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Submission on the exposure draft legislation for the minimum tax on discretionary trusts

Submitted by

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Introduction

Employee Ownership Australia welcomes the opportunity to comment on the exposure draft legislation for the proposed minimum tax on discretionary trusts. This submission builds on the submission dated 31 July 2026 and addresses the operative consequences of the exposure draft provisions for trusts that involve employees.

The submission makes two separate and discrete submissions.

Part A concerns employee share trusts recognised by subsection 130-85(4) of the Income Tax Assessment Act 1997.

Part B concerns employee ownership trusts used to facilitate collective and long-term employee ownership of a business. The fact that both categories involve employees does not make them a single policy category.

Employee share trusts are established remuneration and plan-administration vehicles. They are widely used, including for employee populations numbering many thousands of participants. Some trusts may have more than 10,000 or 20,000 employees as beneficiaries. Their integrity boundary already exists in the sole activities test in subsection 130-85(4). The principal submission is that satisfaction of that test must be sufficient to secure a direct statutory exclusion from the proposed regime.

Employee ownership trusts are different. They are collective ownership and business succession vehicles. The relevant policy consideration is that Australia should remain capable of introducing and developing those structures without their operation being impeded by a tax rule directed at family income splitting. They require a separate definition, a separate statutory safe harbour and a separate policy analysis.

The submissions should be dealt with separately. They raise different policy considerations.



Executive summary

Submission 1: employee share trusts

Employee share trusts should be expressly excluded from the definition of a minimum tax trust where they satisfy subsection 130-85(4). This is the principal submission.

The employee share trust sole activities test confines the trust to obtaining shares or rights, ensuring that employee share scheme interests are provided to employees or their associates, and undertaking activities merely incidental to those functions. It is an existing, objective and familiar statutory integrity rule. A trust that satisfies it presents no family income-splitting risk.

A statement that employee share trusts are “generally” excluded is not adequate

The statement in the explanatory materials that employee share trusts would generally satisfy the proposed fixed trust definition is not adequate. The word generally acknowledges that some conventional arrangements may fail or face material doubt. The consequence may be trustee-level tax, additional reporting, repeated legal review and an unrecoverable economic cost for employees. That outcome should not depend upon evaluative concepts such as material discretion or significant effects on value.

Employee share trusts are mainstream structures. The compliance issue is therefore not confined to a small number of unusual trusts. It may affect listed, private and multinational employers and very large employee populations. A direct exclusion is simpler, more certain and better targeted than forcing these trusts through a general fixed trust definition.

Recommendation 1. Insert an express exclusion in proposed subsection 101AB(1) for an employee share trust within the meaning of subsection 130-85(4) of the Income Tax Assessment Act 1997. The exclusion should operate independently of fixed trust status.

Submission 2: employee ownership trusts

Employee ownership trusts require separate policy consideration.

They are collective ownership vehicles capable of supporting business succession, long-term stewardship and broad employee participation. Their beneficiary population changes as employees join and leave, and their operation may require flexibility that is inconsistent with the proposed fixed trust definition.

The case for exclusion is not derived from the employee share trust rules. It rests on the absence of family income splitting and on the positive policy objective of ensuring that inappropriate tax settings do not prevent employee ownership trusts from being introduced and used in Australia.

A separate statutory safe harbour should confine the trust to a qualifying business, a broad employee beneficiary class, objective employment-related participation criteria, direct distributions, restrictions on loans and entrenched limits protecting the employee ownership purpose.

Recommendation 2. Insert a separate exclusion for a qualifying employee ownership trust satisfying a dedicated statutory definition and objective integrity conditions. The exclusion should operate independently of subsection 130-85(4) and independently of fixed trust status.



Part A - Employee share trusts

1. The policy boundary of the minimum tax

The explanatory materials describe the policy concern as the flexibility of discretionary trusts to allocate income to beneficiaries subject to lower marginal tax rates. The minimum tax is intended to align the tax rate on relevant trust income with rates paid by workers. Employee ownership structures do not exploit the distinction identified by that policy rationale.

