries in its own way. Inconsistencies between trust law and tax law can be exploited to avoid tax, for example where the trust law income of a trust is less than its taxable income.[16]

In theory, current tax law prevents the avoidance of tax through retention of untaxed income in a discretionary trust. The trustee must declare how distributable trust income will be apportioned to beneficiaries each year. A penalty tax rate (the top marginal rate of personal income tax plus Medicare Levy, currently 47%) applies to income retained within a trust where no beneficiary is presently entitled to that income (Section 99A, Income Tax Assessment Act).

How taxation of discretionary trusts works in practice – beneficiary entitlements are often unpaid

In practice, due to exemptions from the 47% penalty tax (e.g. for testamentary trusts) and the abovementioned discrepancies between trust income and taxable income, income may escape tax in the hands of both trustee and beneficiaries.

Trustees may hold 'unpaid present entitlements' (UPEs) within the trust. For example, a beneficiary's entitlement may be held within a 'sub-trust' assigned to that beneficiary instead of distributing it to them. UPEs are a common feature of discretionary trusts and they provide opportunities to avoid tax using strategies identified by ATO such as Potential reimbursement

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[16] See Glover J (2014), *Taxing trust income by 'entitlement': The end of the road?.* Australian Tax Review, Vol 43 p101 and de Silva A et al (2019), *Current issues with trusts and the tax system*. Report commissioned by the ATO, RMIT University, Melbourne.

agreements, Value extraction and corpus distributions and Differences between distributable and net income.

In a 2012 *Options Paper* on reform of the taxation of trusts, Treasury raised the option of principles-based reform to overcome discrepancies between income as defined pursuant to trust law and tax law. Its proposed *'economic benefits model'* (EBM) '*moves away from relying on the deed's labelling of amounts as income or capital to determine tax outcomes'*.[17] Under that model:

- Beneficiaries would be assessed on amounts distributed or allocated to them that represent amounts of the trust's *taxable inco*me (rather than their *'present entitlement'* to the trust estate'*)*;
- Trustees would be assessed on amounts representing taxable income that are not distributed or allocated to beneficiaries (generally by 31 August each year).

However, as worked examples in the Options Paper show, the proposed model would not have solved the UPE problem. Distributions loaned back to the trustee and distributions in the form of payment of university fees where deemed valid. In both cases, tax (including the 47% penalty tax) would be avoided.

By taxing discretionary trust income by default at 30%, the proposed minimum tax treats them as taxable entities, bringing their tax treatment closer to that in other common law countries. This helps ensure that trust income is brought to tax in a timely way.

However, when UPEs are used as part of a tax avoidance strategy (for example using *reimbursement agreements* discussed below) they undermine this objective. For tax purposes, distributions should be treated as payments from the taxable income of the trust, not shares of *'present entitlements'* pursuant to trust law.

To ensure that tax is paid in a timely way - at least at the proposed 30% minimum rate - the 30% trustee tax should only be refunded to beneficiaries in respect of income distributed to them within two months of each tax year. Contrived distributions, such as those which are reimbursed to the trust via loans, should not be recognised for the purposes of the 30% tax offset and the 47% penalty tax on income retained within a trust should apply.

Recommendation 3:

The proposed 30% tax offset should only be available to a beneficiary in respect of a distribution of income to them from a trust (as distinct from an unpaid present entitlement) made within each tax year or up to two months afterwards (by 31 August).

The 30% tax offset should be denied to beneficiaries where tax is avoided through non arms-length transactions that benefit others

A common tax avoidance strategy identified by the ATO is to divert the value of trust income or beneficiary entitlements to other individuals or entities through non arms-length transactions, for example through reimbursement agreements.

In this way, the high-income controller of a trust benefits from an entitlement distributed to a low-income or untaxed beneficiary. For example, an adult child may be asked to compensate

[17] Treasury (2012), *Taxing trust income – options for reform*, Canberra, p8.

their parent for past investment in school fees out of a distribution to them from a discretionary trust. No money actually changes hands – rather, the controller of the trust has avoided paying tax on their own income at a higher marginal rate. A worked example provided by the ATO is outlined below.

