

# The Tax Summit

## Session 4.2: Family Trust Elections – A deep dive into several regularly overlooked issues

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# 1. Introduction

"You can choose your friends but you cannot choose your family"

Harper Lee in To Kill a Mockingbird

Familiarising yourself with all things family, family groups, and family trust elections (**FTEs**) has never been so important. With what appears to be renewed scrutiny of FTEs from the Commissioner of Taxation (the **Commissioner**), FTEs are a pertinent area of tax to be across currently. Families and their advisers should therefore remain vigilant in respect of the elections they have in force (or are proposing to make) and should not simply roll out elections without proper regard to the rules. This is especially so given the undesirable tax and interest consequences, as well as an unlimited review period, that can arise under the FTE rules.

This paper deals with the application of the FTE regime, having regard to both its context and its dense statutory framework. What we will specifically look at is the complexity that arises from what should otherwise be a conceptually simple framework, the evidentiary hurdles that taxpayers are required to overcome in applying these rules, and the uncertainties that come with the lack of jurisprudence in relation to how these rules apply (despite the rules being in existence for over 25 years).

The paper will also explore some of the practical problems that we see arise in practice, such as where families grow and go in different directions and/or where family members die. What we will demonstrate is how these natural flows that come with simply being human can potentially cause the FTE provisions to become quite unwieldy and unworkable, causing unintended consequences for members of the family group.

## 2. Family Trust elections – Purpose and legislative background

Prior to 9 May 1995 (the 1995-1996 Budget time), there were no statutory constraints imposed on trusts insofar as their ability to carry forward prior year tax losses. The lack of restrictions in this area was clearly distinct from the strict company loss rules which prevented companies (not trusts) from carrying forward prior year tax losses in the absence of satisfying either the continuity of ownership test or the continuity of business test. What the lack of restrictions caused in many circumstances was a trust becoming a more favourable vehicle. In this regard, the 1995 Master Tax Guide made the following comment (published before the 1995-1996 Budget):<sup>1</sup>

The absence of restrictions on the deductibility of carry forward trust losses has given rise to some trafficking in 'loss trusts'. These transactions normally involve an alteration to the relevant deed of trust, the appointment of a new trustee or, alternatively, the acquisition of a corporate trustee by new shareholders.

### 2.1 Budget announcements

The treatment of prior year tax losses in the context of trusts was initially raised in the 1995-1996 Budget announcement. The changes proposed in the announcement were intended to place trusts in much the same position as companies insofar as prior year tax losses were concerned.

After being initially rejected by the Senate in or around 1995 for various reasons (including, but not limited to, the fact that the measures would have a significant impact on small businesses operated through trusts), the proposed changes were re-announced in a modified form in the 1997-1998 Budget. The main differences between what was originally proposed and what formed part of the later modified changes was in relation to the “family trust” measures.

Following the 1997-1998 Budget announcement, the proposed trust loss legislation was presented to Parliament again as part of the *Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997*. Alongside this bill was the *Family Trust Distribution Tax (Primary Liability) Bill 1997* and the *Family Trust Distribution Tax (Secondary Liability) Bill 1997*, which imposed a special tax which could become payable if certain conditions in the trust loss legislation were met (i.e. the family trust distribution tax (**FTDT**, which we will discuss later)).

The trust loss regime was later enacted with effect from 16 April 1998 under the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1998 (Cth)*. As foreshadowed above, a part of this

<sup>1</sup> CCH, 1995 Australian Master Tax Guide, p. 1311. This quote from the Master Tax Guide was cited in the Bills Digest No. 98 1997-98 in relation to *Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997*.

regime was the FTE measures, which effectively provided concessionary treatment for trusts which had made an FTE (i.e. trusts which are known under the rules as “family trusts”).

For completeness, the trust loss provisions do not apply to capital losses.

## 2.2 Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1998

The explanatory memorandum to the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1998 (Cth)* (the **EM**) relevantly states [emphasis added]:

1.4 The purpose of the trust loss measures is to restrict the recoupment of prior year and current year losses and debt deductions of trusts in order to prevent the transfer of the tax benefit of those losses or deductions. **The tax benefit of losses is transferred when a person who did not bear the economic loss at the time it was incurred by the trust obtains a benefit from the trust being able to deduct the loss.** The measures are intended to prevent a significant leakage of revenue that has resulted from the transfer of the tax benefit of trust losses.

1.5 The measures achieve this aim by examining whether there has been a change in underlying ownership or control of a trust or whether certain schemes have been entered into in order to take advantage of a trust's losses.

1.22 [...] **family trusts are subject to concessional treatment and most of the trust loss provisions do not apply to them.**

The EM goes on to say [emphasis added]:

1.23 A trust becomes a family trust for the purposes of the measures if it makes a family trust election. A consequence of making the election is that a special tax, called family trust distribution tax, is payable where a family trust gives income or capital to persons who are not members of the family group. This tax is levied at the top marginal rate applying to individuals, plus Medicare levy.

1.24 The family group for the purposes of the family trust rules includes companies, partnerships and trusts that have made an interposed entity election. A consequence of making an interposed entity election is that family trust distribution tax is payable where the interposed entity gives income or capital to persons who are not members of the family group.

1.25 In the case of a family trust that is a fixed trust the family trust election can be revoked provided that certain conditions are met. In the case of a fixed trust, company or partnership it is not necessary to make an interposed entity election where family members have fixed interests to all the income and capital of the entity.

1.26 **The family trust distribution tax ensures that the tax benefit of losses of a family trust cannot be transferred to non-family members.** This is necessary because, as discussed above, a family trust does not need to meet the tests relating to changes in ownership or control or, in many cases, the income injection test.

Accordingly, it appears that the policy reason for affording concessionary treatment to family trusts under the trust loss provisions was that it was **always** expected that distributions from family trusts would only ever go to family members (and never “outsiders”). Therefore, the integrity issues that were otherwise feared in the context of non-family trusts (for example, where prior year tax losses were utilised by someone who did not economically incur the loss) were not something that needed to be addressed insofar as family trusts were concerned.

## 3. Family trust elections

### 3.1 What is a family trust?

A trust is a family trust at any time when a family trust election (see subsection 272-80(1)) in respect of the trust is in force.<sup>2</sup>

### 3.2 Making a family trust election

The trustee of a trust may make an election (the **FTE**) that the trust is a “family trust” for the purposes of Schedule 2F of the *Income Tax Assessment Act 1936* (**ITAA36**) at all times after the beginning of a specified income year.<sup>3</sup> Once the election is made, the trust is a “family trust” at all times from the beginning of the specified income year unless:

- the election is revoked; or
- the “family control test” is not satisfied at all times in the specified income year, in which case the trust is only a “family trust” from the earliest time from which the trust passes the “family control test” for the remainder of that specified income year.<sup>4</sup>

Once an FTE has been made, it cannot be varied or revoked except in limited circumstances (see **Section 5** below for further detail regarding the revocation of FTEs).<sup>5</sup>

### 3.3 Why make an FTE?

The potential benefits of making an FTE include:

- a) In order to carry forward and utilise tax losses, a non-fixed trust must satisfy a string of complex trust loss rules, and, whilst not as burdensome, a fixed trust must also satisfy the trust loss rules. However, as distinct from a fixed trust and non-fixed trust, a “family trust” is only required to satisfy one of these rules (i.e. the income injection test).
- b) In the absence of making an FTE, beneficiaries of a non-fixed trust cannot constitute a “qualified person” for the purposes of Division 1A of former Part IIIAA of the ITAA36.<sup>6</sup> However, the making of an FTE permits the possibility of a beneficiary being a “qualified person” (subject to meeting other requirements), which potentially allows for the flow through of franking credits.
- c) For a company to claim prior year tax losses, it must satisfy either the continuity of ownership test (**COT**) or the business continuity test. In the absence of making an FTE, it will be very

<sup>2</sup> ITAA36, Sch 2F, s 272-75.

<sup>3</sup> ITAA36, Sch 2F, sub-s 272-80(1).

<sup>4</sup> ITAA36, Sch 2F, ss 272-80(9) and (10).

<sup>5</sup> ITAA36, Sch 2F, ss 272-80(5),(5A)-(8).

<sup>6</sup> See ATO ID 2003/1108, ATO ID 2003/1105, ATO ID 2003/1106 and ATO ID 2005/172.



difficult, if not impossible, for a company with a discretionary trust shareholder to satisfy the COT as it needs to be shown that 50% of the shares in the company are beneficially owned by the same persons for a certain period of time. However, a “family trust” is treated as a “single notional entity” for control tracing purposes under our COT rules in the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**), which means there is no need to trace past the family trust for the purposes of such rules.<sup>7</sup>

- d) “Family trusts” do not have to comply with the trustee beneficiary reporting rules.
- e) Under the “small business restructure rollover” relief provisions in subdivision 328-G of the ITAA97, one of the requirements that must be satisfied in order to be eligible for rollover relief is that the transaction does not materially change the “ultimate economic ownership of the asset” being transferred (or, where there is more than one individual involved, each individual’s share of the “ultimate economic ownership of the asset” being transferred).<sup>8</sup> It is impossible for a discretionary trust to satisfy this requirement. However, “family trusts” are conferred concessional treatment under these rules.<sup>9</sup>

In addition to the abovementioned “benefits” which are statutorily provided for under the ITAA36 or the ITAA97, there may be certain other instances where the Commissioner is prepared to apply a practical approach to the law and allow for some concessional treatment where an FTE has been made. We have seen the Commissioner apply this practical approach in several private rulings<sup>10</sup> in the context of Division 149 of the ITAA97. In each of these rulings, the Commissioner found it reasonable to assume, in light of the trustee having made a family trust election, that the assets in question had not lost their pre-CGT status.

