Law Council
OF AUSTRALIA

Business Law Section

Treasury Laws Amendment (Tax Reform No. 1) Bill 2026

Senate Standing Committees on Economics

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Acknowledgements

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to make a submission to the Senate Economics Legislation Committee (the **Senate Committee**) on:

   (a) the Treasury Laws Amendment (Tax Reform No. 1) Bill 2026 (the **Bill**);

   (b) the Income Tax Rates Amendment (Tax Reform No. 1) Bill 2026 (the **Imposition Bill**); and

   (c) the Explanatory Memorandum to the Bill and Imposition Bill (the **Explanatory Memorandum**)

   (together the **Legislation**).

Executive summary

2. This Legislation raises significant rule of law concerns. The Law Council of Australia strongly supports the Committee in bringing these matters to the Senate Committee's attention and seeks a meeting to discuss them. In the Law Council's view, compliance with core rule of law principles is essential and should inform the design of all legislative measures.

3. To this end, the Law Council's Rule of Law Principles Policy Statement (**LCA Policy**) is **attached**. This acts as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy, and practice. We encourage its circulation across Government.

4. The key matters the Committee wishes to comment on are:

   (a) matters expressly not dealt with in the Bill;

   (b) options—dislocation from established capital gains tax principles;

   (c) minimum rate of tax on capital gains—impact on philanthropy;

   (d) delegation of core legislative content—inappropriate breadth of Ministerial power;

   (e) departure from ordinary standards of legislative scrutiny; and

   (f) constitutional uncertainty—manner of imposition of the 30 per cent minimum tax.

5. The Annexure to this submission includes a non-exhaustive compendium of technical issues with the Bill and Explanatory Memorandum for the Senate Committee to consider.

Submission

6. The Committee makes the following comments on the Legislation.

7. At the outset, it should be acknowledged that, within the time available for the introduction of the Legislation, it is not realistically possible to comprehensively address all of the interactions between the proposed regime and the existing capital gains tax provisions, and more broadly across the income tax law. That constraint is understood.

8. However, that practical limitation does not justify the accelerated introduction of the Legislation. On the contrary, it demonstrates why the Legislation should not proceed until those interactions have been properly identified, analysed and resolved.

9. The Explanatory Memorandum itself acknowledges at paragraphs 1.221 and 1.222 that the Bill is the "*first tranche of changes to establish the new CGT regime*" and that:

> *[a] range of areas are under consideration to determine if future amendments may be appropriate, including to manage complex interactions between CGT and other rules.*

10. Legislating in tranches is described as a "standard approach" intended to provide "*certainty to taxpayers and market participants*" (Explanatory Memorandum, paragraph 1.221). With respect, that characterisation is difficult to sustain. A regime that openly depends on unresolved interaction issues does not provide certainty. It provides the appearance of certainty while deferring the substance.

Matters expressly not dealt with in the Bill

11. The Explanatory Memorandum identifies a number of specific matters that are expressly reserved for future legislative attention. These are not marginal or technical concerns. They go to the operation of core features of the regime.

12. First, paragraph 1.63 of the Explanatory Memorandum notes that:

> *… future amendments may be considered in relation to how entities that are resident for only part of the period they hold a CGT asset (themselves, or because their ownership period was interrupted by someone else holding the asset who in turn was not an Australian resident during that period) may access indexation.*

13. Under section 114-25 as inserted by Schedule 1, item 24, an individual must have been an Australian resident for the entire testing period (starting on the later of 1 July 2027 and the day of acquisition, and ending on the day of the CGT event) to access indexation. If at any point the individual was a foreign or temporary resident, indexation is wholly unavailable (subsections 114-25(1) and (2)).

14. The consequence is that a taxpayer who is an Australian resident for the vast majority of a holding period, but who has any period of foreign or temporary residency during that time, is entirely excluded from the benefit of cost base

indexation. That is acknowledged to be an incomplete outcome, yet the Bill proceeds notwithstanding.

15. Second, paragraph 1.178 of the Explanatory Memorandum states that "*the minimum tax may be payable by an individual who was a foreign or temporary resident during part of the income year*" and that:

> *[f]urther consideration will be given to the appropriate application of the minimum tax to such individuals as part of a further tranche of amendments.*
>
> [Section 119 10(1) as inserted by Schedule 1, item 58]

16. Again, the Bill proceeds on the basis of an acknowledged gap in the treatment of a significant class of taxpayer.

17. Third, at paragraph 4.38, the Explanatory Memorandum notes that, although the amendments to the "otherwise deductible" rule in section 24 of the *Fringe Benefits Tax Assessment Act 1986* (**FBTAA**) are limited to expense payment fringe benefits, "*Treasury will monitor taxpayer behaviour for attempts to undermine the integrity of the standard deduction by shifting their work-related expenses into other fringe benefit arrangements and may consider further amendments in the future*" [Schedule 4, item 18, subsection 24(1A) of the FBTAA].

18. These are not minor ancillary issues. They relate to the residency conditions for access to the central mechanism of the new regime (indexation), the application of the new minimum tax, and the integrity of the standard deduction. The fact that they are openly deferred reinforces the conclusion that the Legislation is not yet ready for enactment in final form.

Interaction with existing CGT provisions—preliminary observations

19. It has not been possible, within the time available, to undertake a comprehensive review of the interactions between the proposed regime and the existing CGT provisions. We have included in the annexure a number of issues that have been identified. The gaps identified in this submission are therefore not intended to be exhaustive. They are, however, illustrative of the type and nature of the deficiencies which we believe should be examined and resolved before the Bill passes into law. By way of illustration, we address below a particular issue concerning options. It is one of a series of many issues that have been identified.

Options—dislocation from established capital gains tax principles

20. The treatment of options exposes the structural incompleteness of the Bill in a particularly clear way.

21. Under the existing law, an option is not merely an incident of the underlying asset. It is a distinct CGT asset in its own right, legally and economically separate from the property that may later be acquired on exercise.

22. That distinction is not accidental. It is embedded in the structure of the capital gains tax provisions—specifically Division 134 of the ITAA 1997, comprising sections 134-1 to 134-20—and reflects a deliberate legislative choice to treat the option and the

underlying asset as different assets with different acquisition times and different consequences.

23. Critically, the acquisition of the underlying asset does not relate back to the acquisition of the option. The Legislation proceeds on the basis that the underlying asset is acquired only when the option is exercised.

24. The Bill's transitional provisions in new Subdivision 112-E (sections 112-155 and 112-165, inserted by Schedule 1, item 13) apply to a "CGT asset" that was "acquired" before 1 July 2027 and is held until a "realisation event" on or after 1 July 2027 (paragraphs 112-155(1)(b) and (c)).

25. When that framework is brought into contact with the established treatment of options, the result is immediate distortion.

26. A taxpayer may have acquired the option—and thereby assumed the relevant economic exposure—well before 1 July 2027. The value that is ultimately realised may substantially reflect pre-commencement appreciation.

27. Yet the Legislation, by rigidly anchoring its analysis to the acquisition date of the underlying asset, treats that asset as falling wholly within the new regime. The effect is that any grandfathering protection is effectively denied.

28. That is not a coherent policy outcome. It arises not because of any substantive change in the taxpayer's economic position, but because the Bill relies on an acquisition date concept that does not engage with the established legal distinction between an option and the asset produced by its exercise.

29. The result is arbitrary. It depends on a technical feature of the existing legislation while failing to account for the consequences of that feature within the proposed framework.

30. Nor does the Bill address the interaction between the cost base roll-up mechanism in Division 134 (whereby the cost of the option forms part of the cost base of the acquired asset under section 134-1) and the new deemed disposal and reacquisition regime. The existing provisions in sections 134-1 to 134-20 are not amended by the Bill.

Absence of a transitional recognition point

31. The position is made more serious by the fact that the exercise of the option is not treated as a disposal for these purposes. There is therefore no point within the existing framework at which transitional treatment can be preserved or recognised.

32. The option is not itself the asset that is ultimately realised. The underlying asset is treated as newly acquired. Yet the exercise of the option does not produce a disposal that might allow the taxpayer's pre-commencement position to be recognised. The law therefore moves from one asset to another without any event that can serve as an effective transitional bridge.