Example of a reimbursement agreement

The trustee of the Blue Family Trust is Azure Pty Ltd. Trevor is the sole shareholder and controller of Azure Pty Ltd. The Blue Family Trust derives assessable income in excess of $400,000 a year. Trevor's daughter, Simone, is a beneficiary of the trust. Simone has recently turned 18 years of age and works part-time. Simone expects to derive assessable income from her work of approximately $20,000 a year.

Before the end of the 2020–21 income year, Simone meets with her father and agrees that any distribution resolved to be made by the Trustee will, after the payment of tax, be paid to Trevor to reimburse him for part of the fees for secondary schooling and costs of other extracurricular activities since Simone was five years old. Records maintained by the family show that these expenses amounted to $315,000.

The Trustee resolves to distribute $160,000 to Simone and pays this amount into an account held in Trevor's name. Trevor pays income tax on Simone's behalf.

This arrangement raises the concerns that are mentioned in this Alert. Simone is purportedly made entitled to a trust distribution and this amount is used to reimburse her parents for expenses that they would ordinarily meet. The arrangement, which results in Trevor obtaining the economic benefit of the trust income without that income being subject to tax at the top marginal tax rate he would otherwise have paid, appears to be more readily explained by the tax outcomes achieved, rather than any familial objectives.[18]

In another common tax avoidance strategy, unpaid distributions to a low-income beneficiary (an individual or private company) are diverted back to the trustee through loans. This was the subject of the recent High Court judgement in the *Bendel* case, which ruled that a corporate beneficiary's UPE to trust income was not a 'loan' so could not be taxed as deemed dividend pursuant to Division 7A of the Income Tax Assessment Act.

Reimbursement strategies undermine the principle that a beneficiary's entitlement to trust income, once awarded by the trustee, is for the exclusive benefit of that person. Otherwise, the distribution is ineffective and the trustee should be taxed at the penalty rate of 47% (pursuant to Section 99A, Income Tax Assessment Act).

The challenge for the ATO is to distinguish between contrived 'non-arms length' transactions of this kind and 'ordinary family or commercial dealings' which do not attract the penalty tax (Section 100A Income Tax Assessment Act). The integrity measures in current tax law to curtail reimbursement agreements are unenforceable at scale.

Reimbursement agreements could also be used to shift the value of the proposed 30% tax offset from a beneficiary who pays sufficient tax to take advantage of it (i.e. whose marginal tax rate is at least 30%) to the trustee or another beneficiary or entity so that it ultimately benefits the controller of the trust.

Recommendation 4:

(i) The 30% tax offset should be denied to beneficiaries in cases where its value is shifted to another individual or entity in a non-arms length transaction.

[18] ATO (2022), *Taxpayer Alert TA2022/1*, p4.

(ii) Where such transactions occur beyond the tax year in which the offset was claimed, the penalty tax rate of 47% should apply.

Excess franking credits must not be used to circumvent the 30% minimum tax

ACOSS supports measures to ensure that franking credits cannot be used in a way that undermines the policy intent of a genuine 30% minimum tax on discretionary trust income.

To this end, ACOSS supports the government's proposal that trustees receiving franked dividends should first be required to apply available franking credits against their tax liabilities as trustees, consistent with existing arrangements where a trust is assessed and liable for tax. This helps ensure that income derived through discretionary trusts remains subject to the proposed minimum tax while avoiding double taxation of company profits.

The treatment of *excess* franking credits should be assessed first and foremost against the integrity of the minimum tax rather than the preservation of existing franking credit refund arrangements. If excess credits are refunded to trustees without appropriate safeguards, high-income individuals may be able to structure their affairs so that refundable franking credits partially or wholly offset the effect of the minimum tax. This could reduce the intended effective tax rate on discretionary trust income and recreate some of the tax advantages that the reform is intended to remove.