### 3.4 Making a valid FTE

There are four requirements for making a valid FTE:

- 1) the election must specify an individual (the “test individual” / “primary individual”) as the individual whose “family group” (as defined – see **Section 4** below) is taken into account in relation to the election, and must contain such other information as the Commissioner requires;<sup>11</sup>
- 2) the election must be made in writing and in the approved form;<sup>12</sup>

<sup>7</sup> See section 165-207 of the ITAA97. See also ATO ID 2006/157.

<sup>8</sup> ITAA97, s 328-430(1)(c).

<sup>9</sup> ITAA97, s 328-440.

<sup>10</sup> See Edited Private Advice 1051535930903, Edited Private Advice 1051627768553, and Edited Private Advice 1051639379151.

<sup>11</sup> ITAA36, Sch 2F, s 272-80(3).

<sup>12</sup> ITAA36, Sch 2F, s 272-80(2).

- 3) the election must specify an income year (the “specified income year”) for which the election will apply from (though an earlier income year can be specified if certain conditions are met – see below);<sup>13</sup> and
- 4) the trust must pass the “family control test” (discussed below) at the end of the specified income year.<sup>14</sup>

The trustee of a trust must **not** make more than one FTE in relation to the trust.<sup>15</sup> If an FTE is made and later revoked, the trustee of the trust is prevented from making another FTE.<sup>16</sup> See **Section 5** below for revoking FTEs.

### 3.4.1 Requirement 1 - Specifying a “test individual”

Selecting a suitable person as the “test individual” is of critical importance as it is this particular person who is the point of reference for defining the “family group” in relation to the FTE and hence determining whether conferrals of present entitlements or distributions of income or capital from the family trust (and/or interposed entities) will be subject to FTDT.

The Commissioner in ATO Interpretative Decision ATO ID 2014/3 makes clear that the individual specified in the FTE must be alive at the time the trustee of the trust makes the FTE. For this reason, it is common practice from a succession planning point of view to establish several dormant trusts nominating the individual as the test individual so that these can be used in the future following the individual’s death.

Though it should be noted that the subsequent death of that person does not prevent any other trust, company or partnership from making an interposed entity election (**IEE**) to be included in the test individual’s “family group”.<sup>17</sup> Nor does the subsequent death of that person terminate the FTE.

The trustee of a trust may vary an FTE so that a different individual is the test individual, but only if the following conditions are met:<sup>18</sup>

- a) the new individual was a member of the “family” (as defined<sup>19</sup>) of the individual originally specified in the election at the election “commencement time” (as defined<sup>20</sup>); and
- b) whilst the FTE has been in force, no conferrals of present entitlements, or distributions, of income or capital of the trust or an interposed entity have been made to persons other than the

<sup>13</sup> ITAA36, Sch 2F, s 272-80(1).

<sup>14</sup> ITAA36, Sch 2F, s 272-80(4).

<sup>15</sup> ITAA36, Sch 2F, s 272-80(11).

<sup>16</sup> ATO ID 2008/73 and subsection 272-80(11) of Sch 2F to the ITAA36.

<sup>17</sup> See “Note” in ATO ID 2014/3.

<sup>18</sup> ITAA36, Sch 2F, ss 272-80(5A).

<sup>19</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

<sup>20</sup> As defined in subsection 272-80(10) of Sch 2F to the ITAA36.

new specified individual or members of the new specified individual's "family group" (as defined<sup>21</sup>).

The explanatory memorandum to *Tax Laws Amendment (2007 Measures No 4) Bill 2007* stated at paragraph 8.32 that this is intended to deal with the situation where a trust has chosen the wrong test individual in its FTE but the trust had acted in the past as if the proposed new individual was always the test individual. On this basis, the new test individual must have been alive at the election commencement time.

The test individual may also be varied if, as a result of a family law obligation arising from a marriage breakdown, the control of the trust passes to the new test individual and his or her family members. Specifically, if an order or an agreement, or an award of a kind mentioned in paragraphs 126-5(1)(a) to (f) ITAA97 results in the control of the trust passing to the new individual and members of the new individual's family, the test individual specified in the family trust election may be varied.<sup>22</sup>

In either case, the variation must be made in the trust's tax return for the income year in which the variation is to be effective. If the trust's tax return for the income year in which the variation was to be effective has already been lodged, the ATO takes the view that the return cannot be amended to include the FTE variation.<sup>23</sup>

If the trust is not required to give a return for the income year, the variation must be in writing and in the "approved form", must specify the income year from which the variation is to be effective and must be given to the Commissioner on or before 2 months after the end of that income year, or such later day as the Commissioner allows.<sup>24</sup>

The trustee of a trust cannot vary an FTE to replace the test individual more than once in relation to a variation made under subsection 272-80(5A) of Sch 2F.<sup>25</sup>

### 3.4.2 Requirement 2 – made in writing and in the approved form

#### ***What is the "approved form"?***

As noted above, the second requirement for making a valid FTE is that the election be in writing and in the "approved form". This requirement is set out in subsection 272-80(2) of Sch 2F to the ITAA36, which was amended with effect from 1 April 2005.<sup>26</sup> Relevantly, prior to 1 April 2005, there was a specific statutory requirement in subsection 272-80(2) for the election to be **made in the trust's tax return of income** for the specified income year, and if no return was required, the subsection specifically required the election to be in writing in a form approved by the Commissioner and **given** to

<sup>21</sup> As defined in section 272-90 of Sch 2F to the ITAA36.

<sup>22</sup> ITAA36, Sch 2F, s 272-80(5C).

<sup>23</sup> [Family trusts – concessions | Australian Taxation Office \(ato.gov.au\)](https://www.ato.gov.au/family-trusts-concessions).

<sup>24</sup> ITAA36, Sch 2F, s 272-80(8).

<sup>25</sup> ITAA36, Sch 2F s 272-80 (5B).

<sup>26</sup> *Tax Laws Amendment (2004 Measures No. 7) Act 2005*.

the Commissioner before a certain date. By contrast, the language contained in the current subsection 272-80(2) provides no such requirement to furnish anything to the Commissioner.

The phrase “approved form” in subsection 272-80(2) of Sch 2F to the ITAA36 is defined in section 6 of the ITAA36 to refer to the meaning given by section 388-50 of Schedule 1 to the *Tax Administration Act 1953* (the **TAA**). Section 388-50 of Sch 1 to the TAA states [emphasis added]:

(1) A return, notice, statement, application or other document under a \* taxation law is in the **approved form** if, and only if:

(a) it is in the form approved in writing by the Commissioner for that kind of return, notice, statement, application or other document; and

(b) it contains a declaration signed by a person or persons as the form requires (see section 388 - 75); and

(c) it contains the information that the form requires, and any further information, statement or document as the Commissioner requires, whether in the form or otherwise; and

(d) for a return, notice, statement, application or document that is required to be given to the Commissioner -- it is given in the manner that the Commissioner requires (which may include electronically).

(1A) Despite subsection (1), a document that satisfies paragraphs (1)(a), (b) and (d) but not paragraph (1)(c) is also in the **approved form** if it contains the information required by the Commissioner. The Commissioner must specify the requirement in writing.

(2) The Commissioner may combine in the same \*approved form more than one return, notice, statement, application or other document.

(3) The Commissioner may approve a different \*approved form for different entities.

We will discuss each of these requirements, in turn, below.

### ***Form approved in writing by the Commissioner (para 388-50(1)(a))***

Relevant to the requirement in subsection 388-50(1)(a) of Sch 1 to the TAA, the form approved in writing by the Commissioner for the making of an FTE seems to have changed over the years. The currently approved form is known as, “*Family trust election, revocation or variation 2024*”. A copy of this form is annexed to this paper.

Notwithstanding the existence of a currently published “approved form”, (being “*Family trust election, revocation or variation 2024*”), there is no statutory requirement in the FTE rules that confers an obligation on the taxpayer to furnish this approved form to the Commissioner (as already noted above). This can lead to disputes as to the existence of a valid FTE where, despite there not being any direct

evidence of an FTE having actually been made, there is some suggestion (such as in a trust tax return) that an FTE was made. These disputes will turn on the taxpayer's onus of proof. This may be an extremely difficult task as it may require the taxpayer to provide evidence of absence!

This type of dispute is similar to what happened in the case of *Deputy Commissioner of Taxation v Widdup (No 2)* [2023] FCA 377 (the **Primary Decision**) and the appeal, *Widdup v Deputy Commissioner of Taxation* [2023] FCAFC 145 (the **Appeal Decision**). Whilst each of these cases primarily concerned an application by the taxpayers to have monies paid into court in satisfaction of freezing orders repaid out to them, the Courts made some brief comments as to whether an FTE had actually been made.

By way of summary of the facts, in 2010, the trustee of the trust had indicated in its tax return that an FTE had been made in the financial year ending 30 June 2009. For each financial year ending 2009 through to 2017, each tax return for the trust recorded the same information. In October 2017, a capital gain was made, and the trustee resolved to distribute the capital gain in June 2018 to a company that was not part of the relevant family group. In its 2018 tax return, the trustee did not include any information concerning its FTE or IEE status. The taxpayers contended that no FTE had been made in accordance with section 272-80 of Sch 2F of the ITAA36. The judge in the Primary Decision relevantly noted [emphasis added]:

**115. It may well turn out to be the case, in proceedings pursuant to Pt IVC of the TA Act, that Mr Widdup and Mrs Widdup will be able to prove that they have no family trust distribution tax liability because the Trustee never made a family trust election in accordance with s 272-80 of sch 2F to the ITAA36 and that s 271-15 never applied to the Trust or the distribution made to Fidelity Pacific that formed the basis of the FTDT notices. That, however, is not the question which arises in the context of the current interlocutory application.**

[...]