33. This means that the supposed availability of grandfathering or transitional protection is, in this class of case, largely illusory. The structure of the law itself prevents that protection from being meaningfully preserved.

34. That is not a marginal technical issue. Options are a common feature of commercial arrangements, investment structures, and executive remuneration. The inability of the proposed regime to deal with them coherently is a powerful indication that the necessary interaction work remains incomplete.

35. It falls squarely within the "complex interactions between CGT and other rules" that the Explanatory Memorandum acknowledges at paragraph 1.222 "will benefit from time for closer engagement with experts and affected stakeholders".

Minimum rate of tax on capital gains—impact on philanthropy

36. The Bill introduces legislation to replace the 50 per cent CGT discount for individuals, trusts and partnerships with cost base indexation and a 30 per cent minimum tax rate on capital gains.

37. A significant proportion of major private philanthropy is funded by capital gains from liquidity events, often with charitable giving as an essential feature of long-term plans for owners of businesses and investments. It is common, at that point, for individuals and families to make substantial philanthropic commitments by giving to an existing deductible gift recipient, establishing or contributing to private foundations and giving funds, or making distributions from family and discretionary trusts to charitable entities.

38. The consequence of this change to philanthropy is likely to be significant. When combined with the removal of the 50 per cent CGT discount, the proposed measure can dramatically alter the economics of significant donations.

39. Assume a taxpayer realises a $100 million capital gain and wishes to retain $50 million and give $50 million to charity. Under current settings, the 50 per cent CGT discount produces a $50 million net capital gain. A $50 million gift to a DGR can broadly offset that taxable income, resulting in the charity receiving $50 million and the taxpayer retaining $50 million (which if invested or deployed in new business ventures will produce income to be taxed, or which might be contributed to charity down the track).

40. Under the proposed settings, assuming no material indexation benefit and a top marginal rate of 47 per cent, the removal of the CGT discount means the taxable gain is $100 million. If the taxpayer still gives $50 million to charity, the taxpayer's assessable income remains $50 million and income tax of approximately $23.5 million is payable. The 30 per cent minimum tax then increases the total tax on the capital gain to $30 million. The result is that the taxpayer gives $50 million, pays $30 million in tax, and retains only $20 million.

41. For a taxpayer who wants to retain half of the proceeds, the taxpayer would need to reduce the charitable gift to approximately $5.6 million in order to retain approximately $50 million, with the Commonwealth receiving approximately

$44.4 million in tax. In practical terms, the reform would turn a potential $50 million philanthropic gift into a gift of around $5.6 million.

42. The proposed changes are difficult to reconcile with the Government's stated intention to increase private philanthropy by 20 per cent and the Government's broader goal to double philanthropic giving by 2030.[1]

43. The proposed changes to CGT should be amended to remove the impost of a "gift tax". In particular, gifts to DGR-endorsed charities and giving funds that are funded from a capital gain should be able to reduce, or be credited against, the amount subject to any 30 per cent minimum tax. The policy objective should be that where capital-gain proceeds are genuinely given away for public benefit, those proceeds should not be treated as though they remain available for private consumption.

Delegation of core legislative content—inappropriate breadth of Ministerial power

44. A further and equally serious concern arises from the inclusion in the Bill of a series of broad powers reserved to the Minister to determine the scope of assets, entities and payments to be excluded from, or included within, the regime. This submission builds on the Law Council's previous submissions to the Senate Standing Committee for the Scrutiny of Delegated Legislation's Inquiry into the exemption of delegated legislation from parliamentary oversight.[2]

45. This is not sound legislative practice. The powers are not confined to machinery or administrative detail. They go to the substantive operation of the regime itself, including the identification of the assets that fall within, or outside, its scope. In that respect, the powers do not operate at the margins of the legislation. They operate at its centre.

46. The Law Council of Australia's view, as previously articulated, is that significant matters dealing with substantive policy issues, rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation. In particular: important policy questions and rules with a substantial impact on rights, liberties and financial obligations should remain in primary legislation; delegations should be accompanied by clear statutory criteria and limited in scope; and delegated legislation is justified only in narrow, well-defined circumstances and with enhanced safeguards.

47. The scope of assets to which the regime applies is a defining feature of the Legislation. It determines the taxpayers affected, the transactions captured, and the extent of the tax base itself.

48. A provision that enables the Executive to expand or contract that scope is, in substance, a power to reshape the operation of the law. That is a function that should remain with Parliament.

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[1] The Hon Dr Andrew Leigh MP, 'Boosting Support for Australian Charities' (Media Release, 26 February 2026).

[2] Law Council of Australia *Exemption of delegated legislation from parliament oversight* Senate Standing Committee for the Scrutiny of Delegated Legislation 20 July 2020.

49. The principal powers are identified below with their specific statutory bases.

Power to determine kinds of CGT assets eligible for the 50 per cent discount

50. Subsection 115-102(3), as inserted by Schedule 1, item 30, empowers the Minister to determine by legislative instrument “one or more kinds of CGT assets to be covered by subsection (2)”.

51. Such assets would then be eligible for the 50 per cent CGT discount—and consequential exclusion from the minimum tax under Division 119 and the deemed disposal and reacquisition under Subdivision 112-E (paragraphs 112-155(1)(e) and 112-165(1)(e))—alongside new residential dwellings.

52. The Explanatory Memorandum states at paragraph 1.141 that this:

> *… power gives flexibility for the Minister to ensure the CGT arrangements reflect Australia’s needs as they evolve over time, while ensuring the arrangements are subject to Parliamentary scrutiny, disallowance and sunsetting.*

53. This power is unconstrained in the primary legislation.

54. There is no statutory limitation on the kinds of CGT assets that may be determined, nor any requirement for the Minister to have regard to specified criteria, nor any requirement for prior consultation.

55. The practical consequence is that the Minister may, by subordinate legislation alone, extend the preserved 50 per cent discount to any class of CGT asset, effectively creating new categories of concessionally-taxed gains without amending the primary law. That is a power to reshape the tax base by executive act.

Power to determine apportioning methods

56. Section 112-185, inserted by Schedule 1, item 13, empowers the Minister to determine by legislative instrument “a method for apportioning capital gains and capital losses” between realisation events happening on or after 1 July 2027 and earlier deemed CGT events under subsections 112-155(2), 112-165(2) or 112-175(2).

57. Subsection 112-185(2) requires the method to take into account the deemed acquisition on 1 July 2027 and any expenditure including indexation, and to enable the capital proceeds and cost base to be worked out.

58. The method “*may take into account other matters the Minister considers relevant and may enable other things to be worked out*” (subsection 112-185(3)).

59. The Explanatory Memorandum explains at paragraph 1.123 that this power “provides flexibility and enables the Minister to determine other methods which are appropriate to determine the value of the asset but may be simpler than calculating market value”. This delegation is significant because the default methodology (market valuation) will apply unless a taxpayer affirmatively chooses the apportioning method. The content of the apportioning method will therefore directly determine the quantum

of taxable gains for all assets held across the 1 July 2027 transition. That is not machinery. It is the determination of the practical incidence of the tax.

60. The inappropriateness of relying on a delegated instrument in this context is compounded by the nature of the task it must perform.

61. An apportioning method that is to operate fairly across the full range of CGT assets will need to address an extraordinary diversity of circumstances. It must deal with assets that have appreciated and depreciated in different patterns over time, with assets for which market value is readily ascertainable and those for which it is not, with assets subject to cost base adjustments under Divisions 110, 112 and 114, with assets affected by rollovers, with partially exempt assets, and with assets held through interposed entities.

62. It must engage with the interaction between the apportioned amount and the indexed cost base that applies under the new regime from 1 July 2027.

63. It must accommodate the distinction between residential and non-residential capital gains introduced by the new section 102-6, and the consequential implications for loss quarantining.

64. That level of complexity and detail is entirely at odds with the principle that a single, consistent source of legislative truth should govern the calculation of a taxpayer's capital gain. The consequence of locating such content in a legislative instrument rather than in the primary statute is that the operative rule—the rule that actually determines how much tax is payable—is removed from the Act that imposes the liability.

65. Taxpayers and advisers will be required to locate, interpret and apply a subordinate instrument of potentially considerable technical complexity in order to ascertain their basic tax position. That fragmentation of the law is inimical to certainty, accessibility and the rule of law.