The consultation paper identifies two options for the treatment of franking credits that remain after the trustee's minimum tax liability has been extinguished:

- refund excess franking credits to the trustee; or
- allow excess franking credits to be carried forward and applied against future trustee tax liabilities.

ACOSS is concerned that refunding excess franking credits to the trustee, without additional safeguards, could weaken the effectiveness of the 30% minimum tax. While the trustee would formally pay the minimum tax, refunds of excess credits could generate additional benefits within the trust structure that reduce the overall tax liabilities intended by the reform. This is because, as the consultation paper notes, whether the value of refunded excess credits are trust income available for further distribution to beneficiaries depends in large part on the trust deed. If a refund approach is adopted, additional integrity measures would be required to ensure that refundable franking credits cannot be used to achieve an effective tax rate below the intended minimum.

Allowing trustees to carry forward excess franking credits to offset future trust income tax liabilities could help protect the integrity of the minimum tax. If a carry-forward model is pursued, additional integrity measures would be required to ensure that any future benefit does not undermine a 30% minimum effective tax rate, remains appropriately linked to the beneficiaries whose distributions gave rise to the excess credits and that new beneficiaries cannot access benefits generated before their involvement in the trust.

ACOSS also considers that improved transparency of beneficial ownership would strengthen the integrity of any carry-forward model. In particular, a public register of beneficial ownership of private trusts administered by the ATO could assist in tracing the movement and use of excess franking credits through trust structures over time helping to enforce the minimum tax and associated integrity rules. As discussed below, such a register would also support broader efforts to reduce tax avoidance and evasion and the opacity of private trust structures.

Recommendation 5:

(i) Trustees that receive franked dividends should be required to use their franking credits to offset their tax liabilities as a trustee in the first instance.

(ii) For any excess franking credits received by the trustee after offsetting its tax liabilities, integrity measures should apply to prevent further distribution or offsetting of credits against future tax liabilities in a way that achieves an overall effective tax rate below 30%.

Donations to deductible gift recipients, but not other tax exempt entities, should be exempted from the 30% tax

While exemptions from the 30% minimum tax on discretionary trusts should be kept to a minimum, we are concerned about an unintended consequence of the reform - the weakening of incentives to donate to deductable gift recipients.

Donations from trusts to DGRs and other tax-exempt entities should be treated consistently with direct donations by individual taxpayers.

As in the case of the new 30% minimum tax on capital gains, one consequence of the proposed trusts reform is that a donation from a discretionary trust to a *deductable gift recipient (DGR)* would be treated differently to the same donation made by an individual taxpayer. The donation would effectively be reduced in value by 30% since the proposed 30% tax offset for trust beneficiaries would not benefit an organisation that does not pay income tax (i.e. it is not refundable).

This subverts the intent of the income tax law - to encourage donations to a prescribed set of not-for-profit organisations that contribute to community wellbeing, and to do so consistently. The case for special treatment of donations to DGRs is therefore strong.

On the other hand, a donation from a discretionary trust to a *tax-exempt organisation that is not a DGR* (such as a club or church) is currently treated more generously by the tax system than the same donation made by an individual taxpayer.

A donation by an individual taxpayer to a non-DGR can generally only be made using after-tax income and it does not attract a deduction. In contrast, the controller of a discretionary trust can use the trust to 'split' part of their income with the not-for-profit in the same way that they can split part of their income with a family member on a lower tax rate. In effect, the donation is tax-free as long as the not-for-profit organisation does not pay income tax.

This subverts the intent of the income tax law to limit deductibility to DGRs.

Our preferred solution is to exempt donations to DGRs, but not other tax exempt organisations, from the 30% tax on discretionary trust income. This could be done by deducting such donations from the assessable income of the trust.