118. It was in my view at least open to the Deputy Commissioner to find that the Trust had made a family trust election in accordance with s 272-80 because that is effectively what Mr Widdup, on behalf of the Trustee, told the Deputy Commissioner when he completed the Trust's tax returns for the tax years 2009 to 2017. Even if the Deputy Commissioner was aware, actually or constructively, that Mr Widdup had claimed, in a "cold" call to an ATO enquiry line on 22 March 2018, that he had made a mistake when he indicated, in the Trust's tax returns, that the Trust had made a family trust election, the Deputy Commissioner was not necessarily obliged to accept or act on the basis of that information.

**119. Equally, even if the Deputy Commissioner was aware, actually or constructively, that the ATO's records did not indicate that the Trust had lodged a family trust election in the approved form, it does not follow that the Deputy Commissioner was obliged to find that the Trust had not in fact made a family trust election. Section 271-15 provides that the tax liability applies if a trustee "makes" a family trust election. It does not require that the election be lodged with the ATO. It was open to the Deputy Commissioner to infer**

**and conclude, on the basis of the information available to her, that the Trustee had made a family trust election in the approved form, even if it had not lodged that form with the ATO.**

The Full Federal Court in the Appeal Decision then went on to make the following comments [emphasis added]:

37 For the purposes of addressing the submissions of the applicant on this application for leave to appeal, we conclude that **the Deputy Commissioner has an arguable case that it was open to treat a family trust election as having been made.**

[...]

40 We are satisfied that there is an arguable case that the form published by the Commissioner for the making of a family trust election does not need to be given to the Commissioner and that it is sufficient if the Commissioner is notified that a family trust election in the approved form has been made. Particularly in the context of a self-assessment regime, **there is an arguable case that by completing the tax return forms published by the Commissioner in a manner consistent with the making of a family trust election, the Commissioner may be notified that a family trust election in the approved form has been made by a trustee.**

Having regard to the Court's comments and the lack of any Part IVA proceedings on the issue, taxpayers need to take particular care with not making possible misstatements that could result in the Commissioner putting forward a particular proposition that becomes difficult to disprove where all you have is the evidence of absence. What is troubling is the Full Federal Court's comments where they said that "*it was open to treat a family trust election as having been made*" in light of the statements that were made in the trust's tax returns. Nevertheless, this is not a settled matter, and the primary judge in the Primary Decision acknowledged that this fundamental issue as to whether a valid FTE existed or not ought to be determined through Part IVC proceedings.

***Contains a declaration signed by a person or persons as the form requires (para 388-50(1)(b))***

The second requirement for being an "approved form" is that the form must contain a declaration signed by the person(s) as the form requires.<sup>27</sup>

The currently approved form for making FTEs, i.e. "*Family trust election, revocation or variation 2024*", provides for the following declaration [emphasis added]:

I/We declare that all the information required has been provided on this form and any attachments to this form, and that the information provided is true and correct in every detail, and that the trustee(s) is/are making, varying or revoking a family trust election, the details of which are set out above, for the purposes of section 272-80 of Schedule 2F to the ITAA 1936 and that the trustee(s) **is/are able to make**, vary or revoke the election in accordance with that section.

<sup>27</sup> See also section 388-75 of Sch 1 to the TAA.

The form requires that this declaration be signed by the trustee of the trust, or if the trustee is a company, the public officer of the corporate trustee.

Unlike some other forms or documents, the declaration provided for in the “*Family trust election, revocation or variation 2024*” cannot be delegated to the taxpayer’s agent for signing. This is made clear by the form approved by the Commissioner.

Again, arguably a lot can turn on this requirement where the existence of an FTE is in dispute because of a suggestion that an FTE was made (for example, where it is indicated in the trust tax return). Where the Commissioner argues in these disputes that the information in the trust tax return is sufficient to constitute the making of an FTE, it seems to us that this requirement in section 388-50(1)(b) has not been properly addressed, specifically where the tax return has been lodged electronically and the tax agent signs the trust tax return on the trustee’s behalf (without the trustee actually signing).<sup>28</sup> Should the trustee be a company (which it is often is), failure of the public officer to sign the particular type of declaration required by the FTE form seems to us to be a clear failure to satisfy this second requirement for being an “approved form”. Whilst we have seen this can be a disputed issue in practice, it seems to us to be quite an unambiguous requirement.

***Contains the information that the form requires (para 388-50(1)(c))***

The third requirement for being an “approved form” is that the document must contain the information the document requires and any further information, statement or document as the Commissioner requires, whether in the document or otherwise.

The information required by the “*Family trust election, revocation or variation 2024*” is outlined at Section A of the form. This includes the name and address of the trust, the name and address of the person who is to be the specified individual in respect of the FTE, and the specified income year from which the FTE is to commence. To us, it is unclear whether the omission of any one or more of these details can invalidate the FTE.

***Given in the manner that the Commissioner requires (should it be a requirement to be given to the Commissioner?) (para 388-50(1)(d))***

The fourth requirement for being an “approved form” only needs to be satisfied if the document in question is required to be given to the Commissioner.

As noted above, prior to 1 April 2005, there was a requirement for the FTE to be furnished to the Commissioner. However, this requirement was removed under the *Tax Laws Amendment (2004*

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<sup>28</sup> See paragraph 388-75(3)(b).

*Measure No.7*) Act 2005. The explanatory memorandum to the relevant bill (i.e. *Tax Laws Amendment (2004 Measure No.7)* Bill 2004) said the following:

“8.7 Current subsection 272-80(2) of Schedule 2F outlines the conditions for making a family trust election. The subsection states that a trust must make a family trust election in its income tax return for the specified year. Where the trustee is not required to furnish a return for that year, the family trust election must be written in an approved form; and be submitted within two months after the end of the income year specified.

8.8 Current subsection 272-80(2) is repealed so that the only condition on making a family trust election is that it must be in writing and in the approved form. The approved form is defined in section 388-50 of Schedule 1 to the Taxation Administration Act 1953. [Schedule 8, item 1, subsection 272-80(2)]”.

Again, this requirement can become significant where the existence of an FTE is in dispute due to a suggestion that an FTE was made (e.g. in the trust’s tax return). The Commissioner may try to argue, as we have seen in practice, that despite there not being an FTE lodged with the Commissioner, lodgement of the FTE is not itself a requirement that needs to be satisfied for the making of a valid FTE.

For completeness, it is important to always bear in mind that this fourth requirement (or lack of requirement in the case of FTEs) does not displace the other strict requirements in paragraphs 388-50(1)(a)-(c) for an FTE to be in the “approved form”.

### **3.4.3 Requirement 3 – Specifying an income year.**

Whilst the statutory language contained in Sch 2F to the ITAA36 does not seem to confer any positive obligation on the trustee to specify an income year, it is implied by the paragraphs in section 272-80 of Sch 2F (in particular, subsection 272-80(1)). In addition to this, the Commissioner’s current “approved form” (i.e. “*Family trust election, revocation or variation 2024*”) makes clear that an income year must be specified (see section 6 of Section A of the form).

The trustee that is making the FTE may specify an earlier income year for which the election is to apply if:<sup>29</sup>

- a) at all times from the beginning of the specified income year up until 30 June in the income year before the one during which the election is made, the trust passes the “family control test” (discussed below); and
- b) any distributions of, or conferrals of present entitlements to, income or capital of the trust have been made to, or on, the test individual or members of the test individual’s family group.

Where the requirements in (a) and (b) have not been satisfied but the FTE still purports to commence from an earlier income year, there is uncertainty as to whether the FTE is, in fact, valid. Arguably, the

<sup>29</sup> ITAA36, Sch 2F, s 272-80(4A).



requirement to specify an income year has not been satisfied properly in this instance and there has been a direct breach of section 272-80 of Sch 2F such that an FTE has **not** been validly made. Support for this proposition is contained in *Advanced Holdings Pty Ltd (as trustee for Demian Trust) v Commissioner of Taxation* [2020] FCA 1479 (**Advanced Holdings**).<sup>30</sup> Amongst other issues, the Federal Court in *Advanced Holdings* considered whether an FTE was validly made where the trustee specified an earlier income year. In that case, the family trust election was lodged in February 2018 and stated to apply retrospectively to the 2007 income year. The Commissioner accepted that the Demian Trust passed the “family control test” at all times during the period from 1 July 2006 to 30 June 2017 and thereby satisfied paragraph 272–80(4A)(a). However, the Commissioner did not accept that the Demian Trust satisfied the second element of the test in subparagraph 272–80(4A)(b) of Sch 2F.

The issue in the case was an evidentiary issue. That is, in arguing that the requirement in paragraph 272–80(4A)(b) was satisfied, the applicants contended that resolutions dated 11 June 2013, 30 June 2014 and 30 June 2016 (which were all said to be ineffective) were the only resolutions purportedly made by the trustee of the Demian Trust in relation to the trust law income of the Demian Trust and there had been no resolutions to confer entitlements to, or distribute capital of, the Demian Trust. Whilst the Federal Court did not agree that these were the only resolutions, and that there was also a 2015 resolution (which was also said to be ineffective), the fact that they were all ineffective meant that the default beneficiaries were presently entitled to the trust law income of the Demian Trust for those income years. As it was not disputed by the Commissioner that each of the default beneficiaries were entities in Mr Demian’s “family group”, and there was no evidence of any other distributions, the Federal Court concluded that paragraph 272–80(4A)(b) would be satisfied and therefore the requirements in section 272-80 for the making of an FTE were satisfied. Therefore, it was said that the FTE was effective from the 2007 income year.

### 3.4.4 Requirement 4 – The “family control test”

#### **For trusts**

For trusts that are making an FTE or an IEE (which is discussed later in this paper), the “family control test” is passed where a particular “group” of people (see defined group below) satisfy any of the following:<sup>31</sup>

- a) the group has the power, by means of the exercise of a power of appointment or revocation or otherwise, to obtain beneficial enjoyment (directly or indirectly) of the capital or income of the trust;

<sup>30</sup> This case was later appealed to the Full Federal Court, but the issue of FTEs was not specifically appealed.