An employee share trust acquires, holds and delivers shares or rights under an employee share scheme. The trustee's powers exist to administer plan rules, deal with vesting and forfeiture, acquire and transfer shares, and deliver employee entitlements. An employee share participation trust holds an interest in an employing business for the collective benefit of a broad employee class and supports long-term employee share participation. Neither structure exists to choose among family members according to their marginal tax rates.

A minimum tax designed to protect the progressivity of the personal income tax system should not impose a trustee-level tax on arrangements established to provide workers with ownership interests. Application of the tax would burden the very workers by reference to whom the policy case for the measure is expressed.

2. The exposure draft does not provide the required certainty

Proposed section 101AB

Proposed subsection 101AB(1) defines a minimum tax trust as a trust that is not a fixed trust, a special disability trust, a deceased estate, a complying superannuation entity, or a kind of trust determined by the Minister. Employee share trusts and employee share participation trusts are not listed exclusions.

Proposed subsection 101AB(2) permits the Minister to exclude a class of trust only where it is similar in nature to an already excluded class, lacks sufficient economic connection to Australia, or has statutory functions under Australian law. A conventional employee share trust or employee share participation trust may not comfortably satisfy any of those gateways. The power is therefore not an adequate or dependable route to exclusion.

Even if a legislative instrument could be made, reliance on future executive action is inferior to a direct legislative exclusion. It leaves employers, trustees and employees exposed to uncertainty during design, implementation and operation. It also makes the exclusion subject to amendment, disallowance and sunseting.

The new fixed trust definition is not a safe harbour for employee share trust structures

Proposed section 272-65 provides two limbs. The first requires fixed entitlements to all income and capital. The second applies where there are no material discretionary elements affecting beneficiary entitlements or rights. Employee ownership structures cannot safely rely on either limb in all ordinary cases.

Employee share trusts routinely hold unallocated shares before allocation, permit participation to change as employees join and leave, and allow trustees or plan administrators to implement vesting, forfeiture and dealing restrictions under plan rules. Employee ownership trusts commonly operate for a changing employee population and may provide differential benefits by reference to



remuneration, service or hours worked. Those features are integral to the structure. They may also affect who is entitled, the extent of an entitlement, or the value of an interest.

The second limb is expressed through evaluative and non-exhaustive criteria. It asks whether discretion is “material”, whether rights are “clearly defined”, whether a power can “significantly” vary an entitlement or affect value, and whether a rule is discretionary. Reasonable taxpayers and advisers may reach different conclusions. The exposure draft further permits the Minister to determine both positive and negative matters by legislative instrument. This compounds rather than removes uncertainty.

The explanatory materials acknowledge the problem. They say that employee share trusts and worker entitlement funds would “generally” meet the fixed trust definition. “Generally” necessarily means that some ordinary employee share trusts may not. It also gives no reliable rule by which a trustee can determine which side of the boundary a particular provision falls.

Recommendation: Do not use fixed trust status as the mechanism for excluding employee share trust structures. Insert category-specific exclusions in proposed section 101AB.

Good tax administration requires a clear statutory exclusion

The classification of an employee share trust should be clear from the legislation. The consequences of falling within the regime include trustee-level tax, altered treatment of franking credits and beneficiary offsets, and additional reporting and administration. Those consequences should not depend on qualified statements in explanatory materials or open-textured concepts such as “material” discretion and “significant” effects on value. Uncertainty would require employers and trustees to review plan terms and practices whenever participation, plan rules or corporate circumstances change. It could also lead trustees to restrict ordinary plan administration merely to support an arguable fixed trust classification. The burden would be disproportionate where the trust presents no family income-splitting risk, and would fall particularly heavily on smaller and unlisted employers. Established tax design principles require tax liabilities to be ascertainable from the statute and compliance burdens to be proportionate to the risk addressed. A direct exclusion for qualifying employee share trusts best satisfies those principles.