If this option is pursued, integrity measures would be needed to ensure the transfer to a DGR beneficiary is actually made and is made for genuine charitable purposes and not for tax avoidance purposes. As indicated above, distributions to tax exempt entities can be used to avoid tax and the ATO applies a 'pay or notify rule' to such distributions (Sections 100AA and 100AB of the Income Tax Assessment Act 1936). This requires the trustee to either pay the beneficiary or notify them of their entitlement within two months of the end of the relevant financial year.

For the purpose of exempting a donation from the 30% minimum tax, the trustee should be required to provide timely information to the ATO on the identity of the DGR, the amount donated, the timing of the donation, and bank account details of the DGR, so the ATO can ensure (if necessary) that the donation was appropriately made. This removes the need for the DGR to report this information to the ATO.

Another option is to apply the 30% tax to donations and allow DGRs to claim a refundable 30% tax credit in respect of tax paid by the trustee. This is not our preferred option as it would bring extra compliance costs for the DGR – especially smaller charities receiving a large number of modest donations. It may also discourage donations.

Recommendation 6:

(i) Donations by trusts to DGRs should be deducted from the assessable income of the trust before the 30% minimum trusts tax is applied.

(ii) Trustees should report to the ATO in timely fashion the name and financial account details of the DGR, and the timing and amount of the donation.

(iii) Donations to other income tax exempt organisations that are not DGRs should not be exempted from the 30% upfront tax, and they should not be eligible for the related tax offset.

The Government should commit to reform the scope of DGR status

The above approach preserves the distinction between deductable and non-deductable donations. However as ACOSS has argued for many years, the rules around gift deductibility are out of date and not fit for purpose. For example, a charity that advocates to reduce poverty or environmental harms cannot generally secure DGR status unless it is awarded to them specifically by the Treasurer of the day. On the other hand, private school building funds have DGR status even though the 'donations' are in many cases surrogate school fees.

The Productivity Commission recommended reforms to address these problems in its 2024 *Report on Philanthropy*, which ACOSS supported. Two decades earlier, the *Charity Definitions Inquiry* recommended major reform of the archaic *Public Benevolent Institution* rules. Reform of DGR status has not been pursued by successive governments and this is an opportunity for the Albanese government to resolve long-standing inequities.

Recommendation 7:

The Government should commit to modernisation of DGR status along the following lines:

DGR status should be extended to all charities that are registered with the ACNC, except those whose purposes and activities are solely for the advancement of religion, or the advancement of education through childcare and primary and secondary education (unless the activity is sufficiently related to advancing another charitable purpose).

Special tax concessions for testamentary trusts should not extend across multiple generations, nor to minor beneficiaries with a living parent.

The government proposes to exempt testamentary trusts from the 30% minimum tax on discretionary trusts. In our view this exemption is not necessary. The vast majority of testamentary trusts are fixed trusts in which each beneficiary has a definite entitlement. With some exceptions – such as the protection of beneficiaries of the estate with disabilities, discretionary testamentary trusts are not needed unless the deceased or their family office wishes to control family finances 'beyond the grave'.

Testamentary discretionary trusts have a privileged tax status. Income which the trustee does not distribute each year does not attract the penalty rate of tax (47%) which may apply to inter vivos discretionary trusts. An exemption from the proposed 30% minimum tax would add to the existing advantages of testamentary trusts, further encouraging their use to avoid tax.

Aside from the opportunity to use a testamentary trust to avoid the 30% minimum tax, there are two problems with the proposed exemption.

First, many testamentary trusts reach beyond a single generation. Where a wealthy individual settles their estate in a discretionary trust, the beneficiaries could include children, grandchildren and great grandchildren, as control of the trust passes down the generations. To the extent that this structure is used to avoid tax (and the 30% minimum tax does not apply), this may entrench inherited wealth inequality.

Second, beneficiaries of testamentary trusts who are minors (children under 18 years) are exempted from the 47% tax rate that would otherwise apply to their investment income. They are instead taxed at their own marginal tax rate (often zero).

The purpose of this penalty tax rate is to prevent wealthy individuals from assigning investment income to minors (usually through discretionary trusts) to avoid tax. The benefits of this investment income are then diverted to the controller of a trust or another adult within the family.