<sup>31</sup> ITAA36, Sch 2F, s 272-87(2).

- b) the group is able (directly or indirectly) to control the application of the capital or income of the trust;
- c) the group is capable, under a scheme, of gaining the beneficial enjoyment in point (a) or the control in point (b);
- d) the trustee of the trust is accustomed, under an obligation or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the group;
- e) the group is able to remove or appoint the trustee of the trust;
- f) the group has more than a 50% stake in the income or capital of the trust; or
- g) persons in the group are the only persons who, under the terms of the trust, can obtain the beneficial enjoyment of the income and capital of the trust.

### ***Who is the “group”?***

The “group” consists of:<sup>32</sup>

- the test individual;
- one or more members of the test individual’s “family” (as defined<sup>33</sup>); or
- the test individual **and** members of the test individual’s “family” (as defined<sup>34</sup>).

In relation to the tests outlined in paragraphs (a) to (g) above, such tests can be satisfied by a “group” of persons consisting of:<sup>35</sup>

- the test individual and/or one or more members of the test individual’s “family” (as defined<sup>36</sup>); and
- one or more legal or financial advisors to the test individual or to a member of the test individual’s “family” (as defined<sup>37</sup>).

In relation to the test outlined in paragraph (f) above, such a test can be satisfied by a “group” of persons consisting of:<sup>38</sup>

- the trustees of one or more family trusts, provided the test individual is also the test individual in respect of the other family trusts; or
- such trustees and the test individual and/or one or more members of the test individual’s “family” (as defined<sup>39</sup>).

<sup>32</sup> ITAA36, Sch 2F, s 272-87(1)(a).

<sup>33</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

<sup>34</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

<sup>35</sup> ITAA36, Sch 2F, s 272-87(1)(b).

<sup>36</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

<sup>37</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

<sup>38</sup> ITAA36, Sch 2F, s 272-87(1)(c).

<sup>39</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

**For companies or partnerships**

For companies or partnerships proposing to make an IEE (discussed in this paper below), the “family control test” is passed where a “group” of people have (between them), directly or indirectly, and for their own benefit, fixed entitlements to a greater than 50% share of the income or a greater than 50% share of the capital of the company or partnership.<sup>40</sup>

The “group” for the purposes of a company or partnership proposing to make an IEE consists of:<sup>41</sup>

- the test individual;
- one or more members of the test individual’s “family” (as defined<sup>42</sup>);
- the trustees of one or more family trusts, provided the test individual is specified in the FTEs of each of those family trusts; or
- any persons covered by any combination of the three abovementioned bullet points.

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<sup>40</sup> ITAA36, Sch 2F, s 272-87(3).

<sup>41</sup> ITAA36, Sch 2F, s 272-87(3).

<sup>42</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

## 4. Who is the “family group” of the test individual?

If a trust that has made an FTE, or an interposed entity that has made an IEE (discussed below), makes a distribution of, or confers a present entitlement to, income or capital to a person or entity that is **not** the test individual or a member of the test individual’s “**family group**”, such a distribution or present entitlement will attract FTDT.

### *Who is the family group of the test individual?*

The “family group” of the test individual is limited to the following persons and entities **in relation to a distribution, or conferral of a present entitlement, of income or capital**:

- a) a member of the test individual’s “family” (as defined in section 272-95 and discussed below);<sup>43</sup>
- b) a person who was a spouse of either the test individual or of a member of the test individual’s “family” (as defined in section 272-95 and discussed below) before a “breakdown in the marriage or relationship”;<sup>44</sup> and
- c) a person who was the spouse of the test individual or of a member of the test individual’s “family” (as defined in section 272-95 and discussed below) immediately before the death of the test individual or member of the test individual’s family, and is now the spouse of a person who is not a member of the primary individual’s family;<sup>45</sup>
- d) a person who was a child of the spouse of either the test individual or of a member of the test individual’s “family” (as defined in section 272-95 and discussed below) before a breakdown in the marriage or relationship of the test individual or the member of the test individual’s “family”;<sup>46</sup>
- e) the trust in respect of which the FTE was made;<sup>47</sup>
- f) a trust with the same primary individual in its FTE;<sup>48</sup>
- g) a company, partnership or trust that has made an IEE but only to the extent that the IEE was in force when the conferral takes place or the distribution is made;<sup>49</sup>
- h) a company, partnership or trust where any of the following have fixed entitlements directly or indirectly, and for their own benefit, to all of the income and capital of the company, partnership or trust:<sup>50</sup>
  - i. the test individual;

<sup>43</sup> ITAA36, Sch 2F, s 272-90(2).

<sup>44</sup> ITAA36, Sch 2F, s 272-90(2A)(a).

<sup>45</sup> ITAA36, Sch 2F, s 272-90(2A)(b)(i).

<sup>46</sup> ITAA36, Sch 2F, s 272-90(2A)(c).

<sup>47</sup> ITAA36, Sch 2F, s 272-90(3).

<sup>48</sup> ITAA36, Sch 2F, s 272-90(3A).

<sup>49</sup> ITAA36, Sch 2F, s 272-90(4).

<sup>50</sup> ITAA36, Sch 2F, s 272-90(5).

- ii. one or more members of the test individual's "family" (as defined in section 272-95 of Sch 2F); or<sup>51</sup>
- iii. the trustees of one or more family trusts, provided the test individual is specified in the FTE of each of those family trusts.<sup>52</sup>
- i) certain funds;<sup>53</sup>
- j) certain tax-exempt bodies;<sup>54</sup>
- k) certain institutions where there are no living beneficiaries;<sup>55</sup>
- l) the deceased estates of the test individual and the members of the test individual's family if the test individual and all the members of his or her family are deceased at a certain time.<sup>56</sup>

It is particularly important to always keep in mind that the "family group" (as outlined above) includes the "family" (as defined in section 272-95 of Sch 2F – see below) but is not synonymous with the "family".<sup>57</sup> Each of these phrases are used independently throughout Sch 2F to the ITAA36 and should be carefully considered before any application of the rules.

Say, for example:

- you have a company ("**Company ABC**") which is 100% owned by another company ("**Company XYZ**");
- Company XYZ has an IEE in place in respect of the test individual specified in the FTE for Trust A ("**Individual 1**"); and
- Company XYZ is 51% owned by Individual 1 and 49% owned by an outsider to Individual 1's "family group",

the question of whether Company ABC is a member of Individual 1's "family group" turns on subsection 272-90(5) of Sch 2F (assuming Company ABC has not made an IEE).

As noted above, pursuant to subsection 272-90(5), a company, partnership or trust is a member of the test individual's family group where any of the following have fixed entitlements directly or indirectly, and for their own benefit, to **all** of the income and capital of the company, partnership or trust:<sup>58</sup>

- the test individual;
  - one or more members of the test individual's "**family**" (as defined in section 272-95 of Sch 2F);
- or

<sup>51</sup> See also ATO ID 2003/164 (Withdrawn).

<sup>52</sup> See also ATO ID 2004/876 (Withdrawn).

<sup>53</sup> ITAA36, Sch 2F, s 272-90(6).

<sup>54</sup> ITAA36, Sch 2F, s 272-90(7).

<sup>55</sup> ITAA36, Sch 2F, s 272-90(8).

<sup>56</sup> ITAA36, Sch 2F, s 272-90(9).

<sup>57</sup> See Note under s 272-90(2A) of Sch 2F to the ITAA36.

<sup>58</sup> ITAA36, Sch 2F, s 272-90(5).

- the trustees of one or more family trusts, provided the test individual is specified in the FTE of each of those family trusts.

In this case, whilst Company XYZ is a member of Test individual 1's **"family group"** (by virtue of having made an IEE) and has fixed entitlements (directly), and for its own benefit, to all of the income and capital of Company ABC, Company XYZ is **not** a member of Test Individual's **"family"** (which is what needs to be satisfied for the purposes of subsection 272-90(5)). Further to this, Individual 1 only owns 51% of Company XYZ so therefore does not own (even on an indirect basis) all the fixed entitlements to all of the income and capital of Company ABC. Therefore, Company ABC is not a member of Individual 1's "family group" (unless it makes an IEE, which it should be capable of doing).

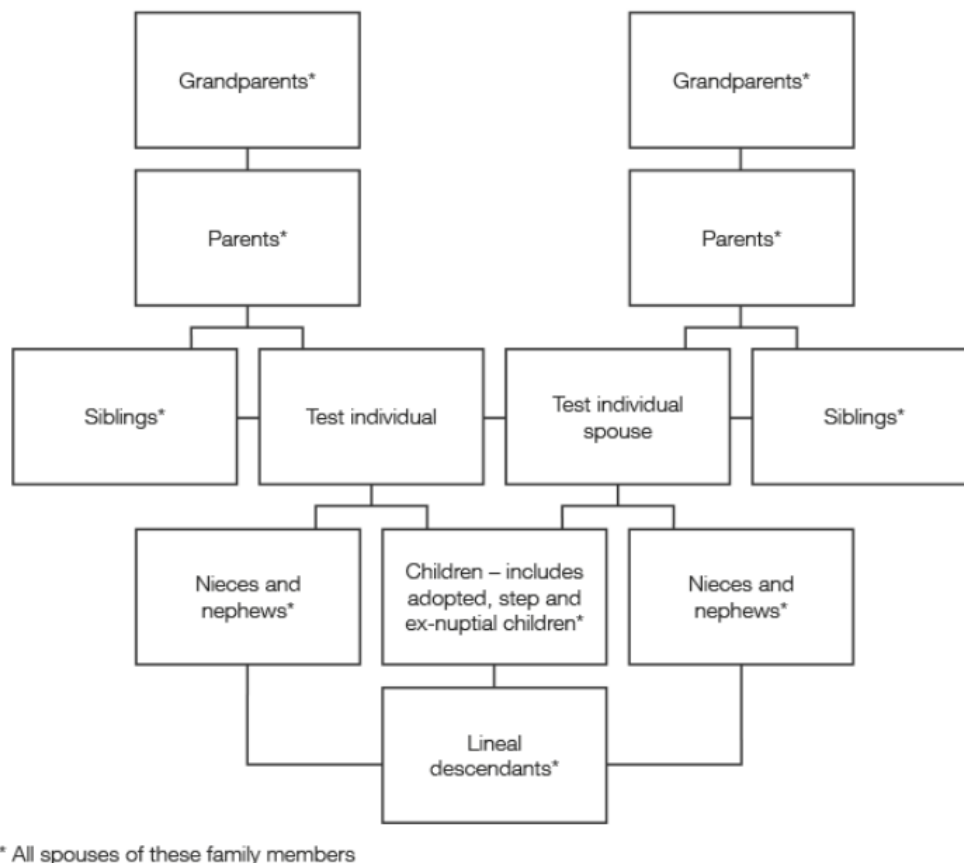
For completeness, it is also useful to consider the "Note" in section 272-90(2A) of Sch 2F to the ITAA36 (which deals with certain former family members specifically says, *"the fact that a person is a member of the family group of an individual under this subsection does not mean that the person is a member of the individual's family under section 272-95"*).