Certainty must be found in the operative legislation

Statements that employee share trusts will “generally” satisfy the fixed trust definition do not determine the legal outcome, bind the Commissioner of Taxation or remove the need for professional advice. If the policy is that trusts satisfying subsection 130-85(4) are outside the regime, that result should appear in the operative provisions. Proposed subsection 272-65(2) does not provide an exhaustive safe harbour. Its listed factors are indicators only, leaving open the possibility that another feature may be treated as a material discretionary element. That residual uncertainty is inappropriate for a threshold rule carrying substantial tax consequences.

Compliance costs should be proportionate to the integrity risk

Without a direct exclusion, an employee share trust may need recurring review of its deed, plan rules, allocation and vesting practices, amendment powers and ordinary administration. The resulting costs may include legal advice or rulings, document changes, additional reporting and record-keeping, systems changes, tax provisioning and governance work. Those costs do not address the identified mischief. A trust satisfying subsection 130-85(4) is confined to employee share scheme functions and merely incidental activities. It should not also be required to establish fixed trust status.



Guidance and delegated legislation are not substitutes for a statutory exclusion

Administrative guidance should explain the law, not narrow a broad liability for taxpayers whom the measure is not intended to affect. Legislative instruments are also an inadequate foundation for long-term employee plans because they may be amended, disallowed or sunsetted. The core exclusion should therefore appear in primary legislation. Any supporting instrument or guidance should operate prospectively and supplement, rather than qualify, the statutory exclusion.

Employee share trusts are established and widely used

Employee share trusts are established remuneration and plan-administration vehicles used by listed, private and multinational employers. Many support thousands of participants, and some may have more than 10,000 or 20,000 employee beneficiaries. Uncertainty at trust level can therefore affect large employee populations and require coordinated review of plan documents, payroll, equity administration, tax reporting and financial statements. The scale of a plan does not create an integrity concern. It magnifies the cost of applying an uncertain classification rule to a trust confined to employee share scheme activities. For smaller employers, those costs may make a trust-based plan uneconomic.

Parliament has already established the integrity boundary

Subsection 130-85(4) defines an employee share trust by its sole activities: obtaining shares or rights, providing employee share scheme interests to employees or their associates, and undertaking merely incidental activities. A trust undertaking unrelated wealth-holding or family distribution activities does not satisfy that test. The sole activities test therefore provides the relevant integrity boundary. Requiring the same trust to satisfy the fixed trust definition adds a different inquiry into beneficiary entitlements and operational discretions without more effectively addressing family income splitting. The correct approach is to determine whether subsection 130-85(4) is satisfied and, if so, exclude the trust from the minimum tax regime without further analysis of fixed entitlements or material discretion.

Why the proposed fixed trust test may fail

A complying employee share trust may hold unallocated shares, accommodate employees joining and leaving, and administer invitations, allocations, vesting, forfeiture, disposal restrictions, dividends and corporate transactions. Plan rules may also be amended in response to law, listing rules or remuneration policy. These are ordinary features of employee share scheme administration, not indicators of income splitting. They may nevertheless create doubt about fixed entitlements or whether a power materially affects beneficiary rights or value. The exclusion should turn on subsection 130-85(4), not those evaluative concepts.

Practical consequences if employee share trusts remain within scope

The consequences may include trustee-level tax on trust income, complex interactions with franking credits, additional reporting and an unrecoverable cost for employees whose tax otherwise payable is less than a non-refundable beneficiary offset. That outcome would reduce the value delivered through a standard employee remuneration structure without addressing family income splitting.

Recommended statutory drafting for employee share trusts

Insert the following paragraph in proposed subsection 101AB(1): “(f) an employee share trust within the meaning of subsection 130-85(4) of the Income Tax Assessment Act 1997.” The explanatory materials should confirm that the exclusion applies irrespective of fixed trust status



and permits powers ordinarily required to administer an employee share scheme, provided the sole activities test remains satisfied.

5. Specific concerns with the exposure draft as it applies to employee share trusts

The electable regime is not a practical solution

The excluded election trust regime would require an existing trust to nominate beneficiaries and fixed proportions of income and capital totalling 100 per cent, then maintain those proportions. It cannot accommodate a changing workforce and is unavailable to trusts established after commencement. It is not a substitute for exclusion.