66. It also means that the method may be amended, replaced or supplemented by the Executive without the rigour and transparency of the Parliamentary process, notwithstanding that such changes may materially alter the tax outcomes for taxpayers who have already made investment decisions in reliance on the existing method.

Power to determine the definition of "new residential dwelling"

67. Subsection 26-160(4), inserted by Schedule 2 to the Bill, item 1, provides that the Minister "must, by legislative instrument, determine requirements" for what constitutes a "new residential dwelling".

68. This definition is of critical importance because new residential dwellings are exempted from loss quarantining for negative gearing (paragraph 26-155(2)(b)) and from the removal of the CGT discount and the minimum tax (sections 115-102 and 119-5).

69. Subsection 26-160(4) provides a non-exhaustive list of matters the requirements may relate to, including the kind of dwelling, the kind of interest held, circumstances of

creation, whether it has separate title, and whether it “genuinely adds to the supply of residential dwellings in Australia”.

70. The Explanatory Memorandum notes at paragraph 2.44 that this delegation is appropriate as:

> *… the range and complexity of different kinds of developments may require detailed specifications about what will be considered a new residential dwelling in particular contexts, involving a level of detail that is better suited to delegated legislation.*

71. That justification deserves close examination. It is precisely because the definition must deal with a complex range of circumstances—greenfield developments, subdivisions, demolition and rebuild, substantial renovation, off-the-plan purchases, conversions from commercial to residential use, mixed-use developments, and emerging models of property development—that the resulting instrument will necessarily be lengthy, technical and heavily qualified.

72. A legislative instrument of that character does not serve the function of providing taxpayers with a single, accessible and consistent source of legislative truth. It fragments the law.

73. The taxpayer who wishes to know whether a particular investment qualifies for negative gearing, or for the preserved CGT discount, cannot determine that from the Act alone. The answer depends upon the content of a subordinate instrument that may itself require interpretation, that may change over time, and that will not have been subjected to the same quality of scrutiny as primary legislation.

74. That is an unsatisfactory position for a provision that determines whether an investment is taxed under one regime or another.

75. The delegation is further difficult to justify in circumstances where the concept of new residential property is already familiar in tax legislation. The definition of ‘new residential premises’ in section 40-75 of *A New Tax System (Goods and Services Tax) Act 1999* is supported by established jurisprudence and rulings. Defining a core term by means of a legislative instrument, where an existing and analogous term already exists in principal legislation, runs the risk of creating error and confusion on the part of tax advisers.

76. Subsection 26-160(5) permits the Minister to determine requirements “relating to matters or circumstances existing before the commencement of this section” (Explanatory Memorandum, paragraph 2.42).

77. Section 12 of the *Legislation Act 2003* constrains the Minister from retrospectively disadvantaging taxpayers (Explanatory Memorandum, paragraph 2.46), and the Explanatory Memorandum notes at paragraph 2.48 that the Government intends to:

> *… release the details of this legislative instrument publicly as soon as possible after introduction of the Bill to Parliament.*

78. The Government’s stated intention to release the instrument promptly after introduction is not a substitute for having the substance settled before enactment.

It confirms that Parliament is being asked to enact a regime whose practical scope cannot be known at the time of enactment.

Power to exclude dwellings from the definition of residential dwelling

79. Paragraph 26-160(1)(e), inserted by Schedule 2 to the Bill, item 1, empowers the Minister to determine by legislative instrument that "a dwelling in a class of dwellings" is not a residential dwelling for the purposes of loss quarantining.

80. The Explanatory Memorandum explains at paragraphs 2.23 and 2.24 that this "*is necessary to ensure that the intent of these amendments … does not result in unintended outcomes*". In substance, this enables the Minister to expand the category of investments that can be negatively geared beyond those expressly identified in the primary legislation.

Power to exclude dwellings used for certain activities, purposes or businesses

81. Paragraphs 26-155(2)(c) and (d), inserted by Schedule 2 to the Bill, item 1, exempt from loss quarantining residential dwellings used for "*an activity or purpose determined by the Minister by legislative instrument" and those used for "a business or enterprise of a kind determined by the Minister by legislative instrument*".

82. The Explanatory Memorandum states at paragraph 2.51 that examples include "*using or holding residential dwellings as rental properties to provide social or affordable housing*" and at paragraph 2.52 explains that there are "*many different types of residential housing in existence now that provide concessionally priced rental accommodation to persons with particular needs*".

Power to exclude entities from loss quarantining

83. Paragraph 26-155(4)(c), inserted by Schedule 2 to the Bill, item 1, empowers the Minister to determine by legislative instrument a "class of entities" not subject to loss quarantining.

84. This is in addition to the statutory exclusions for widely held trusts and complying superannuation entities in paragraphs 26-155(4)(a) and (b). The Explanatory Memorandum states at paragraph 2.56 that this "is intended to allow additional types of entities to be prescribed for the purpose of excluding them from the requirement to quarantine amounts".

Power to determine exempt payments for minimum tax

85. Subsection 119-15(2), inserted by Schedule 1, item 58, empowers the Minister to determine by legislative instrument the "kind of payment" receipt of which exempts an individual from the minimum tax.

86. Unlike the powers identified above, this power is expressly constrained in the primary legislation: the payment must be either a social security payment within the meaning of the *Social Security Act 1991*, or a payment made by an Australian government agency where eligibility depends on "the recipient's means or financial position" or "the recipient's impaired ability to work or incapacity" (paragraphs 119-15(2)(a) and (b)). The Explanatory Memorandum at paragraph 1.190 states that the limits on

scope mean "*this power can only be exercised to include payments that are linked to the income, wealth or capacity of the recipient*".

87. This power is notable precisely because it demonstrates that Parliament can, where it chooses, impose meaningful statutory constraints on the scope of delegated authority. The absence of comparable constraints in relation to the powers identified in paragraphs 4.1 to 4.6 above is therefore a deliberate legislative choice, not an oversight.

Power to require trustee reporting

88. Subsection 115-235(4), inserted by Schedule 1, item 43, empowers the Commissioner of Taxation (rather than the Minister) to determine by legislative instrument that trustees of "all or specified kinds of trusts" are required to prepare and give beneficiary statements, and to specify the period within which this must be done (Explanatory Memorandum, paragraph 1.162).

Power to determine method for calculating the Working Australians tax offset

89. Subsection 61-160(2), inserted by Subdivision 61-E of the ITAA 1997, empowers the Minister to determine by legislative instrument the method for calculating the amount of the Working Australians tax offset (up to the $250 cap).

Departure from ordinary standards of legislative scrutiny

90. The concerns regarding the Ministerial powers are reinforced when the provisions are considered against the ordinary standards of legislative scrutiny expected for a taxing measure of this significance.

91. All legislative instruments made under the powers identified above are subject to the disallowance provisions in Part 2 of Chapter 3 of the Legislation Act and to sunsetting after ten years under Part 4 of Chapter 3 of that Act (Explanatory Memorandum, paragraphs 2.48, 2.53, 2.57 and 1.190).

92. Section 12 of the Legislation Act prevents retrospective application that would disadvantage a person, except to the extent the primary legislation expressly provides otherwise. The Explanatory Memorandum notes at paragraph 2.46 that subsection 26-160(5) of the Bill does not override section 12(4) of the Legislation Act.

93. Notwithstanding these safeguards, the difficulty is not answered by observing that the instruments are disallowable.

94. The issue is not whether there exists some mechanism of accountability.

95. The issue is whether that mechanism is adequate for decisions of this character. The practical reality is that the making of legislative instruments does not involve the same discipline as the passage of an Act. It does not attract equivalent public consultation, stakeholder engagement, committee review, or Parliamentary debate.

96. The cumulative effect of these delegated powers is to confer upon the Minister very substantial capacity to shape the practical boundaries of the new CGT regime—including which assets retain access to the 50 per cent discount, which assets and

entities remain outside loss quarantining, how transitional gains are to be apportioned, and even what constitutes a "new residential dwelling"—through subordinate legislation that has not been subjected to the standard of scrutiny that a measure of this significance demands.