This Note reinforces the point that "family" is not synonymous with "family group" under the FTE provisions.

## 4.1 Who is the "family" of the test individual?

The test individual's "family" is comprised of natural persons only, and includes the test individual's spouse, any parent of the test individual, any grandparent of the test individual, any brother or sister of the test individual, and child of the test individual, and other persons shown in the following diagram:<sup>59</sup>

<sup>59</sup> A "spouse" of an individual is defined in s 995-1 of the ITAA97 to include an individual of the same sex or a different sex with whom the test individual is in a relationship registered as a prescribed kind of relationship under a State or Territory law and an individual who lives with the test individual on 'a genuine domestic basis in a relationship as a couple'.



Importantly:

- “Spouse” is defined in section 995-1(1) of the ITAA97 and includes same sex couples.
- “Child” is defined in section 995-1(1) of the ITAA97 and includes the test individual’s adopted child, stepchild, exnuptial child, a child of the individual’s spouse and someone who is a child of the individual within the meaning of the *Family Law Act 1975*.
- A person does not cease to a family member **merely** because of the death of any other family member.<sup>60</sup>

It is also important to keep in mind that section 960-255 of the ITAA97 may also be relevant in determining whether a person falls within the scope of the test individual’s “family”.<sup>61</sup>

Broadly speaking, section 960-255 of the ITAA97 treats relationships traced to, from and through a stepchild, adopted child, or exnuptial child relationship in the same way as if the relationship were a “natural child relationship”. Section 960-255 provides the following example:

Clare's stepfather Frank has a sister Angela. This Act applies as if Angela were Clare's aunt because Clare is defined to be Frank's child. That is, Clare's relationship to Angela is determined on the basis that Clare is Frank's natural child.

<sup>60</sup> ITAA36, sub-s 272-95(2).

<sup>61</sup> Refer to Note 2 under subsection 272-95(1) of Sch 2F of the ITAA36.

What this means is that someone such as a step-sibling of the test individual will generally form part of the test individual's "family" for the purposes of the FTE rules.

Separately, section 960-255 of the ITAA97 also treats relationships traced to, from and through a "spouse" of another individual where that individual is a "spouse" as defined in subsection 995-1 of the ITAA36 in the same way as if the individual were legally married to the other individual. Section 960-255 provides the following example:

George and Angelika are not legally married but live together on a genuine domestic basis in a relationship as a couple. This Act treats them as part of each other's family.

What is interesting (and somewhat perplexing) is that "Note 2" in section 272-95 of Sch 2F to the ITAA36 (which defines who is the "family") only makes reference to the possible application of section 960-255 of the ITAA97 for the purposes of determining whether a "parent", "grandparent", "brother" or "sister" of the test individual or the test individual's spouse is within the "family group" of the test individual.<sup>62</sup> There is no note or other specific statutory reference in the FTE rules to the possible application of section 960-255 of the ITAA97 for the purposes of determining whether other persons, such as nephews and nieces, fall within the "family group" of the test individual. Therefore, it is questionable whether a step-niece of the test individual, for example, would fall within the test individual's family group. We believe a step-niece would be part of the step-uncle's family group, on the basis that the application of section 960-255 essentially has the effect that:

- (a) the step relationship between the step niece and her stepfather or stepmother (whoever is the sibling of the test individual) is treated as a "natural relationship" for the purposes of subsection 272-95(1) of Sch 2F to the ITAA36; and
  - (b) all relationships "**traced to, from or through**" the step relationship between the step niece and her stepfather or stepmother, including her relationship with her step uncle will also be treated as a "natural relationship" for the purposes of subsection 272-95(1) of Sch 2F to the ITAA36.
- Similar analysis was provided by the Commissioner in Edited Private Advice 1012872697591.

## 4.2 Companies, partnerships or trusts that make an IEE

A company, the partners in a partnership or a trustee of a trust may make an IEE to be included in a test individual's "family group" after a specified day in a specified income year so that distributions to that company, partner or trustee will not attract FTDT. Before 24 September 2007, there was no specific provision in the FTE provisions to include in the "family group" of a test individual (being a person who is specified in respect of one family trust) **another** family trust with the same specified individual. Accordingly, it became common practice for IEEs to be put in place for all entities so as to make sure that the "other" family trust fell within the "family group" of the individual specified in respect of the first-

<sup>62</sup> Refer to Note 2 under subsection 272-95(1) of Sch 2F of the ITAA36.



mentioned family trust. However, with the insertion of subsection 272-90(3A) under the *Tax Laws Amendment (2007 Measures No 4) Bill 2007*, trusts such as the second-mentioned trust can now be included in the “family group” of the person specified in the FTE of the first-mentioned family trust, without the need to make an IEE.<sup>63</sup>

From what we have seen, it seems that the common practice of making IEEs has not changed (even where there is really no need for an IEE). This, at times, can be dangerous as an IEE cannot be varied (say, for example, when shareholders in a company that has an IEE in place wish to sell all their shares in the company to an outsider, or say, for example, the company wishes to make a distribution to an outsider of the family group). In any event, an IEE can be revoked if certain requirements are met (see **Section 5** below for revoking IEEs).

The following requirements must be satisfied in order to make a valid IEE:

- the IEE must contain such information as is requested by the Commissioner;<sup>64</sup>
- the IEE must be in writing and in the approved form;<sup>65</sup>
- the IEE must specify an income year and specify a specific date within that income year for which the IEE is to apply from (though an earlier income year can be specified if certain conditions are met – see below);<sup>66</sup> and
- the company, partnership or trust must pass the “family control test” at the end of the income year (discussed above).<sup>67</sup>

If the election is not revoked, the IEE will be in force at all times from the beginning of the specified day in the IEE (unless the company, partnership or trust does not pass the “family control test” at all times in the specified income year, in which case the IEE will be in force from the later of the beginning of the specified day and the earliest time from which the company, partnership or trust pass the family control test for the remainder of the specified income year).

An IEE will continue to exist even if the family trust to which it was made ceases to exist.<sup>68</sup>

The company, partners or trustee that is making an IEE can make multiple IEEs in respect of different trusts that have FTEs in place, but only if the individual specified in each of the FTEs is the same.<sup>69</sup> Notwithstanding this, you can disregard an IEE which has been revoked for this purpose.<sup>70</sup>

<sup>63</sup> See also the EM to the *Tax Laws Amendment (2007 Measures No.4) Bill 2007*, page 206.

<sup>64</sup> ITAA36, Sch 2F, s 272-85(3).

<sup>65</sup> ITAA36, Sch 2F, s 272-85(2).

<sup>66</sup> ITAA36, Sch 2F, s 272-85(1). See also section 6 of “Interposed entity election or revocation” (2023).

<sup>67</sup> ITAA36, Sch 2F, s 272-85(4).

<sup>68</sup> ATO ID 2013/21.

<sup>69</sup> ITAA36, Sch 2F, s 272-85(7). See also ATO ID 2002/1082 (Withdrawn).

<sup>70</sup> ITAA36, Sch 2F, s 272-85(8).

#### 4.2.1 Specifying an earlier date and income year for the IEE

The company, partners or trustee that are making the IEE may specify an income year before the one in which the election is made if:<sup>71</sup>

- a) at all times from the beginning of the specified income year up until 30 June in the income year before the one during which the election is made, the company, partnership or trust passes the “family control test” (discussed above); and
- b) in the case of a trustee, any distributions of, or conferrals of present entitlements to, income or capital of the trust have been made to, or on, the test individual or members of the test individual’s “family group”.

Similar to FTEs, the approved form for IEEs, “*Interposed entity election or revocation 2024*”, requires at Section A that the specific “date” and “income year” for the IEE to be specified (see item 7). The “*Interposed entity election or revocation 2024*” even goes further to say, “**Note that a day must be specified for an election to be made**”. Therefore, again, like with FTEs, it is arguable that in instances where a company, the partners or trustee specifies an earlier date and income year for the IEE, but the requirements in either (a) or (b) have not been satisfied, that an IEE has not been validly made. Not only have the requirements in (a) or (b) been specifically breached, but the result is that there is no accurate date and income year specified in relation to the IEE for the purposes of Section A of the *Interposed entity election or revocation 2024*.

A copy of the “*Interposed entity election or revocation 2024*” is annexed to this paper.

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<sup>71</sup> ITAA36, Sch 2F, s 272-85(4A).