Roll-over relief is not a solution

Employee share trusts should not be required to abandon a trust structure integral to plan administration. Restructuring also raises legal, commercial, governance, securities-law and state-tax consequences beyond the income tax relief provided.

Future tranches increase uncertainty

Later legislation is expected to address administration, reporting, residency, capital gains tax, international interactions and integrity rules. The status of employee share trusts should be resolved now so that employers are not required to assess successive tranches while the threshold issue remains uncertain.



Part B - Employee ownership trusts

10. Employee ownership trusts should be separately and expressly excluded

Employee ownership trusts are distinct

An employee ownership trust is not merely an employee share trust with different drafting. It is a collective ownership vehicle. It ordinarily holds a substantial interest in an employing business for the benefit of all or a broad class of employees, supports long-term stewardship and succession, and may provide benefits over time by reference to objective employment-related factors.

Because the trust benefits a changing workforce collectively, it may not satisfy the employee share trust sole activities test. It may also be unable to satisfy the proposed fixed trust definition. A separate exclusion is therefore required.

The broader benefits of employee ownership trusts

As Employee Ownership Australia explained in its earlier submission, employee ownership trusts can provide substantial economic, business and workforce benefits. They create a mechanism through which ownership of a business can be held for the collective and long-term benefit of its employees. They can broaden access to business ownership beyond founders, senior executives and employees with the financial capacity to acquire shares directly.

Employee ownership trusts can assist private business succession by providing an ownership pathway where a sale to a third party, management buyout or family succession is unavailable or inappropriate. The structure can preserve the continuity and independence of the enterprise while transferring the economic benefits of ownership to the workforce that contributes to the business over time.

The collective trust model is particularly important because individual employees may not have the capital, borrowing capacity or risk appetite required to acquire a meaningful direct interest in their employer. The trust allows ownership to be held collectively without requiring each employee to fund an acquisition or assume concentrated personal investment risk as the price of participation.

The trust can also provide continuity as the workforce changes. Employees may join and leave the organisation, and their level of participation may vary by reference to objective employment factors, without requiring the underlying controlling interest in the business to be repeatedly transferred. The features needed to accommodate a changing workforce are therefore central to the effectiveness of the structure. They are not evidence of the family-directed discretion at which the proposed minimum tax is aimed.

By supporting broad-based employee participation in the value created by the business, the structure can strengthen the alignment between employees and the long-term performance of the enterprise. It can also provide a practical institutional framework for employee voice, stewardship and the preservation of an employee ownership purpose across successive generations of employees.

The proposed regime would impair the operation of employee ownership trusts

The mechanism adopted to determine the scope of the proposed minimum tax would materially limit the effectiveness of employee ownership trusts. The regime uses the absence of fixed



entitlements, or the presence of material discretionary elements, as a proxy for the income-splitting risk it seeks to address. That proxy is inappropriate for an employee ownership trust.

An employee ownership trust must be capable of operating for a changing employee population. It may need to determine eligibility, admit new employees to participation, cease or adjust participation when employment ends, differentiate benefits by reference to objective employment criteria, retain value for future employees, and respond to changes in the business. Those operating features may prevent all beneficiaries from having fixed entitlements to all income and capital at every point in time. They may also be characterised as discretionary or as affecting the value of beneficiary rights under proposed section 272-65.

The consequence is that the very features that make an employee ownership trust workable may expose it to the minimum tax. A trustee may therefore be encouraged to make participation rules more rigid, narrow the eligible workforce, reduce provision for future employees or adopt economically inferior arrangements merely to support an argument that the trust is fixed. Tax law should not distort the governance and operation of a legitimate employee ownership structure in that way.

The regime would impose the burden on employees rather than address tax avoidance

Application of the minimum tax would not impose a burden on an abstract legal vehicle. The economic cost would be borne by the employees for whose benefit the trust exists. Trustee-level tax reduces the amount available to provide employee benefits, support collective ownership, reinvest in the employee ownership structure or meet the costs associated with maintaining the trust's ownership interest.