97. The difficulty is further compounded by the fact that the instruments required under these powers will, of necessity, be detailed and complex in their own right. They will not be brief or self-evident. They will need to grapple with the same diversity of asset types, holding structures, development models and transitional circumstances that the primary legislation has itself left unresolved.

98. The effect is not merely to delegate power. It is to create a parallel body of operative tax law—located outside the principal statute, developed outside the ordinary legislative process, and liable to alteration without equivalent safeguards—that governs fundamental questions of liability.

99. That outcome is at odds with the principle that taxpayers should be able to identify their obligations from a single, coherent and stable source of legislative truth. It substitutes legislative certainty with executive contingency.

100. That breadth creates two serious problems.

101. It undermines certainty, because taxpayers cannot rely on a stable statement of the assets to which the regime applies.

102. It also undermines accountability, because decisions about the scope of the tax base are removed from the ordinary discipline of Parliamentary debate and amendment.

Constitutional uncertainty—manner of imposition of the 30 per cent minimum tax

103. A distinct and serious concern arises in relation to the constitutional basis for the imposition of the 30 per cent minimum tax on capital gains introduced by new Division 119 of the ITAA 1997 and new section 12AA of the *Income Tax Rates Act 1986* (**Rates Act**) (Schedule 1, items 58 and 60; Imposition Bill, Schedule 1, item 1).

104. The minimum tax is described in the Explanatory Memorandum at paragraph 1.173 as "extra income tax" and its rate is set by a formula in new section 12AA of the Rates Act, calculated by dividing the "minimum tax gap amount" by the "minimum tax capital gain" (Explanatory Memorandum, paragraph 1.192).

105. The effect is to impose an additional layer of income tax on certain capital gains of individuals to ensure that a rate of at least 30 per cent applies before offsets (subsection 119-10(1) as inserted by Schedule 1, item 58).

106. Section 55 of the Constitution requires that laws imposing taxation shall deal with one subject of taxation only, and that laws imposing duties of customs shall deal with duties of customs only.

107. The constitutional distinction between a "tax" and the "law imposing" it has been the subject of sustained judicial consideration, particularly in relation to the separation

between the assessment provisions (which identify liability, calculate amount, and define incidence) and the imposition provisions (which impose the tax at specified rates). That separation is not merely a matter of legislative convenience. It reflects a constitutional requirement.

108. The difficulty with the minimum tax as currently structured is that the determination of whether the tax is payable, and if so in what amount, depends upon a multi-step calculation of considerable complexity.

109. Subsection 119-10(2), as inserted by Schedule 1, item 58, requires the taxpayer to work through a seven-step method that involves calculating the minimum tax capital gain under section 119-5, determining the basic income tax liability apart from Division 119, identifying the portion of that liability attributable to the minimum tax capital gain by treating it as the top slice of income, and then computing the difference between 30 per cent of the minimum tax capital gain and the tax otherwise attributable to that gain (Explanatory Memorandum, paragraphs 1.180 to 1.184).

110. Only then can the rate prescribed by section 12AA of the Rates Act be applied.

111. The question that arises is whether this structure satisfies the constitutional requirement that the rate of tax be ascertainable from the imposition Act.

112. The rate under section 12AA is expressed as a formula: the minimum tax gap amount divided by the minimum tax capital gain.

113. Both of those terms are defined in and calculated under the ITAA 1997. The rate therefore cannot be known without first performing the full calculation under the assessment provisions. In substance, the Rates Act does not prescribe a rate.

114. It prescribes a formula that is entirely parasitic on the assessment legislation for its content.

115. Whether that satisfies the constitutional requirements for valid imposition of taxation is a question that admits of genuine doubt.

116. That doubt is not resolved by the fact that income tax rates have historically been expressed by reference to amounts calculated under the assessment Act.

117. The distinction here is that the minimum tax is not simply a rate applied to a defined base. It is a residual amount—the difference between a benchmark (30 per cent of the minimum tax capital gain) and the tax otherwise attributable to that gain under the ordinary rate schedule.

118. The rate is therefore not fixed, not uniform, and not ascertainable independently of the assessment provisions. It varies from taxpayer to taxpayer depending on their other income, their offsets, and the composition of their capital gains. That is a materially different proposition from the application of a stated percentage to a defined amount.

119. The constitutional concern is further compounded by the role of Ministerial determination in defining the scope of the tax. Subsection 119-15(1), as inserted by Schedule 1, item 58, provides that the minimum tax does not apply to an individual

who received a payment of a kind specified by the Minister by legislative instrument during the income year.

120. The Explanatory Memorandum at paragraphs 1.186 to 1.190 describes the intended scope of this exemption, which is to cover recipients of income support payments including the Age Pension, Disability Support Pension, JobSeeker, and certain other payments. The power is constrained by subsection 119-15(2) to payments that are either social security payments or payments where eligibility depends on means, financial position, or incapacity.

121. Nevertheless, the effect of this provision is that the class of persons upon whom the minimum tax is imposed is not finally determined by Parliament. It is determined, at least in part, by executive act.

122. The Minister’s determination of which payments are covered by subsection 119-15(1) directly affects whether a given individual is liable to pay the tax at all. That is not the specification of administrative detail. It is the delineation of the incidence of a taxing measure.

123. If the constitutional requirement is that the imposition of taxation be a matter for the Parliament, the delegation of the power to determine which persons are exempt from a tax raises a question as to whether Parliament has sufficiently determined the incidence of the tax at the point of enactment.

124. These concerns are reinforced by the novel character of the minimum tax itself. It is not a conventional rate of income tax. It is a supplementary impost that applies only in defined circumstances, operates as a top-up to the ordinary tax liability, and is calculated by a method that depends entirely on the individual taxpayer’s particular circumstances.

125. The Explanatory Memorandum describes it as ensuring that capital gains are “subject to a tax rate closer to the tax rate individuals faced during their working life” (Explanatory Memorandum, paragraph 1.172).

126. That policy objective is intelligible. But the legislative mechanism chosen to achieve it raises genuine questions about the constitutional adequacy of the manner of imposition, particularly when combined with the executive power to determine its scope.

127. It is not suggested that these questions are necessarily fatal to the validity of the minimum tax. But they are real, they are not addressed in the Explanatory Memorandum, and they create a material source of legal uncertainty for taxpayers and administrators alike.

128. A regime that imposes an additional layer of taxation on individuals should rest on a constitutional foundation that is beyond reasonable doubt. The present structure does not clearly achieve that.

129. At a minimum, the interaction between the Rates Act and the assessment provisions should be examined with care before enactment, and the appropriateness of delegating the scope of the exemption to the Minister should be reconsidered in light

of the constitutional requirement that the imposition of taxation be a Parliamentary function.

Conclusion—necessity for deferral and proper integration

130. When the Bill is viewed as a whole, the difficulties are cumulative and mutually reinforcing.

131. The Legislation is proposed to operate within a highly complex and already differentiated capital gains tax framework. Yet it does not adequately engage with the way that framework treats options, asset identity, acquisition timing, and transitional recognition. It introduces a regime that is structurally incomplete, while at the same time reserving to the Executive significant powers over scope and relying on delegated legislation to supply content that ought to be found in the primary statute.

132. Those are not independent concerns. They form part of the same underlying problem. The Bill seeks to introduce a major reform before the analytical and legislative work necessary to support that reform has been completed.

133. The appropriate course is therefore not to proceed on the basis that those matters can be resolved later through executive power, regulation, or administrative practice. The appropriate course is to undertake the necessary consultation and technical development first, and to introduce the Legislation only once it can operate coherently, completely, and with the level of certainty that a measure of this significance requires.

134. In particular, the Legislation should not proceed until:

    (a) The constitutional basis for the imposition of the minimum tax under Division 119, and particularly the adequacy of the rate-setting mechanism in section 12AA of the Rates Act and the delegation of exemption scope under subsection 119-15(1), has been properly examined and, if necessary, placed on a firmer footing.

    (b) The interaction between Subdivision 112-E and Division 134 (options) has been properly identified, analysed and resolved, so that taxpayers holding options acquired before 1 July 2027 are not arbitrarily denied transitional protection.

    (c) The key legislative instruments—particularly the section 115-102(3) determination of CGT asset kinds, the section 112-185 apportioning method, and the section 26-160(4) definition of “new residential dwelling”—have been released in exposure draft form and subjected to meaningful consultation.