Prior to 2019, a common tax avoidance strategy took advantage of this concessional treatment of children's investment income from testamentary trusts by injecting income not derived from the estate of the deceased into those trusts. In that year, tracing rules were legislated to restrict this concession to income derived from the estate though it can be difficult in practice to separate that from 'other' income injected into a trust.

The concessional tax treatment of the investment income of minor children from a testamentary trust was based on the idea that such children were more disadvantaged than those who received care and support from parents who were still alive. However, this justification does not apply to grandchildren and great-grandchildren of the deceased whose parents are alive and able to support them. In any event, there is no need to distribute investment income directly to a minor if an adult in the family is responsible for their care (provided they are not orphaned).

The 47% tax should apply to distributions of investment income to minors unless they belong to a group specifically excluded in the 2019 legislation referred to above (for example, if they are orphaned).

Recommendation 8:

(i) If testamentary trusts are exempted from the minimum 30% tax, then at the least such exemption should be time limited (for example, until the youngest direct descendant reaches 18 years).

(ii) Investment income distributed by the trustee of a testamentary trust to minors should be taxed at the standard rate of 47% unless the child is an 'excepted person' (e.g. has a disability, or is orphaned) or the income is 'excepted income (e.g. from loss of parental support or personal injury).

3. Further reforms are needed

This part of the submission raises priorities for further reform of the taxation of private trusts and companies to deal with tax integrity gaps and inequities that will remain once the reforms are in place, which are likely to undermine their effectiveness if not addressed.

The proposed reforms of the taxation of private trusts and companies will go a long way to reduce inequities and inconsistencies in the tax treatment of personal income received through interposed entities rather than directly. However the reforms will only work if financial arrangements in private trusts and companies are much more transparent.

Further, they leave in place a substantial gap between upfront tax rates for private trusts and companies (at 30%) and the top marginal rate of personal income tax (47% including Medicare Levy). This will continue to undermine the equity and integrity of the personal income tax system.

Close the gap between the 30% company and trusts tax rate and 47% personal tax rate for people with high incomes

The proposed minimum 30% tax would help ensure that at least 30% of trust income is taxed in a timely way, removing many opportunities to avoid or evade tax. However, this is still 17 percentage points below the top marginal rate of personal income tax (plus Medicare Levy) so a major avoidance opportunity remains for trust controllers with high incomes.

A similar problem arises with the diversion of personal earnings and investment income to private companies, which are taxed up-front on their income at either 30% or 25%.[19] It is likely that the proposed reform will encourage many taxpayers with high incomes, especially active business owners, to use a private company structure instead of a discretionary trust. This is a desirable outcome (since a company is a simpler and more transparent structure that facilitates retention of profits to grow the business), but the gap between the company tax rate and top personal rate remains problematic.

We reject proposals to 'level down' the highest personal tax rate to 30% to align with the company rate. Such proposals are self-serving on behalf of people with high incomes and would greatly reduce progressivity in the tax system.

The current reform would limit the scope for the high-income controllers of discretionary trusts to reduce tax by retaining income in 'bucket companies' (private companies that are the beneficiaries of discretionary trusts), by taking advantage of the gap between company and top personal income tax rates. This loophole should also be closed for private companies and discretionary trusts generally.

The solution to this problem – both for private companies and discretionary trusts – is to tax retained profits (income that is not distributed to shareholders or beneficiaries each year) at the top marginal rate of personal income tax plus Medicare Levy (currently 47%) rather than 30% or 25%.

[19] The 25% rate applies to small and medium-sized companies in which at least 20% of turnover is from an active business rather than passive investment. Regrettably, a private company owned by a wealthy investor that is predominantly used for passive investment purposes still attracts the lower 25% tax rate.