The effect would be particularly inappropriate for lower-paid employees, who are commonly among the most junior and youngest employees in an organisation. Those employees are less likely to have substantial personal investment assets or the financial capacity to acquire shares directly. A collective employee ownership trust may therefore provide one of the few practical means by which those employees can participate meaningfully in business ownership and share in the value created by the enterprise.

The beneficiary offset does not remove this concern. To the extent the offset is non-refundable, an employee whose tax otherwise payable is below the amount of tax attributed to the employee cannot recover the difference. The minimum tax can therefore create a permanent economic cost for an employee below the 30 per cent rate. The burden is liable to be most acute for lower-paid employees, even though the policy rationale for the regime is expressed by reference to protecting the taxation of income earned by workers.

This produces a perverse policy outcome. A measure intended to prevent income from being diverted away from workers and taxed at lower rates may itself reduce the value delivered to workers through a genuine employee ownership arrangement. It would penalise broad-based employee ownership without counteracting any family income-splitting practice.

A sound tax system should be neutral between legitimate commercial and ownership structures unless a difference in treatment is justified by a genuine policy or integrity concern. There is no such justification here. Direct employee share ownership and collective ownership through a qualifying employee ownership trust pursue the same broad objective of giving employees an economic interest in the business. The use of a trust should not trigger a minimum tax merely because collective ownership requires flexibility for a changing workforce. The proposed treatment would also be inconsistent with horizontal and vertical fairness: employees receiving equivalent value should not bear a greater tax burden solely because collective ownership



requires a trust, and lower-paid employees should not suffer a non-refundable or structurally embedded cost that higher-paid employees may more readily absorb. Employee Ownership Australia supports a carefully defined exclusion with objective safeguards, not an open-ended concession. A structure demonstrably confined to genuine employee ownership should not be forced through a rule designed for family income splitting where doing so imposes real costs on workers without a corresponding integrity benefit.

Employee ownership trusts do not create a tax integrity risk

The relevant discretions in an employee ownership trust are operational and fiduciary. They exist to administer collective ownership for a changing employee population, not to select lower-rate family beneficiaries. The character of a power should be assessed by reference to its purpose, the eligible beneficiary class and the constraints on its exercise, rather than by treating the mere existence of flexibility as evidence of tax risk.

A carefully framed sole purpose safe harbour would provide a more accurate and administrable boundary. The trust would qualify only where it is established and maintained solely to facilitate broad-based employee ownership of a qualifying business and to provide benefits to eligible employees, together with merely incidental activities. The beneficiary class, asset composition, distribution powers, loan restrictions, amendment powers and treatment of substantial owners could all be objectively confined by statute.

Those conditions would prevent the exclusion from being used for ordinary family income splitting. They would also allow the Commissioner to test the trust against observable facts and legal obligations rather than an impressionistic assessment of whether a particular operating power is material. The exclusion would therefore improve integrity by directing the statutory test to the real distinction between genuine employee ownership and private tax planning.

The absence of an integrity risk is not merely a reason for administrative tolerance. It is a reason for exclusion from the operative regime. A trust should not first be exposed to a substantive minimum tax and then required to seek guidance or a ruling to establish that its ordinary operation is benign. Where objective statutory conditions remove the mischief, the legislation should remove the trust from scope.

Recommendation: The legislation should expressly exclude an employee ownership trust that satisfies the detailed definition proposed by Employee Ownership Australia. The cumulative conditions in that definition confine the trust to genuine collective employee ownership and prevent family income splitting. The exclusion should therefore apply automatically and independently of fixed trust status.

Recommended legislative structure

Proposed subsection 101AB(1) should include an additional exclusion in the following form:

“(g) an employee ownership trust within the meaning of section [X].”

Section [X] should then define an employee ownership trust by reference to the cumulative conditions set out below. The definition should be self-executing. It should not depend on the Commissioner or Minister being satisfied, the making of a legislative instrument, or a case-by-case ruling.