    (d) The powers in subsection 115-102(3), section 112-185, and paragraph 26-160(1)(e) are subjected to specified statutory criteria or purposes in the primary legislation, to ensure that substantive determinations about the scope of the tax base are made within an articulated and bounded policy framework.

(e) The future tranches addressing part-period residency (foreshadowed at Explanatory Memorandum paragraphs 1.63 and 1.178) are enacted with sufficient lead time before 1 July 2027 to provide certainty for affected taxpayers.

135. A regime of this complexity requires sustained technical consultation, detailed engagement with affected taxpayers and advisers, and careful legislative development to ensure that its interaction with the existing capital gains tax framework is coherent, principled and operable in practice. Without that work, the Legislation will introduce uncertainty, distort established outcomes, and impose an unworkable overlay on an already intricate body of law. That is not a satisfactory basis on which to legislate.

136. The Committee would be pleased to engage further with the Senate Committee on options to redraft the relevant provisions to better align with these principles.

ANNEXURE

Technical issues with the Bill and Explanatory Memorandum

Scope and approach

This annexure contains a non-exhaustive compendium of technical issues with the Bill, the Imposition Bill, and the Explanatory Memorandum. It focuses on legislative design, drafting, administration, compliance costs, and parliamentary scrutiny.

Each is an issue for the Senate Committee. Some of these issues are referred to in the body of our submission but are summarised here for completeness.

Technical issues

Issue 1: Incomplete legislative package before parliamentary consideration

Schedule 1 to the Bill would replace the CGT discount with cost base indexation and a minimum tax on capital gains, while Schedule 2 would limit negative gearing for residential property. The Explanatory Memorandum describes these measures in Chapters 1 and 2, but the Bill leaves key operational detail to later instruments and further implementation work. Parliament should not have to test the combined operation of the CGT, negative gearing, trust and residential dwelling rules without that detail in the Bill or in the Explanatory Memorandum.

The second reading speech and accompanying materials indicate that further legislation and consultation will address specific implementation details, including small and start-up business assets with low or nil cost base, AMITs, tax consolidation, residency changes and the minimum tax on discretionary trusts. Those matters sit outside the current Bill. This leaves a major gap in the legislative scheme and compromises the Senate Committee’s ability to scrutinise the provisions as a coherent and integrated package. Treasury introduced the first tranche while still consulting on core technical details affecting Schedule 1 and Schedule 2, reducing the ability of lawyers, advisers and affected taxpayers to test the provisions as an integrated scheme.

Issue 2: Complexity inconsistent with simplification objectives

The Bill risks creating a more complex and uncertain system. Schedule 1, Schedule 2, Schedule 3 and Schedule 4 introduce separate measures with different operative dates, eligibility tests, grandfathering rules, exemptions, and carve-outs. The commencement provisions distinguish between parts of each Schedule. This architecture may add layers of compliance rather than reduce them. Where a stated purpose of reform is to simplify tax time, the technical architecture should be assessed against that objective.

Issue 3: Substantive tax settings left to legislative instruments

Schedule 1, item 13 of the Bill would insert proposed sections 112-155, 112-160, 112-165, 112-170 and 112-185 into the ITAA 1997, which rely on a Ministerially determined apportioning method. Schedule 2, item 1 would insert proposed sections 26-155 and 26-160 into the ITAA 1997, which leave excluded activities, purposes, businesses, entities, and new residential dwelling requirements to legislative instruments. These matters shape liability and concession access. The Explanatory Memorandum should justify why the Bill does not state them in primary legislation.

If significant tax outcomes depend on subordinate instruments rather than primary legislation, this raises questions of parliamentary oversight, certainty, and accountability. Taxpayers and advisers cannot plan with confidence if the method for apportioning gains between pre-commencement and post-commencement periods remains unsettled. The Senate Committee should recommend that core apportionment principles and concession eligibility appear in the Act, with subordinate instruments confined to mechanical or procedural matters.

Issue 4: Unreleased apportioning method and transitional CGT mechanics

Schedule 1, item 13 of the Bill would allow a taxpayer to use market value or a Ministerially determined apportioning method under proposed sections 112-155, 112-160, 112-165, 112-170 and 112-185 of the ITAA 1997. The Explanatory Memorandum refers to that method but does not set it out. The absence of the method affects record keeping, advice, transaction planning, and future disputes about the split between pre-commencement and post-commencement gains.

Proposed sections 112-160 and 112-170 address the transitional position for individuals and trusts. Proposed section 112-175 modifies cost base outcomes, proposed section 112-180 deals with later recognition of deferred amounts, and proposed section 112-185 permits the Ministerial apportionment method. These rules raise valuation, evidentiary, record-keeping and dispute risks because taxpayers may need to establish market value or apportion gains for every relevant CGT asset at 1 July 2027. The Explanatory Memorandum should explain these mechanics with greater precision, particularly in the parts corresponding to Explanatory Memorandum paragraphs 1.46 and 1.80.

Issue 5: Fixed-date market valuation burden

Schedule 1, item 13 of the Bill would require taxpayers to work out market value immediately before 1 July 2027 for relevant transitioned assets, unless a later apportioning method applies under the proposed provisions. That requirement will place significant evidentiary pressure on taxpayers holding interests in private companies and trusts, real property, business goodwill, partnership interests, crypto assets and other illiquid or intangible assets.

The Bill and Explanatory Memorandum should address how taxpayers should substantiate these values and whether safe harbours, default valuation methods or evidentiary standards will apply. The Explanatory Memorandum should provide a more granular assessment of valuation costs, evidentiary burden, and expected dispute risk.

Issue 6: Loss of pre-CGT status and collateral consequences

Schedule 1, item 13 of the Bill would insert proposed section 112-175 into the ITAA 1997, bringing gains accruing on pre-CGT assets after 1 July 2027 within the CGT regime. That change affects a long-standing status that interacts with private company shares, trust interests, deceased estates, main residence rules, rollovers, and other parts of the CGT code. The Explanatory Memorandum should map those collateral consequences and identify any consequential amendments that Schedule 1 does not make.

Proposed sections 112-160, 112-170 and 112-180 require careful scrutiny in this context. The interaction with existing integrity rules, including CGT event K6 in section 104-230, should be clearly addressed. The Senate Committee should test whether the Bill adequately separates gains that accrued before 1 July 2027 from gains that accrued after that date, and whether the Explanatory Memorandum, including paragraph 1.80, provides sufficient guidance.

Issue 7: Private company and trust complexity

Schedule 1, item 13 of the Bill would apply the transition rules to shares and trust interests through proposed sections 112-155, 112-165 and 112-175 of the ITAA 1997. The practical task may require valuation of both the relevant interest and underlying entity assets, which can be complex for private groups and may arise without an immediate cash sale. The Explanatory Memorandum should include private company and trust examples, including the evidentiary standard expected where the deferred gain only crystallises on a later realisation event.

Trust taxation concepts, including present entitlement, streaming, character allocation and beneficiary tax positions, are fact-sensitive and may depend on the terms of individual trust deeds. The Senate Committee should consider whether the provisions can operate with certainty in the absence of the legislation to impose a minimum 30% tax on discretionary trusts. Decisions such as *Commissioner of Taxation v Carter* [2022] HCA 10 and *Peter Greensill Family Co Pty Ltd (Trustee) v Commissioner of Taxation* [2021] FCAFC 99 illustrate the complex interaction of trust law and taxation law.

Issue 8: AMITs and managed funds

The Government has acknowledged ongoing consultation on AMIT interactions. Schedule 1 may affect managed funds through the CGT reforms, the trust streaming rules and the tracing rules for new residential dwelling gains. Proposed section 115-102(4) should be reviewed against section 102P of the *Income Tax Assessment Act 1936* (**ITAA 1936**) and the Explanatory Memorandum's explanation of tracing through trusts and public unit trusts, including Explanatory Memorandum paragraph 1.142 where relevant. The Bill should avoid fund-level compliance burdens, investor inequity, and inconsistent attribution of post-commencement gains.

Issue 9: Tax consolidation and corporate group transactions

Schedule 1 may affect consolidated groups where transitional cost base, indexation and capital gain character rules interact with joining and leaving rules, allocable cost amounts, and internal restructures. The Government has acknowledged that consolidation interactions remain subject to further work. The Senate Committee should recommend that the Government publish exposure draft materials on consolidation interactions before passage or otherwise include clear transitional rules in the Bill.

