31/07/2026

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

Via email to **mintaxtrusts@treasury.gov.au**

Dear Treasury,

AustralianSuper submission to Treasury's consultation on a "Minimum Tax on Discretionary Trusts"

AustralianSuper welcomes the opportunity to respond to Treasury's "Minimum tax on discretionary trusts" consultation paper ("**Consultation Paper**").

AustralianSuper is Australia's largest superannuation fund and is run to benefit members. Our vision is to be Australia's leading superannuation fund, in the world's best system for members. AustralianSuper has over 3.6 million members and manages over $410 billion of members' assets.

As noted in the Treasury's consultation paper: "The minimum tax will not apply to other types of trusts, such as fixed trusts, widely held trusts, complying superannuation funds, special disability trusts, deceased estates and charitable trusts." With that in mind, we provide the following information and context to support the Government in delivering on that policy objective, as the introduction of a 30% minimum tax ("**Minimum Tax**") to discretionary trusts may result in unintended consequences for Australian complying superannuation funds ("**CSFs**").

This submission provides recommendations on the following:

- application of the Minimum Tax to trusts that are wholly owned by CSFs;
- the definition of discretionary trust; and
- application of the Minimum Tax to other types of entities.

Thank you for the opportunity to comment on these important policy reforms.

We would be pleased to provide additional information or to discuss this submission in further detail. If that would be of assistance, please do not hesitate to contact Gina Maio, Head of Tax Services (gmaio@australiansuper.com).

Regards

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Context for complying superannuation funds

CSFs commonly invest through wholly owned Australian unit trusts to hold unlisted assets globally. The use of wholly owned unit trusts is predominantly for non-tax reasons such as quarantining potential legal liability risks of an investment. They are preferred to other types of entities (e.g. companies) due to their tax 'flow through' nature which enables capital gains and other tax attributes to pass through them to CSFs which enables efficient after-tax outcomes for members. All income and capital of these trusts accrues to the CSFs as the sole unit holder.

Additionally, unit trusts are often used as a consortium investment vehicle for domestic investments. CSFs invest into those vehicles alongside other institutional investors (for example, other CSFs, foreign pension funds or large-scale asset managers). This happens directly, or indirectly via a wholly owned unit trust. In these cases, the investors economic ownership and entitlement to income and capital is effectively fixed, rather than determined by the trustee on a discretionary basis.

In both cases, the trust deeds may contain powers that are commonly included for commercial flexibility. These include powers to amend the deed, issue or redeem units, admit additional investors, or vary procedural rights. If the proposed Minimum Tax relies on the existing strict fixed trust concept, these ordinary administrative powers may cause these types of trusts to fall outside the fixed trust definition and be classified as 'discretionary trusts', even though there is no genuine income-splitting risk.

Recommendation 1: Extend exclusion to wholly owned trusts of complying superannuation funds

To robustly exempt CSFs, the exemption needs to extend to their wholly owned trusts which, as noted above, are commonly used by CSFs to invest in unlisted assets.

The Minimum Tax is targeting "income splitting" through discretionary trusts, which can only occur where there are two or more beneficiaries of a trust. This does not pertain to CSFs and their wholly owned trusts, as CSFs will still be subject to tax on all the income and gains of the trust.

The following points are also noted in respect of wholly owned unit trusts of CSFs:

- Many of these trusts may not strictly qualify as 'fixed trusts' due to ordinary administrative powers contained in trust deeds. In practice, it is common for taxpayers to rely on the ATO's discretion for fixed trust treatment pursuant to Practical Compliance Guideline 2016/16, but this is merely guidance that is subject to change at the discretion of the ATO. Requiring wholly owned trusts of CSFs to rely on this guidance to preclude application of the Minimum Tax would create unnecessary risks and uncertainty.

- The attribution managed investment trust ("**AMIT**") regime provides a mechanism for trusts to achieve deemed 'fixed trust' status. However, it would be inappropriate to rely on the AMIT regime as the sole mechanism to prevent the Minimum Tax from applying to wholly owned trusts of CSFs. This is principally because there are several unrelated conditions that must be satisfied before a trust can elect into the AMIT regime (e.g. eligible investment business and licensing requirements), which may preclude wholly owned trusts of CSFs from being exempted. For example, CSFs may hold a 'retail' AFSL instead of the prescribed 'wholesale' AFSL.

- Whilst the proposed non-refundable tax offsets mechanism might enable CSFs to achieve the same net tax outcomes even if their wholly owned trusts were subject to the Minimum Tax, it would create substantial and unnecessary administrative and compliance costs. It would also undermine the Government's red tape reduction initiative.

We **recommend** the Minimum Tax provisions exempt wholly owned trusts of CSFs from the Minimum Tax. This could be achieved by either directly extending the CSF exclusion or, alternatively, creating a new exclusion category for single beneficiary trusts. This change will ensure that CSFs are not indirectly (and inadvertently) subject to the Minimum Tax through their wholly owned trusts which are used as part of their ordinary investing practices.

Recommendation 2: Amend the definition of discretionary trust

CSFs are significant investors in many types of Australian businesses and assets, such as infrastructure and property. Unit trusts are a commonly used vehicle for pooling and investing capital from investors globally, including CSFs, into these types of assets in Australia.

In these scenarios, all investors will effectively hold fixed interests in the trust (equal to their proportion of the total issued units) which, other than in very limited circumstances, entitles them to that same percentage interest of any income and capital of the trust. In other words, the trustee does not have discretion to allocate income and capital among different beneficiaries.

As noted above, many trusts may not qualify as 'fixed trusts' (and hence may be classified as discretionary trusts) merely due to ordinary administrative powers contained in trust deeds. As a result, there is a genuine risk that the Minimum Tax rules would be enlivened for many commercial investment trusts despite investors' (including CSFs) economic entitlement to income and capital being substantially fixed. It is possible that another exemption could apply in these contexts (e.g. widely held trust exemption) or that fixed trust status could be achieved through an AMIT election. However, for similar reasons outlined above, there are other conditions associated with these positions which present additional uncertainty and risk to investors.

We **recommend** that discretionary trusts in the context of the Minimum Tax should be defined in the legislation by reference to whether the trustee has a substantive discretion to allocate income or capital among different beneficiaries or taxpayers. The definition should not rely solely on whether a trust satisfies the current fixed trust concept which can be difficult to apply to institutional trust deeds.

Recommendation 3: Expressly clarify entities not within scope

The Consultation Paper refers to the application of the Minimum Tax to discretionary trusts only. For completeness, we note our understanding that it is not intended for the proposed reform to apply to other entity types. We support this approach and submit that this intended scope should be confirmed within both the final legislation and supporting Explanatory Memorandum.