Proposed definition

For the purposes of the exclusion, an employee ownership trust should mean a trust that satisfies all of the following conditions:



- The trust is a resident trust estate within the meaning of subsection 95(2) of the Income Tax Assessment Act 1936.
- All or substantially all of the market value of the trust property is attributable, directly or indirectly, to membership interests in one or more qualifying companies controlled by the trust. A qualifying company is an Australian incorporated private company carrying on a business, whether directly or as the head company of a consolidated group.
- The trustee holds membership interests in the qualifying company carrying an entitlement to at least 20 per cent of the distributable profits of the company, the assets of the company on winding up, or the voting power on all questions affecting the company as a whole.
- The property of the trust must be applied solely for the benefit of all eligible employees, together with activities merely incidental to that purpose.
- An eligible employee is an individual employed by, holding office in, or acting as an independent contractor of, a qualifying company or a related entity, but does not include an individual holding a membership interest of 10 per cent or more in the qualifying company.
- The trustee may permit differential participation only by reference to matters relating to the individual's employment, office or contractual engagement with the qualifying company or a related entity.
- Where the trustees are natural persons, at least one third of the trustees must be beneficiaries of the trust. Where the trustee is a company, at least one third of the directors of the trustee company must be beneficiaries of the trust.
- The trust may distribute income or capital of the trust estate only directly to beneficiaries in their capacity as beneficiaries.
- The trust is prohibited from making a loan, within the meaning of subsection 109D(3) of the Income Tax Assessment Act 1936, to a beneficiary or an associate of a beneficiary.
- The power to amend the trust instrument is restricted so that it cannot be used to alter the employee ownership purpose of the trust or the nature of the beneficiaries entitled to benefit under the trust.

How the definition protects the integrity of the regime

Each element of the proposed definition performs a specific integrity function. Taken together, the conditions ensure that the safe harbour is confined to genuine employee ownership and cannot be used as an alternative vehicle for family income splitting.

Resident trust requirement. This gives the trust an Australian tax connection and places the trustee within the ordinary Australian trust taxation and administration framework.

Concentration of assets in the qualifying business. Requiring all or substantially all of the market value of trust property to be attributable to interests in the qualifying company prevents the trust from becoming a general investment or family wealth-holding vehicle.

Minimum ownership threshold. The 20 per cent threshold requires a meaningful employee ownership interest. It distinguishes a genuine employee ownership structure from a trust holding a merely incidental or nominal parcel of shares to obtain the exclusion.

Private operating company requirement. Confining the definition to an Australian incorporated private company carrying on a business directs the safe harbour to the succession and collective ownership context for which it is proposed.

Sole employee benefit requirement. Trust property must be applied solely for the benefit of all eligible employees. The trustee cannot redirect value to founders, family members or other private objects merely because they are included in a wide discretionary class.



Broad and employment-connected beneficiary class. Eligibility arises from employment, office or contractual engagement with the business or a related entity. The class is not defined by family connection, personal relationship or marginal tax rate.

Exclusion of substantial owners. The 10 per cent limit prevents a person with a substantial pre-existing ownership interest from using the trust as a vehicle to receive private value under the employee safe harbour.

Objective limits on differential participation. Differences between employees must relate to employment, office-holding or contractual engagement. The trustee cannot select beneficiaries by reference to tax rates or family relationships.

Employee representation in governance. The one-third trustee or director requirement embeds employee participation in the governance of the trust and supports the collective employee ownership character of the structure.

Direct distributions only. The trust may distribute only directly to beneficiaries in their capacity as beneficiaries. This prevents the safe harbour from facilitating distributions through interposed trusts, companies or associates in a manner capable of reproducing family income splitting.

Prohibition on loans. The Division 7A loan concept provides an established boundary and prevents trust value from being extracted by beneficiaries or associates through loans rather than permitted distributions.

Entrenched purpose and beneficiary class. Restrictions on amendment prevent the trust from qualifying on establishment and later being converted into a family or private benefit vehicle.