Issue 10: Part-year residency and residency changes

Schedule 1 of the Bill would insert cost base indexation rules, including proposed section 110-36(1A) and amendments connected with Division 114. Proposed sections 112-160 and 112-170 should be tested for their application to individuals and trusts with residency changes near the commencement date. A rule that denies indexation because of a short foreign residency period would depart from the apportionment logic familiar under existing CGT discount settings.

The deemed disposal mechanism, market value rules, foreign income tax offset interactions and double taxation treaty consequences create particular complexity for mobile taxpayers. Without clear rules, taxpayers may face double taxation, uncertain treaty outcomes or difficulty determining their Australian tax position. The Bill should include a workable apportionment rule before passage.

Issue 11: Indexation returning as primary CGT relief mechanism

Schedule 1 replaces the 50 per cent CGT discount with indexation for relevant gains accruing from 1 July 2027. Proposed section 114-30 sets requirements for applying indexation, and proposed sections 960-275(1B) and 960-275(1C) address indexation timing. Indexation has historical precedent in former Part IIIA of the ITAA 1936 and Division 114, but that history also demonstrates the need for clear calculation rules.

Explanatory Memorandum Example 11.6 should be checked against the statutory language for instalment payments and partly paid shares or units. The Explanatory Memorandum should include sufficient worked examples so that taxpayers can apply the indexation rules without ambiguity.

Issue 12: Low or nil cost base assets and small business concessions

Schedule 1 of the Bill would insert proposed section 110-36(1A) and amend the net capital gain method statement in proposed sections 100-50 and 102-5. Cost base indexation gives little practical relief where an asset has a low or nil cost base. That creates a technical mismatch for founder equity, internally created goodwill, and other assets that may represent labour, foregone salary, or enterprise risk rather than passive capital.

Eligibility for the small business CGT concessions, including the 15-year exemption in Subdivision 152-B, may depend on facts at the later realisation event rather than the transition date. A taxpayer may satisfy the concessions at 30 June 2027 and fail them when the deferred gain later crystallises. The Explanatory Memorandum should include worked examples for low-cost base and nil-cost base assets, growth businesses, trusts, connected entities, changes in aggregated turnover, and the interaction between the transition date and later realisation.

Issue 13: Prescribed capital loss ordering

Schedule 1, item 3 of the Bill would insert proposed section 100-50, and items 5 and 6 would amend proposed sections 102-5 and 102-6. The new method statement prescribes how current year capital losses, carried-forward net capital losses and quarantined residential amounts reduce different categories of capital gain. In particular, proposed subsection 102-5(1), step 1 requires losses to be applied first against deferred gains (that is, pre-1 July 2027 gains that attracted the 50 per cent discount) before reducing fully taxed current gains. That mandatory ordering wastes loss value by extinguishing losses against concessionally taxed gains rather than gains taxed at the full rate. Note 3 to the method statement permits choice only within a category, not between categories. The effect is to remove the ordering choice that taxpayers currently have. The Explanatory Memorandum should explain the policy reason for that ordering and show its effect through worked examples.

Issue 14: Quarantined rental amounts incorporated into CGT calculation

Schedule 2, item 1 of the Bill would insert proposed section 26-155 to quarantine excess residential rental deductions. Schedule 1, item 5 would then apply quarantined amounts through the proposed section 102-5 method statement for net capital gains. This design links ordinary income deductions to the capital gains calculation in a way that taxpayers may find difficult to follow. The Explanatory Memorandum should include examples covering losses, capital gains, revenue gains, multiple properties, trust beneficiaries, and carried-forward amounts.

Issue 15: Portfolio treatment of negative gearing quarantine

Schedule 2, item 1 of the Bill would insert proposed sections 26-155(1), 26-155(6) and 26-155(7). Those provisions apply by reference to amounts relating to using or holding residential dwellings as residential accommodation, but they do not clearly state whether quarantine operates on a portfolio basis or property-by-property basis. The two approaches produce different incentives, fairness outcomes, and compliance records. The Explanatory Memorandum should state the intended approach expressly and justify it.

Issue 16: New residential dwelling carve-out and negative gearing

Schedule 2, item 1 of the Bill would insert proposed section 26-160. Proposed subsections 26-160(3), 26-160(4) and 26-160(5) leave the requirements for a new residential dwelling to a legislative instrument, with the possibility that requirements may relate to matters or circumstances existing before commencement. Schedule 1 also uses proposed section 115-102 to preserve access to the CGT discount for certain new residential dwelling gains.

The exception affects the availability of deductions and related CGT settings, yet the Bill does not define the central concept in primary law. The delegation is difficult to justify in circumstances where the concept of new residential property is already familiar in tax legislation. The definition of ‘new residential premises’ in section 40-75 of *A New Tax System (Goods and Services Tax) Act 1999* is supported by established jurisprudence and rulings. Defining a core term by means of a legislative instrument, where an existing and analogous term already exists in principal legislation, runs the risk of creating error and confusion on the part of tax advisers. The Explanatory Memorandum should explain the intended treatment of off-the-plan purchases, finance approvals, build-to-rent projects, substantial renovations, conversions, staged developments, replacement dwellings, mixed-use property, and changes of use. Taxpayers entering into contracts, construction arrangements, and substantial renovation projects during the interim period before the instrument exists require certainty as to their position.

Issue 17: Minimum tax calculation, ordinary deductions and low-income taxpayers

Schedule 1, Part 2 of the Bill would insert proposed Division 119, including proposed sections 119-10 and 119-15, and the Imposition Bill would impose the minimum rate. The minimum tax may produce outcomes that taxpayers would not expect where ordinary deductions, including donations to deductible gift recipients, reduce taxable income but do not reduce the effective rate imposed on the relevant capital gain. The Explanatory Memorandum should test the rule against deductible superannuation contributions, gifts, and other deductions, and should state its intended interaction with the ordinary progressive rate structure.

Explanatory Memorandum paragraph 5.9 states that the Legislation includes a mechanism so that certain income support recipients can be exempted from the minimum tax. That exemption may not protect lower income taxpayers who do not qualify for government income support. Proposed section 119-15 permits exemptions with detail to be determined by legislative instrument. Eligibility for an exemption from a tax floor is a substantive matter. The Explanatory Memorandum should explain why the relevant payments cannot be listed in the primary legislation and should include examples for retirees, part-year recipients, episodic income taxpayers and taxpayers whose payment status changes during an income year.

Issue 18: Trust reporting and beneficiary attribution burden

Schedule 1 of the Bill would create new categories of capital gains and amend the treatment of trust attributed capital gains, including through proposed section 102-6. Trustees will need to pass information to beneficiaries with enough precision for each beneficiary to calculate their own position. The Explanatory Memorandum should include the proposed form of trustee reporting, examples for mixed resident and non-resident beneficiaries, and transitional penalty settings.

Issue 19: Historical residential accommodation day records

Schedule 1, item 6 of the Bill would insert proposed section 102-6. Proposed subsections 102-6(2) and 102-6(4) use residential accommodation days across the relevant ownership period to classify residential and deferred residential capital gains. Taxpayers may not have maintained day-by-day records because existing law did not require that classification in the same way. The Explanatory Memorandum should explain what evidence will satisfy the rule for long-held assets, mixed-use property, main residence periods and changes in use.

Issue 20: Administration, ATO systems readiness and self-preparing taxpayer burden

The Senate Committee should consider whether the Australian Taxation Office can administer all four schedules in time. Schedule 1 and Schedule 2 may require new labels, pre-fill logic, valuation records, trust distribution reporting, and loss quarantining systems; Schedule 3 and Schedule 4 require offset and deduction changes. The Explanatory Memorandum acknowledges transitional and ongoing compliance costs for individuals and businesses in relation to the CGT and negative gearing amendments.

Self-preparing taxpayers face a greater risk of error than taxpayers who can obtain professional advice. The Senate Committee should seek evidence from the

Commissioner on systems readiness, ATO guidance timelines, compliance risk modelling, and whether the Explanatory Memorandum and anticipated ATO guidance will enable ordinary taxpayers to comply without professional assistance.