This higher tax rate for retained company profits was in place for many years before the company and top personal tax rates were briefly aligned in the late 1980s. Its purpose was to reduce opportunities for high-income private company owners to delay or avoid paying tax at the top personal tax rate while income is retained in the company. They faced a choice to either pay tax at the top personal tax rate within the company or to distribute company income to themselves through wages or dividends (with similar effect).

If retained company earnings are taxed at 47%, small business owners with lower personal tax rates would not need to pay tax at the higher rate. By paying themselves wages or dividends, they could ensure they are only taxed at their own (lower) personal tax rate. In the past when retained company earnings were taxed at the top personal tax rate, a proportion of company income was quarantined from the higher tax (through a reinvestment allowance) so that active business owners had scope to reinvest profits to grow the business. This allowance was not available to private companies used for passive investment purposes.

For consistency, income of private trusts that is not distributed to beneficiaries each year should also be taxed at the top marginal personal income rate. A 47% penalty tax rate already applies to trust income that is not at least notionally distributed to beneficiaries each year (as a *present entitlement*). However, as discussed previously those entitlements are not always actually distributed to the beneficiary in a timely fashion.

If income retained with a trust is taxed at the top personal rate, beneficiaries with lower tax rates would still ultimately pay tax at their own marginal rate, but income would be taxed at the top rate while it accumulates within the trust. The higher rate of tax on retained income within a trust would not be levied on top of the proposed 30% minimum tax since the latter would be limited to trust income that is distributed to beneficiaries.

Recommendation 9:

Income retained in private companies or discretionary trusts throughout a tax year, apart from a reinvestment allowance for those engaged in active business (comprising a fixed proportion of the active business assets of the company), should be taxed at the top marginal rate of personal income tax plus Medicare Levy rather than the 30% rate that will apply once the trust reforms are implemented.

Improve transparency of beneficial ownership of private trusts

Private closely held trusts (both fixed and discretionary, though especially the latter) are opaque financial arrangements. Unlike companies, there is no public register revealing who operates the trust and who benefits from it. Trustees are required to submit tax returns to the ATO but not financial accounts. This means they are well suited to the purpose of avoiding tax as well as illegal activities such as tax evasion, money laundering and terrorism financing. It is especially difficult for the authorities to trace movements of income and assets between multiple interconnected private trusts and companies.

Private trusts and companies have been widely used to evade tax and launder money through secrecy jurisdictions or 'tax havens', as shown by revelations from 'Operation Wickenby' (Switzerland), 'Panama Papers' (Panama), 'Paradise Papers' (Bermuda), and 'Pandora Papers' (Cayman Islands and Samoa). In 2014, Australia promoted at a G20 meeting the *Financial Action Task Force (FATF)* initiative to curb these practices by improving the transparency of beneficial ownership of companies, trusts and other financial transactions. Yet independent progress reviews have repeatedly found that Australia has failed to comply with its commitments to improve transparency of beneficial ownership of companies and trusts.[20]

We welcome the Government's commitment to increase tax transparency through a public register of beneficial ownership of private companies. This should extend to private trusts. Information on the trustees and beneficial ownership of private trusts along with financial information should also be published by the Australian Taxation Office (ATO) on a public register similar to that for companies. The privacy of beneficiaries of family trusts registered as such could be protected by exempting those trusts (but not related entities that are not themselves family trusts) from the public register, but not from requirements to report beneficial ownership and financial information to the ATO.[21]

Recommendation 10:

A public register should be established by the ATO to hold the following information in regard to trusts that are required to lodge tax returns: the names and tax file numbers of the trustee, controller, any beneficiaries that are not natural persons (for example other trusts or companies), annual financial statements, and (where the trust is not a family trust) all other beneficiaries together with a declaration from the trustee identifying all beneficial owners.

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[20] Financial Action Task Force (2024), *Anti-money laundering and counter-terrorist financing measures – Australia, 4th Enhanced Follow-up Report*. FATF, Paris.

[21] In a family trust election, the transfer of income or losses beyond beneficiaries who belong to the family that 'owns' the trust is discouraged by a penalty tax. Private companies exempted from disclosure requirements by previous grandfathering arrangements should be included.