## 5. Revoking FTEs or IEEs

### 5.1 Revoking FTEs by trustees of fixed trusts

The trustee of a fixed trust may revoke an FTE if:<sup>72</sup>

- a) at the beginning of the specified income year, the following persons had fixed entitlements, directly or indirectly, and for their own benefit, to all the income and capital of the trust:
  - i. the test individual;
  - ii. one or more members of the test individual's "family" (as defined<sup>73</sup>);
  - iii. the trustee of another family trust (provided the test individual is specified in that trust's FTE); or
  - iv. any combination of the persons referred to in (a)(i) to (a)(iii); and
- b) at a "later time", an individual other than the persons mentioned in (a)(i) to (a)(iii) above holds a fixed entitlement, directly or indirectly, and for his or her own benefit, to any of the income or capital of the trust.

For the trustee of a fixed trust to revoke its FTE, the revocation must be made in the trust's tax return for the income year in which the "later time" (i.e. the time referred to in (b) above) occurs.<sup>74</sup> If the entity's tax return for the year in which the "later time" occurs has already been lodged, the ATO takes the view that the return cannot be amended to include the FTE revocation.<sup>75</sup> If the trustee is not required to lodge a return for that income year, the revocation must be in writing and in the "approved form", must specify the "later time" and must be given to the Commissioner either before the end of the 2 months after the end of the income year in which the "later time" occurs, or such later day as the Commissioner allows.<sup>76</sup>

If the FTE is revoked by the trustee of the fixed trust, it will cease being "in force" from the "later time" specified in the revocation.<sup>77</sup> Therefore, if, after that point in time, the trustee distributes, or confers a present entitlement, of income or capital of the trust to, or on, "outsiders", such distributions or present entitlements will not be subject to FTDT (which is discussed below in **Section 6**). Whilst this may be an obvious "positive" of revoking an FTE, the "negative" is that the trust will lose its status as a "family

<sup>72</sup> ITAA36, Sch 2F, s 272-80(6).

<sup>73</sup> As defined in section 272-95 of Sch 2F to the ITAA36.

<sup>74</sup> ITAA36, Sch 2F, s 272-80(7).

<sup>75</sup> [Family trusts – concessions | Australian Taxation Office \(ato.gov.au\)](https://www.ato.gov.au/family-trusts-concessions)

<sup>76</sup> ITAA36, Sch 2F, s 272-80(7).

<sup>77</sup> ITAA36, Sch 2F, s 272-80(9)(b).

trust” and therefore its ability to potentially benefit from being a “family trust”. Separately, any IEE to which the revoked FTE relates will also cease being “in force”.<sup>78</sup>

## 5.2 Other situations where a trustee of a family trust can revoke an FTE

The trustee of any other family trust (i.e. a family trust that is not a fixed trust) may revoke its FTE **so long as:**

- the revocation is made in respect of an income year that occurs within a certain “time period” (see below); and
- neither the family trust, nor any other entity, has “**benefitted**” because of the FTE (see below).

The time period for revoking the FTE is between:<sup>79</sup>

- the start of the income year specified in the FTE; and
- the end of the 4th income year after the income year specified in the FTE.

By way of example, if the specified income year in respect of the FTE is 2017, the FTE cannot now be revoked (in 2024) as the time period has finished. If, however, the specified income year had been 2022, the FTE may be revoked on or before the lodgement of the trust’s 2026 year tax return.

### ***“Benefitted” because of the FTE***

The family trust or another entity would have “benefitted” because of the FTE where:<sup>80</sup>

- (a) the family trust or the other entity utilised a tax loss at some point after the beginning of the income year specified in the FTE, but before the end of the income year immediately prior to the income year from which the revocation is to be effective, and the family trust or the other entity could not have utilised the tax loss had the FTE not been in force;
- (b) the family trust or the other entity claimed a deduction for bad debts in an income year during the period specified in subparagraph (a) immediately above, and the family trust or the other entity could not have claimed the deduction had the FTE not been in force; or
- (c) a beneficiary of the family trust received a franked distribution indirectly through the trust in an income year during the period specified in subparagraph (a) above and would not have been a “qualified person” in relation to the distribution had the FTE not been in force.

### ***How to make the revocation***

For the trustee to revoke the FTE, the revocation must be made in the trust’s tax return for the income year in which the revocation is to be effective.<sup>81</sup> If the entity’s tax return for the year in which the

<sup>78</sup> ITAA36, Sch 2F, s 272-85(6A)(c) and (d).

<sup>79</sup> ITAA36, Sch 2F, s 272-80(6B).

<sup>80</sup> ITAA36, Sch 2F, s 272-80(6A).

<sup>81</sup> ITAA36, Sch 2F, s 272-80(8).

revocation is to be effective has already been lodged, the ATO takes the view that the return cannot be amended to include the FTE revocation.<sup>82</sup> If the trustee is not required to lodge a return for that income year, the revocation must be in writing and in the “approved form”, must specify the income year from which the revocation is to be effective and must be given to the Commissioner on or before two months after the end of that income year, or such later day as the Commissioner allows.<sup>83</sup>

If the FTE is revoked by the trustee, the FTE will cease being “in force” from the end of the income year immediately prior to the income year from which the revocation is to be effective.<sup>84</sup> The same consequences as set out above in respect of fixed trusts will follow.

### 5.3 Revoking an IEE

An IEE cannot generally be revoked.

An entity can only revoke an IEE if:

- at any time from the IEE’s “commencement date”, the entity was, or becomes, a member of the “family group” of the individual specified in the FTE on the basis that:<sup>85</sup>
  - it is another family trust with the same test individual; or
  - the test individual, one or more members of the test individual’s “family” (as defined in section 272-95 of Sch 2F), and/or the trustees of one or more family trusts with the same test individual, have fixed entitlements directly or indirectly, and for their own benefit, to all of the income and capital of the entity; and
- the revocation is made in respect of an income year that occurs between:<sup>86</sup>
  - either the start of the income year specified in the IEE or the beginning of the income year in which the entity became a member of the “family group” (whichever is the latest); and
  - the end of the 4th income year after the start of the income year specified in the IEE or the beginning of the income year in which the entity became a member of the “family group (whichever is the latest)”.

#### ***How to make the revocation***

For an entity to revoke the IEE, the revocation must be made in the entity’s tax return for the income year in which the revocation is to be effective.<sup>87</sup> If the entity’s tax return for the year in which IEE is to be effective has already been lodged, the ATO takes the view that the return cannot be amended to

<sup>82</sup> [Family trusts – concessions | Australian Taxation Office \(ato.gov.au\).](https://www.ato.gov.au/family-trusts-concessions/)

<sup>83</sup> ITAA36, Sch 2F, s 272-80(8).

<sup>84</sup> ITAA36, Sch 2F, s 272-80(9)(c).

<sup>85</sup> ITAA36, Sch 2F, s 272-85(5A).

<sup>86</sup> ITAA36, Sch 2F, s 272-85(5C).

<sup>87</sup> ITAA36, Sch 2F, s 272-85(6).

include the FTE revocation.<sup>88</sup> If the entity is not required to lodge a return for that income year, the revocation must be in writing and in the “approved form”, must specify the income year from which the revocation is to be effective and must be given to the Commissioner on or before 2 months after the end of that income year, or such later day as the Commissioner allows.<sup>89</sup>

If the IEE is revoked, the election will cease being “in force” from the end of the income year immediately prior to the income year from which the revocation is to be effective.<sup>90</sup>

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<sup>88</sup> [Family trusts – concessions | Australian Taxation Office \(ato.gov.au\)](#).

<sup>89</sup> ITAA36, Sch 2F, s 272-85(6).

<sup>90</sup> ITAA36, Sch 2F, s 272-85(6A).

## 6. What happens when things go wrong? FTDT

Whilst there are distinct benefits to making an FTE, the making of an FTE means that the trustee of the family trust, and/or the directors, trustee or partners of the interposed entity, have to be careful when making distributions or conferring present entitlements on persons/entities. This is because, where the family trust or interposed entity makes a distribution of, or confers a present entitlement to, income or capital to an “outsider”, such a distribution or present entitlement will attract FTDT. There is no limited period for imposing this tax, so the potential implications can be significant.

FTDT is not an income tax, nor is it something that is “assessed”. It is a “special tax”<sup>91</sup> that is imposed by the *Family Trust Distribution Tax (Primary Liability) Act 1998* where certain conditions in Sch 2F of the ITAA36 are breached. These conditions are:

- a) where a trustee of a trust that has an FTE in force makes a distribution of, or confers a present entitlement to, income or capital to a person who is not the test individual, or a member of the test individual’s “family group” (as defined);<sup>92</sup> or
- b) where a trustee of a trust has an IEE in force (for the trust to be included in the “family group” of a test individual) and the trustee makes a distribution of, or confers a present entitlement to, income or capital to a person who is not the test individual, or a member of the test individual’s “family group” (as defined);<sup>93</sup>
- c) where the partners of a partnership have an IEE in force (for the partnership to be included in the “family group” of a test individual) and the partnership makes a distribution of, or confers a present entitlement to, income or capital to a person who is not the test individual, or a member of the test individual’s “family group” (as defined);<sup>94</sup> and
- d) where a company has an IEE in force (for the company to be included in the “family group” of a test individual) and the company makes a distribution of, or confers a present entitlement to, income or capital to a person who is not the test individual, or a member of the test individual’s “family group” (as defined).<sup>95</sup>

Where the conditions in subparagraphs (a) or (b) above are met, the trustee is liable to pay FTDT under the *Family Trust Distribution Tax (Primary Liability) Act 1998*. If the trustee is a company, the trustee together with any person who was a director of the company at the time of the distribution or conferral, is **jointly and severally liable** to pay the FTDT. Similar treatment applies where the conditions in subparagraphs (c) and (d) are met.