Recommended clarifications and refinements

The legislation and explanatory materials should make the following matters clear:

- The safe harbour is available to existing and future employee ownership trusts.
- The safe harbour applies irrespective of whether the trust satisfies either limb of the fixed trust definition.
- Activities merely incidental to acquiring, holding, financing, administering or realising the qualifying company interest, and providing employee benefits, do not breach the sole benefit test.
- Changes in the employee population, and differential participation determined solely by objective employment-related factors, do not jeopardise the safe harbour.
- Ordinary powers dealing with eligibility, allocation, vesting, forfeiture, cessation of employment, corporate transactions and administration are permitted where exercised consistently with the statutory purpose and conditions.
- The phrase “all or substantially all” should be supported by a practical statutory or regulatory threshold, with limited exceptions for cash, working capital and assets reasonably required to administer the trust.
- The control requirement and the 20 per cent economic ownership threshold should be coordinated so that the legislation gives effect to the intended collective ownership model without creating inconsistent tests.
- A temporary breach caused by an external transaction, valuation movement or administrative error should be capable of correction within a reasonable statutory cure period where no value has been diverted outside the permitted employee class.



Why an additional anti-avoidance discretion is unnecessary

The safe harbour should not be expressed as a broad Commissioner discretion to determine whether a trust is sufficiently similar to an employee ownership trust or whether the Commissioner is satisfied that no integrity concern arises. Such a discretion would recreate the uncertainty that the safe harbour is intended to remove.

The cumulative statutory definition already contains the relevant safeguards. If Treasury considers a further integrity rule necessary, it should be a targeted rule denying the exclusion where a scheme is entered into or carried out for a more than incidental purpose of obtaining the exclusion for an arrangement that benefits persons outside the permitted employee class. It should not permit the exclusion to be denied merely because the trustee exercises an operational discretion contemplated by the definition.

11. The policy objective is facilitation, not assimilation

The policy case for employee ownership trusts should not be expressed by assimilating them to employee share trusts. The relevant question is whether a dedicated collective ownership structure can be introduced and operated in Australia without being subjected to a minimum tax designed for family discretionary trusts.

The exclusion would not confer an open-ended preference. It would define the conditions under which a trust is sufficiently confined to broad-based employee ownership that the family income-splitting concern cannot arise. The policy benefit and the integrity safeguard should be expressed within the same dedicated definition.

This approach allows Treasury to assess employee ownership trusts on their own terms. It also avoids weakening the separate and simpler employee share trust submission, which rests upon an existing statutory test.



Schedule 1 - Recommended operative amendments

Employee share trust exclusion

Insert in proposed subsection 101AB(1): “(f) an employee share trust within the meaning of subsection 130-85(4) of the Income Tax Assessment Act 1997.”

Employee ownership trust exclusion

Insert in proposed subsection 101AB(1): “(g) an employee ownership trust within the meaning of section [X].”

Section [X] should contain the cumulative employee ownership trust conditions set out in Part B. Each exclusion should apply independently of the fixed trust definition in proposed section 272-65.

Schedule 2 - Proposed explanatory material

- Employee share trusts and employee ownership trusts should be addressed under separate headings.
- The materials should state unequivocally that a trust satisfying subsection 130-85(4) is not a minimum tax trust.
- The materials should explain that the employee share trust exclusion relies upon the existing sole activities test as its integrity boundary.
- The materials should separately explain that a qualifying employee ownership trust is excluded because a dedicated definition confines it to collective employee ownership and removes the family income-splitting risk.
- The word “generally” should not be used to describe either statutory outcome.
- Each exclusion should apply to existing and future qualifying trusts from commencement.

Conclusion

The exposure draft should be amended to recognise two separate categories and two separate policy outcomes.

Employee share trusts satisfying subsection 130-85(4) should be expressly excluded. They are established and widely used structures, including for very large employee populations. Their sole activities test already provides the relevant integrity protection. They present no family income-splitting concern and should not be required to establish fixed trust status.

Employee ownership trusts should be separately excluded under a dedicated statutory definition. The relevant policy objective is to ensure that collective employee ownership and business succession structures can be introduced and operated in Australia without being impeded by tax settings directed at a different mischief.

The submissions are complementary but not aggregated. The employee share trust exclusion should stand on the existing law. The employee ownership trust exclusion should stand on its separate policy case and purpose-built safeguards.



Employee Ownership
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Employee Ownership Australia would welcome the opportunity to assist Treasury with the detailed drafting of both exclusions.

Yours sincerely

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Employee Ownership Australia