Issue 21: Standard deduction election, substantiation, and indexation

Schedule 4, item 3 of the Bill would insert proposed section 25-130 into the ITAA 1997 to introduce a standard deduction for work-related expenses. The technical relationship between that deduction, actual expenses and expenses that remain separately deductible needs clearer treatment. A fixed $1000 amount will also lose value over time unless indexed or reviewed. The Explanatory Memorandum should explain the election mechanics, amended assessment consequences, record-keeping expectations, and whether the amount will remain appropriate after the first years of operation.

Issue 22: Fringe benefits tax interaction with standard deduction

Schedule 4, Part 2 of the Bill would amend the *Fringe Benefits Tax Assessment Act 1986* to address fringe benefits connected with expenses covered by the standard deduction. The interaction will affect salary packaging, reimbursements, and expense payment benefits. The Explanatory Memorandum should include practical examples for employers and employees, including cases where a worker claims the standard deduction but also receives a reimbursed or packaged benefit during the income year.

Issue 23: Parliamentary scrutiny and Senate timing

The Senate Committee is reviewing a Bill with four schedules and the Imposition Bill. The Bills were referred on 28 May 2026 and the reporting date is 22 June 2026. That timetable gives limited time to test the technical detail of Schedule 1, Schedule 2, Schedule 3, Schedule 4 and the Imposition Bill. Given the scale and complexity of the reforms, the Senate Committee should consider whether further scrutiny or additional hearing time is warranted.

Issue 24: Legislative examples and explanatory materials

The technical operation of the Bill depends on the fine print, interaction rules and worked examples. The Explanatory Memorandum should include worked examples for private business sales, pre-CGT assets, trusts, AMITs, crypto assets, partial disposals, changes of residence, new residential dwellings, low-income taxpayers, private company interests, deceased estates, employee equity, and deductible gifts. Existing Explanatory Memorandum references, including paragraphs 1.46, 1.80 and 1.142, Explanatory Memorandum Example 11.6 and paragraph 5.9, should be supplemented if they do not cover common scenarios. Where the Explanatory Memorandum is silent or inadequate, taxpayers and courts will lack guidance on Parliament’s intention.

Issue 25: Need for review and remediation mechanisms

Given the scale of the reforms and the acknowledged gaps in the current Bill, the Legislation should include a statutory post-implementation review mechanism, a targeted regulation-making power confined to mechanical issues, and a clear pathway for technical amendments before the first affected assessment cycle in 2027–28. Schedule 1 and Schedule 2 create the highest risk of unintended consequences because they alter long-standing CGT and negative gearing settings. Without review and remediation mechanisms, errors may take years to identify and correct.

Issue 26: CGT rollovers and interaction with deferred gains

The Bill does not address how the deferred gain regime in proposed sections 112-155, 112-160, 112-165 and 112-170 interacts with CGT rollovers generally. The affected rollovers include those for marriage or relationship breakdown (Subdivision 126-A), scrip-for-scrip transactions (Subdivision 124-M), demergers (Division 125), small business restructures (Subdivision 152-E), replacement asset rollovers (Subdivision 124-B), and the asset rollovers in Subdivisions 122-A and 124-B. It is unclear whether a frozen deferred gain attaching to a CGT asset rolls to the replacement asset or transferee, crystallises on the rollover event, or is simply lost. That uncertainty affects the ability of taxpayers to undertake ordinary commercial transactions during the transition period without inadvertently triggering or forfeiting deferred gains. The Explanatory Memorandum should identify the intended treatment, and the Bill should include consequential amendments to the relevant rollover provisions.

Issue 27: Death, Division 128, and deferred gains

The Bill does not address the interaction between Division 128 (death) and the deferred gain regime in proposed sections 112-160 and 112-170. Under Division 128, the deceased's legal personal representative or beneficiary is generally taken to have acquired the asset for its market value at the date of death (or, in certain cases, at the deceased's cost base). It is unclear what happens to a deferred gain that has accrued under the transition provisions when the holder of the asset dies. In particular, the Bill does not state whether the deferred gain crystallises on death, passes to the legal personal representative or beneficiary as part of the inherited cost base, or is extinguished. The interaction between the deemed disposal and reacquisition at 1 July 2027 and the cost base reset on death creates a further layer of complexity, particularly for assets held for long periods where both the transition and the death occur within a short timeframe. The Explanatory Memorandum should explain the intended treatment and the Bill should include consequential amendments to Division 128 if necessary.

Issue 28: Options, Division 134, and transitional treatment

The Bill's transitional provisions in new Subdivision 112-E (sections 112-155 and 112-165, inserted by Schedule 1, item 13) apply to a CGT asset that was acquired before 1 July 2027 and is held until a realisation event on or after that date. Under Division 134 of the ITAA 1997 (sections 134-1 to 134-20), an option is a distinct CGT asset, legally and economically separate from the underlying asset that may be acquired on exercise. The acquisition of the underlying asset does not relate back to the acquisition of the option; the underlying asset is treated as acquired only when the option is exercised.

The consequence is that a taxpayer who acquired an option before 1 July 2027, and whose realised value substantially reflects pre-commencement appreciation, may be denied any grandfathering or transitional protection because the Bill anchors its analysis to the acquisition date of the underlying asset rather than the date economic exposure was assumed. The Bill does not address the interaction between the cost base roll-up mechanism in Division 134 (whereby the cost of the option forms part of the cost base of the acquired asset under section 134-1) and the new deemed disposal and reacquisition regime. The exercise of the option is not treated as a disposal event, so there is no point within the existing framework at which transitional treatment can be preserved or recognised. Options are a common feature of commercial arrangements, investment structures, and executive remuneration. The Bill should include specific transitional rules for options acquired before 1 July 2027 and address the interaction with the Division 134 cost base provisions.

Issue 29: Constitutional uncertainty in the imposition of the minimum tax

The 30 per cent minimum tax on capital gains is imposed by new Division 119 of the ITAA 1997 and new section 12AA of the Rates Act (Schedule 1, items 58 and 60; Imposition Bill, Schedule 1, item 1). Section 55 of the Constitution requires that laws imposing taxation deal with one subject of taxation only, and the constitutional distinction between a tax and the law imposing it requires that the rate of tax be ascertainable from the imposition Act.

The rate under section 12AA is expressed as a formula (the minimum tax gap amount divided by the minimum tax capital gain), both terms of which are defined in and calculated under the ITAA 1997. The rate cannot be known without first performing a multi-step calculation under the assessment provisions, including working through the seven-step method in subsection 119-10(2). The rate is not fixed, not uniform, and not ascertainable independently of the assessment provisions. It varies from taxpayer to taxpayer depending on their other income, offsets, and the composition of their capital gains. That is a materially different proposition from the application of a stated percentage to a defined amount.

The constitutional concern is compounded by the role of Ministerial determination in defining the scope of the tax. Subsection 119-15(1) provides that the minimum tax does not apply to an individual who received a payment of a kind specified by the Minister by legislative instrument during the income year. While the power is constrained by subsection 119-15(2), the effect is that the class of persons upon whom the minimum tax is imposed is determined, at least in part, by executive act rather than by Parliament. Whether these features satisfy the constitutional requirements for valid imposition of taxation is a question that admits of genuine doubt. The Explanatory Memorandum does not address this issue. The Senate Committee should satisfy itself that the constitutional basis for the manner of imposition, and the delegation of exemption scope, has been properly examined before enactment.

Issue 30: Minimum tax on capital gains and impact on philanthropy

A significant proportion of major private philanthropy is funded by capital gains from liquidity events, with charitable giving as an essential feature of long-term plans for owners of businesses and investments. At that point, it is common for individuals and families to make substantial philanthropic commitments by giving to an existing deductible gift recipient, establishing or contributing to private foundations and giving funds, or making distributions from family and discretionary trusts to charitable entities.