<sup>91</sup> The explanatory memorandum to the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1998*, paragraph 5.43.

<sup>92</sup> ITAA36, Sch 2F, s 271-15.

<sup>93</sup> ITAA36, Sch 2F, s 271-20.

<sup>94</sup> ITAA36, Sch 2F, s 271-25.

<sup>95</sup> ITAA36, Sch 2F, s 271-30.

FTDT is generally due and payable 21 days after the relevant distribution or conferral, however if the distribution or conferral was made before the election was made, the FTDT is due 21 days after the making of the FTE.<sup>96</sup> In special circumstances, the Commissioner may allow for a different due date.<sup>97</sup>

Liability to pay FTDT is not at all contingent on the Commissioner issuing any notice or document of any kind. The exception to this is where the person or entity that would be liable to the FTDT is a non-resident.

The current FTDT rate is 47% of the “amount” or “value” of the income or capital.<sup>98</sup>

Objection rights are contained in subsection 271-90(6) of Sch 2F to the ITAA36. Essentially, persons who are dissatisfied with an FTDT notice may object against it in the manner set out in Part IVC of the TAA.

## 6.1 Exclusions for jointly and severally liable directors

Directors may avoid joint and several liability if:<sup>99</sup>

- they did not take part in any decision to confer the entitlement or make the distribution; and
- if they did take part in such a decision or were aware of the proposed decision to confer the entitlement or make the distribution, they took reasonable steps to prevent the making, or the implementation, of the decision.

Unfortunately, the Commissioner does not provide any guidance (public or private) for what may satisfy this exclusion.<sup>100</sup>

## 6.2 General interest charges

Failure to pay FTDT within 60 days of its due date will result in the imposition of general interest charges (**GIC**).<sup>101</sup>

So, for example, if an FTE is in force and a distribution or conferral of income or capital is made to an outsider after the FTE is made, GIC will be imposed 81 days after the distribution or conferral (assuming the FTDT is due 21 days after the distribution or conferral, which is generally the case).

Remission of the GIC is dealt with in the usual way under Part II of the TAA.<sup>102</sup>

<sup>96</sup> ITAA36, Sch 2F, s 271-75.

<sup>97</sup> ITAA36, Sch 2F, s 271-75.

<sup>98</sup> *Family Trust Distribution Tax (Primary Liability) Act 1998*, s 4.

<sup>99</sup> ITAA36, Sch 2F, s 271-40.

<sup>100</sup> Although one may be informed by the cases that deal with defences to the imposition of director penalties given the similarity in language used regarding the reasonableness of steps taken.

<sup>101</sup> ITAA36, Sch 2F, s 271-80.

<sup>102</sup> TAA, s 8AAG.



## 6.3 Resolving double taxation

To prevent double taxation, where distributions or conferrals of present entitlements are subject to FTDT, and the FTDT is fully paid, certain amounts (as determined through a formula in section 271-105 of Sch 2F to the ITAA36) are **not** assessable income and not exempt income (**NANE**) in the hands of the person or entity that otherwise received the distribution or was conferred the present entitlement. This is pursuant to section 271-105 of Sch 2F to the ITAA36.

Section 170 of the ITAA36 provides an unlimited amendment period for section 271-105 of Sch 2F, which essentially mirrors the unlimited period for imposing the FTDT.

For example, say:<sup>103</sup>

- ABC Co derives \$100,000 of rental income.
- ABC Co pays tax of \$30,000 on the \$100,000 rental income and distributes \$70,000 to its sole shareholder, the 123 Trust, with \$30,000 franking credits.
- 123 Trust has an FTE in place with Individual A as the test individual.
- The trustee of the 123 Trust exercises its discretion to distribute the \$70,000 franked dividend to a distant relative of the test individual who, although is a beneficiary of the 123 Trust, is not part of the test individual's "family" (as defined).
- Because the distribution from the 123 Trust was made to a person outside the test individual's "family group", the trustee (and its directors, if any) will be jointly and severally liable to FTDT pursuant to section 271-15 of Sch 2F of the ITAA36.

On these facts:

- Once the FTDT has been paid, a franked distribution does not flow indirectly to the distant relative, and any entitlement the relative may have otherwise had to the franking credits is not available.
- Similarly, the trustee of the 123 Trust is not assessed on the franking credits and is not entitled to a tax offset with respect to those credits once the FTDT is paid.
- Accordingly:
  - ABC Co paid tax of \$30,000 in respect of the \$100,000 of rental income it derived.
  - The trustee of the 123 Trust then paid FTDT of \$32,900 (i.e. 47% of \$70,000).
  - The distant relative paid **no** tax in respect of the purported distribution made to him or her (by virtue of section 271-105 of Sch 2F of the ITAA36 applying). He or she is also not entitled to any franking credits in respect of the purported distribution.

<sup>103</sup> See, also ATO ID 2004/859.

- Total tax in respect of the \$100,000 of rental income derived by ABC Co is **\$62,900** (63% of \$100,000).

Had the distant relative still been assessed on the distribution (in the absence of section 271-105 of Sch 2F applying), the total tax in respect of the \$100,000 of rental income derived by ABC Co would have been **\$79,900**.

Notwithstanding that 271-105 of Sch 2F seeks to mitigate the risk of double taxation, it is not perfect. As can be seen from the above example, where the franking credits are lost, the effect is double tax on that part of the distribution that has also been subject to company taxation.

## 6.4 What is a “distribution” of income or capital?

***Trust distributions to a beneficiary (which is relevant to consider where you have a family trust that has made an FTE or an interposed trust that has made an IEE)***

A trust distributes income or capital of the trust to a person if it:<sup>104</sup>

- pays or credits the income or capital in the form of money to the person; or
- transfers the income or capital in the form of property to the person; or
- reinvests or otherwise deals with the income or capital on behalf of the person or in accordance with the directions of the person; or
- applies the income or capital for the benefit of the person;

in the person’s capacity as a beneficiary of the trust.

This essentially picks up distributions of income and capital in the “ordinary sense” made in the context of trusts.

***Company distributions to a shareholder (which is relevant to consider where you have an interposed company that has made an IEE)***

A company distributes income of the company to a person if the company pays a dividend or non-share dividend to the person.<sup>105</sup>

A company distributes capital of the company to a person if:<sup>106</sup>

<sup>104</sup> ITAA36, Sch 2F, s 272-45.

<sup>105</sup> ITAA36, Sch 2F, s 272-50(1).

<sup>106</sup> ITAA36, Sch 2F, s 272-50(2).

- it pays or credits money, or transfers property, of the company to the person, where the amount paid or credited, or the amount or value of the property, is debited against an amount standing to the credit of the share capital account of the company;
- the payment crediting the transfer is not the payment of a dividend; and
- a company distributes capital of the company to a person if the company makes a non-share capital return to the person.

This essentially picks up distributions of income and capital in the “ordinary sense” made in the context of companies.

***Partnership distribution to a partner (which is relevant to consider where you have an interposed partnership that has made an IEE)***

A partnership distributes income or capital of the partnership to a person if it:<sup>107</sup>

- pays or credits the income or capital in the form of money to the person; or
- transfers the income or capital in the form of property to the person; or
- reinvests or otherwise deals with the income or capital on behalf of the person or in accordance with the directions of the person; or
- applies the income or capital for the benefit of the person;

in the person's capacity as a partner in the partnership.

This essentially picks up distributions of income and capital in the “ordinary sense” made in the context of partnerships.

***Other distributions***

What is important to always keep in mind is the incredibly broad scope of the term “distribution” under the FTE rules, which not only includes distributions of income and capital in the “ordinary sense” used in the context of trusts and their beneficiaries, companies and their shareholders and partnerships and their partners (which are referred to above), but also covers circumstances where a trustee, company or partnership:<sup>108</sup>

- a) pays (including by way of a loan) or credits money of the entity to the person, or reinvests such money for the person; or
- b) transfers property of the entity to, or allows use of property of the entity by, the person; or
- c) deals with money or property of the entity for or on behalf of the person or as the person directs; or

<sup>107</sup> ITAA36, Sch 2F, s 272-55.

<sup>108</sup> ITAA36, Sch 2F, s 272-60.

- d) applies money or property of the entity for the benefit of the person; or
- e) extinguishes, forgives, releases or waives a debt or other liability owed by the person to the entity,

**to the extent that** the amount paid, credited, reinvested or applied, the value of the property transferred, or the value of the other thing done **exceeds** the consideration given in return.

The words “*to the extent that*” essentially mean that something is only a “distribution” within the extended meaning of “distributes” if the property or other amount that is provided by the trustee, company or partnership exceeds the amount or value of any consideration given in return. In practice, the Commissioner will infer that this is not the case where the relevant transaction:<sup>109</sup>

- occurs on arm’s length terms; and
- is an ordinary incident of a business being carried on by the trust, partnership or company.

In the context of trust distributions, what is especially important to note is that a “distribution” of income or capital for the purposes of the FTE rules can potentially be made to persons who are **not** beneficiaries of the trust. This is made clear from the specific statutory language contained in subsection 272-60 of Sch 2F to the ITAA36, where there is no reference to the capacity of the person to whom the distribution is made. This can be contrasted with subsection 272-45 of Sch 2F to the ITAA36 (which deals with “distributions” in the ordinary sense), which is specifically confined to payments, credits, transfers, reinvestments, dealings or applications of income or capital to persons in their “*capacity as a beneficiary of the trust*”.

The Commissioner in TD 2017/20 provides the following examples of amounts that fall within the extended definition of “distribution”:

#### **Various business-related transactions**

The Rhino Family Trust is a discretionary trust. It has made an FTE and Paul Rhino is the specified individual.

The trust operates a commercial café and a separate catering business.

The trust employs Paul Rhino, his wife Jane and 20 other employees (who are not members of the family group) in the two businesses.