Attachment: Income definitions, tax rates and taxing points for discretionary trusts in common-law countries

Australia

The trust is not generally subject to tax on its taxable income.

Beneficiaries are assessed on a share of the trust's taxable income based on their *present entitlement to a share of the trust's distributable income*. This is taxed at their personal tax rate (between zero and 47%). The trustee is assessed on any residual taxable income.

'Present entitlement' is defined according to trust law and each trust's deed. Broadly, a beneficiary has a present entitlement to the distributable income of a trust where they have:

- an interest in the distributable income of the trust that is both vested in interest and in possession; and
- a present right to demand and receive payment of trust income.

'Distributable income' is the taxable income of the trust (defined according to tax law).

Capital gains and franked distributions of the trust can be streamed to beneficiaries that are '*specifically entitled'* to those amounts and retain their character for tax purposes.

A special penalty tax rate (the top marginal rate of personal income tax plus Medicare Levy, currently 47%) applies to income retained within a trust where no beneficiary is *presently entitled* to that income. However, '*present entitlement'* is broadly interpreted by the ATO and the courts to include a range of '*Unpaid Present Entitlements'*.

United States

Trusts are taxed on their taxable income in a similar way to individuals but are allowed a deduction for amounts distributed to beneficiaries.

The progressive rate scale for trust income is more compressed than for individuals, so trust tax rates are often higher. In 2025, a trust's income was taxed at 10%, 24%, 35%, and 37%, with income exceeding $15,650 taxed at the 37% rate. By comparison, a single person's income is taxed at bracket rates of 10%, 12%, 22%, 24%, 32%, 35%, and 37%, with income exceeding $626,350 taxed at the 37% rate.

The deduction is based on each beneficiary's *share of trust's distributable net income*, that is, its taxable income modified for capital gains, or losses, tax-exempt interest and certain amounts that are allocated to capital.

The number of trust income recipients declined by half after tax reforms in 1986 reduced the income threshold at which trusts were taxed at the top marginal tax rate.

Canada

Trustees (including those of testamentary trusts) are subject to tax on the trust's taxable income, generally at the top marginal personal tax rate minus a deduction for income that is *currently distributable* to beneficiaries.

An amount is *currently distributable* to a beneficiary if it has *actually been paid* to the beneficiary, or the beneficiary is *entitled to enforce the payment* of the amount. In the case of a discretionary trust, an amount becomes distributable to a beneficiary only when the trustee exercises their discretion to allocate the income to the beneficiary, so that the beneficiary may enforce its payment.

Income distributed to a beneficiary is taxed at the beneficiary's rate of tax.

Any amounts that are not distributed to beneficiaries are 'undistributed income'. These amounts are taxed to the trustees of a trust at graduated personal tax rates if the trust is a testamentary trust and at the highest personal tax rate if the trust is an inter vivos trust.

United Kingdom

Trust income is taxed at different rates depending on the character of the income. Dividend-type income is taxed at 39% and other income at 45%.

Distributions to beneficiaries are treated as though income tax has already been paid at 45%. This means the beneficiary can claim some or all of the tax back if their individual tax rate is lower than this.

Ireland

Trustees are generally assessed on the taxable income of a trust at 20%, or 40% where income is accumulated in trust and is not distributed within 18 months from the end of the tax year. Capital gains are taxed at a different rate.

Where a beneficiary receives a distribution they are liable to tax on this income at their marginal tax rates but are entitled to a credit for the tax already paid by the trustee.

Beneficiaries may also be liable to pay capital acquisitions tax at 25 per cent where they receive a distribution of a capital from a trust. If the trustee has already been subject to capital gains tax on this amount a credit is available.

Discretionary Trust Tax (DTT) – a form of wealth tax - is also payable by trustees:

- An initial once-off 6% charge applies to the value of all the assets in the trust.
- An annual 1% charge applies on 31 December each year to the value of all the assets in the trust on that date

Sources:

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