The interaction between the removal of the CGT discount and the imposition of the minimum tax can dramatically alter the economics of significant donations. Under current settings, a taxpayer who realises a $100 million capital gain and wishes to retain $50 million while giving $50 million to charity benefits from the 50 per cent CGT discount, which produces a $50 million net capital gain. A $50 million gift to a DGR can broadly offset that taxable income, resulting in the charity receiving $50 million and the taxpayer retaining $50 million. Under the proposed settings, assuming no material indexation benefit and a top marginal rate of 47 per cent, the removal of the CGT discount means the taxable gain is $100 million. If the taxpayer gives $50 million to charity, assessable income remains $50 million and income tax of approximately $23.5 million is payable. The 30 per cent minimum tax then increases the total tax on the capital gain to $30 million. The result is that the taxpayer gives $50 million, pays $30 million in tax, and retains only $20 million.

The Bill should be amended so that gifts to DGR-endorsed charities and giving funds that are funded from a capital gain can reduce, or be credited against, the amount subject to the 30 per cent minimum tax. The policy objective should be that where capital gain proceeds are genuinely given away for public benefit, those proceeds are not treated as though they remain available for private consumption. Without such an amendment, the minimum tax operates as an effective gift tax on philanthropic dispositions of capital gains, creating a material disincentive to give at the point where major philanthropy is most commonly funded.

About the Business Law Section

The Business Law Section of the Law Council of Australia provides a forum through which lawyers and others interested in all matters pertaining to business law can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section:

- prepares almost half of the Law Council's submissions each year, putting the views of the business community and the legal profession directly to the Federal Government and its agencies, and Federal Parliamentary Committees;
- provides a forum for debate of current issues, and assists lawyers to develop and maintain their professional skills and knowledge, through a schedule of regular conferences, workshops and seminars;
- represents the Law Council on a number of bodies—for example, the National Taxation Liaison Group and its sub-committees, the Customs and Border Protection National Consultative Committee and its sub-committees and the ASX Corporate Governance Council; and
- gives its members the opportunity to develop a network of professional contacts in their fields of practice.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.

Law Council
OF AUSTRALIA

POLICY STATEMENT

Rule of Law Principles

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Introduction

A key objective of the Law Council of Australia is the maintenance and promotion of the rule of law. For that reason, the Law Council often provides analysis of federal legislation and federal executive action based on its compliance with so-called "rule of law principles".

This document seeks to articulate some of those key principles. It is intended to act as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice.

This document is not intended to offer a comprehensive definition of the "rule of law". It is acknowledged that what is encompassed under the banner of that phrase is a matter of some contest and that it is a concept which is not necessarily amenable to an exhaustive definition.

In particular, it is acknowledged that there is considerable public debate about two matters:

- ◊ the intersection between human rights and the rule of law and the extent to which the rule of law is necessarily predicated on respect for human rights.
- ◊ the intersection between democracy and the rule of law and the extent to which the rule of law necessarily assumes that laws are passed by a democratically elected legislature formed following free, fair and regular elections.

It is not necessary to definitively resolve either of those debates in this document.

Instead, this document focuses on the most basic tenets of the rule of law — and those which are most often invoked in Law Council submissions and advocacy.

With respect to broader human rights principles, it is noted that Australia is a party to the seven key international human rights treaties and has also signed or ratified a number of optional protocols to those treaties. These international treaties, which Australia has voluntarily entered in, set out in clear terms Australia's international human rights obligations. Australia is bound to comply with their provisions and to implement them domestically. For that reason, in an Australian context, regardless of the extent of any agreed overlap between the rule of law and human rights, it is entirely appropriate to evaluate government legislation, policy and practice by reference to its compliance with international human rights law.

Key Principles

1. The law must be both readily known and available, and certain and clear

In particular, people must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. For that reason:

a. Legislative provisions which create criminal or civil penalties should not be retrospective in their operation.

b. The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction.

c. The fault element for each element of an offence should be clear.

2. The law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds

In particular, no one should be regarded as above the law and all people should be held to account for a breach of law, regardless of rank or station. Furthermore:

a. Everyone is entitled to equal protection before the law and no one should be conferred with special privileges.

b. Where the law distinguishes between different classes of persons, for example on the basis of age, there should be a demonstrable and rational basis for that differentiation.

3. All people are entitled to the presumption of innocence and to a fair and public trial

In particular, no one should be subject to punitive action by the state unless he or she has first been found guilty of an offence by an independent, impartial and competent tribunal. Inherent in this is a prohibition on indefinite detention without trial. Furthermore:

a. No one should be compelled to testify against him or herself. Where a person is subject to questioning by the state, he or she should be given appropriate warnings about this right. Where a person is compelled to provide information to the state, there should be a prohibition on that information, or further information derived from it, being used in proceedings against that person (that is there should be use and derivative use immunity)..

b. Upon arrest and/or charge, a person should be fully and promptly informed of any offence which he or she is alleged to have committed and, at trial, an accused person should be afforded a meaningful opportunity to interrogate and challenge the information which is relied upon against him or her.

c. A person who is subject to criminal charge should be tried without undue delay. Where the time delay between the conduct constituting an offence and the prosecution for that offence is such that it will unduly prejudice a person's ability to defend themselves, proceedings should be stayed, except where the person has caused or substantially contributed to the delay.

d. Persons awaiting trial should not generally be detained in custody, unless they are a demonstrated flight risk or their release poses a demonstrated risk to the community or ongoing investigation.

e. The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence. Only where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, should the defendant bear the onus of establishing that matter. Even then the defendant should ordinarily bear an evidential, as opposed to a legal burden.

f. The state should be required to prove that a person intended, or at the very least was reckless about, each physical element of an offence in order for a person to be found guilty of that offence. Strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of the relevant regulatory regime.

g. A person convicted of a crime should have the opportunity to have his or her conviction and sentence reviewed by a higher tribunal.

4. Everyone should have access to competent and independent legal advice

In particular, everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights. Furthermore:

a. The state should provide adequate resources to guarantee access to a competent and independent lawyer in circumstances where individuals do not have the independent means to retain a lawyer.

b. Lawyer-client communications should be regarded as confidential, except where lawyer and client are together engaged in conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

c. Lawyers should not be subject to sanction or discrimination as a result of the legal advice or representation they have provided, except where that advice fails to comply with agreed standards of professional conduct.

d. Lawyers should be given timely access to relevant information and documents about their client in order to enable them to provide effective legal assistance to their clients.

5. The Judiciary should be independent of the Executive and the Legislature

The existence of an independent, impartial and competent judiciary is an essential component of the rule of law. On that basis:

a. Procedures for appointing judicial officers should be based on identifying individuals of integrity and ability with appropriate training or qualifications in law and should not be such that they compromise the independence of those appointed.

b. The term of office of judges, their independence, security, remuneration, conditions of service, pensions and the age of retirement should be adequately secured by law.

c. Judicial officers should have the power to control proceedings before them and, in particular, to ensure that those proceedings are just and impartial.

d. The allocation of cases to judges within a particular court should be an internal matter of judicial administration.

e. Legislation, particularly legislation which seeks judicial authorisation for executive action, should not limit judicial discretion to such an extent that the Judiciary is effectively compelled to act as a rubber stamp for the Executive. The Judiciary should always have sufficient discretion to ensure that they can act as justice requires in the case before them.

f. In criminal matters, judges should not be required to impose mandatory minimum sentences. Such a requirement interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime.

6. The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law

Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used. In particular:

a. Where legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision. Moreover, the Executive should not be able to issue an instrument which creates new offences or confers new powers on Executive agencies.

b. The use of executive powers should be subject to meaningful parliamentary and judicial oversight, particularly: powers to use force; to detain; to enter private premises; to seize property; to copy or seize information; to intercept or access telecommunications or stored communications; to compel the attendance or cooperation of a person; or to deport a person. Mechanisms should be in place to safeguard against the misuse or overuse of executive powers.

c. Where the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress.

d. Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.

7. No person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being

In particular:

a. No person should be subject to torture. Information obtained by torture should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.

b. No person should be subject to cruel, inhuman or degrading treatment or punishment. No person should be held in conditions of detention which amount to cruel, inhuman or degrading treatment. Information obtained by cruel, inhuman or degrading treatment should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.

c. No person should be subject to the death penalty.

8. States must comply with their international legal obligations whether created by treaty or arising under customary international law

Both states and individuals are entitled to expect that other states will comply with and honour their international legal obligations, including obligations relating to the promotion and protection of human rights. States must avoid inconsistencies between their international legal obligations and their domestic laws and policies.

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