Jennifer is a delivery driver in the catering business. She is permitted to take the trust’s delivery van home after late afternoon deliveries.

Zara is a book-keeper. As there is no office space at the business premises, the trust has given Zara a laptop to facilitate her working from home.

<sup>109</sup> Taxation Determination TD 2017/20.

Roberto, the chef, recently celebrated his 10 year anniversary working at the café. Paul and Jane (as trustees) gave Roberto a cash bonus for his years of service.

Every Friday the café gives a free coffee to the first customer that correctly answers a trivia question written on the café blackboard.

The trust conducts each of these four transactions on arm's length terms.

Each is the giving of a benefit as described in the extended meaning of 'distributes' in subsection 272-60(1) and none of the employees nor the customer contributes directly to the cost of these transactions.

However, in each case it will be inferred that the amount or value of the benefit provided by the trust does not exceed the amount or value of consideration given in return. Each transaction is on arm's length terms and is an ordinary incident of a business that the trust carries on. None is a disguised distribution of trust property outside of the family group.

### **Use of holiday home, not an incident of a business**

The Wonder Family Trust has made an FTE and Diana Prince is the specified individual. The trust owns a holiday home. The holiday home is used by Diana's friends, for no consideration, for four weeks in the year.

This transaction is not on arm's length terms nor an ordinary incident of a business being carried on by the trust. As no consideration is given in return for the use of the property, the full value of that use is a distribution within the extended meaning of 'distributes'.

The Commissioner in ATO ID 2004/162 provides another example of an amount that falls within the extended definition of "distribution":

#### **Facts**

- The trustee of a unit trust has made a family trust election, which is in force.
- A number of units in the trust are held by a superannuation fund.
- The superannuation fund has not made an interposed entity election and is not a member of the family group of the individual specified in the FTE.
- The trustee of the unit trust redeemed all of the units held by the superannuation fund, at a value exceeding the market value of the units at the time of redemption.

#### **Reasons for decision**

The redemption of the units in the unit trust is a "distribution" under ITAA 1936 Sch 2F s 272-60, so that the unit trust is deemed to have made a distribution to the superannuation fund in an amount equal to the amount by which the money paid for redemption of the units exceeds the market value of the units. Accordingly, a distribution of income or capital has been made to an entity that is not a part of the family group and the trustee is liable for FDTD under s 271-15.

## ***Indirect distributions***

A trust distributes income or capital **indirectly** to an individual if it distributes the income or capital to a company, partnership or trust (the “first interposed entity”) interposed between the trust and the individual and:<sup>110</sup>

- the first interposed entity distributes to the individual an amount or property attributable to the income or capital; or
- another company, partnership or trust (the final interposed entity) distributes to the individual an amount or property that is attributable to the income or capital as a result of:
  - the distribution of an amount or property attributable to the income or capital to the final interposed entity by the first interposed entity; or
  - successive distributions of amounts or property attributable to the income or capital to and by any companies, partnerships or trusts interposed between the first interposed entity and the final interposed entity.

The explanatory memorandum to the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1998* states:

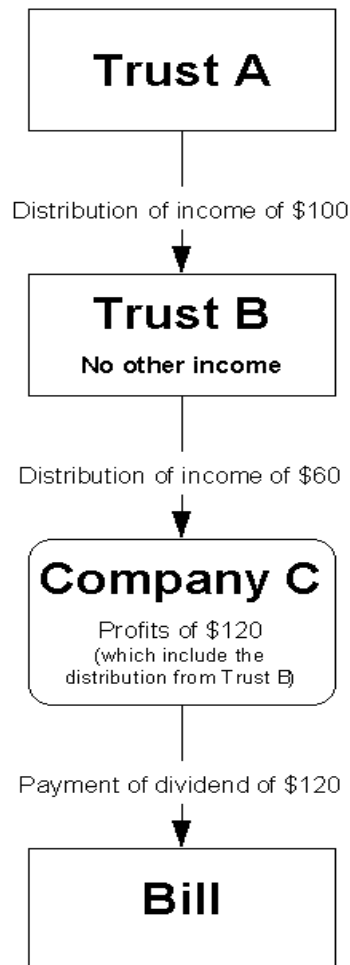
*The definitions of 'distribution of income or capital' in sections 272-45 to 272-60 will also apply to distributions made by interposed entities in the distribution chain.*

The explanatory memorandum provides the following examples:

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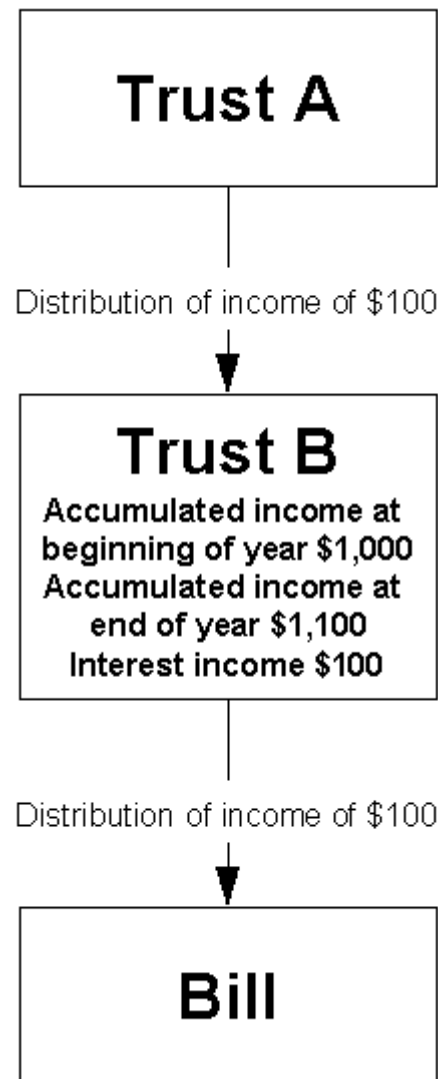
<sup>110</sup> ITAA36, s 272-63 of Sch 2F.

- In an income year Trust A makes a distribution of income indirectly through a chain of entities to an individual, Bill. The amount of distributions of all the distributing entities is shown in the diagram below.



- The explanatory memorandum concludes that “*it would be fair and reasonable in the circumstances to take Trust A as having indirectly distributed \$60 of the distribution to Bill as Trust B only distributed to Company C \$60 of the \$100 distributed from Trust A. Only half of the profits distributed by Company C can be traced back to Trust A.*”

- Separately, as shown in the diagram below, in the income year Trust A makes a distribution of income of \$100 to Trust B. Under the trust deed of Trust B, the trustee has a discretion to distribute only interest derived by the trust from accumulated income of the trust to discretionary beneficiaries. The trustee exercises the discretion to pay the amount of interest income derived by the trust for the income year in favour of Bill.



- The explanatory memorandum concludes that, “it would **not** be fair and reasonable in the circumstances to take Trust A as having indirectly distributed \$100 to Bill as the income that has been distributed to Bill is sourced from the interest income derived by Trust B.”

Unfortunately, there appears to be no guidance (in the explanatory memorandum or from the Commissioner of Taxation) on the interaction between section 272-63 (regarding indirect distributions) and the FTDT measures in sections 271-15 to 271-30 of Sch 2F to the ITAA36.



## 7. Case Studies

### 7.1 When there is a breakup in the family

Take the following example:

- Individual A is the specified individual for Trust A. Trust A was established in 2014 and the trustee of the trust made an FTE in the following year.
- In June 2019, Individual A and his wife separated and filed for divorce, with the divorce finalised by July 2021.
- In June 2022, the trustee of Trust A exercised its discretion to distribute \$100 to the wife.

Will FTDT apply to the trustee of the trust? If yes, when will it be due and payable? When will GIC start to accrue?

Subsection 272-90(2A)(a) of Sch 2F to the ITAA36 makes clear that a person who was a spouse of either the test individual or of a member of the test individual's family before a breakdown in the marriage or relationship is a member of the test individual's "family group". *"Breakdown in the marriage or relationship"* is defined in section 272-140 of Sch 2F to the ITAA36 to occur if the individual is living with another individual on a genuine domestic basis in a relationship as a couple (whether the individuals are the same sex or different sexes and whether legally married or not) and ceases to do so.

Whilst the effect of subsection 272-90(2A)(a) of Sch 2F to the ITAA36 does not necessarily mean that the ex-wife is included in the test individual's "family" (as defined in subsection 272-95 of Sch 2F), it means that the ex-wife is included in the test individual's "family group" (as defined in subsection 272-90 of Sch 2F) and therefore the distribution to her in June 2022 should not attract FTDT.

### 7.2 When there is a death in the family

Take the following example:

- Trust A was established in 2014 and the trustee of the trust made an FTE in the following year, with Individual A as the specified individual.
- Individual A and Individual B were married.
- In 2019, Individual A passed away.
- In June 2022, the trustee of Trust A exercised its discretion to distribute \$100 to Individual B.
- Individual B has not remarried.

Will FTDT apply to the trustee of Trust A because of the distribution to Individual B? If yes, when will it be due and payable? When will GIC start to accrue?

The question here is whether Individual B is a member of Individual A's "family group" at the time that Individual B received the distribution from Trust A.

Members of a "family group" are exhaustively defined at section 272-90 of Sch 2F. Relevantly, and as noted above, subsection 272-90(2) of Sch 2F says that a member of the primary individual's "family" is a member of the primary individual's "family group" in relation to the relevant conferral or distribution. The term "family" is exhaustively defined at section 272-95 of Sch 2F and includes a "spouse" of the test individual.<sup>111</sup>

Section 995-1 of the ITAA97 defines the "spouse" of an individual to be:

- another individual (whether of the same sex or a different sex) with whom the individual is in a relationship that is registered under a State law or Territory law prescribed for the purposes of section 2E of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that section; and
- another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple.

Having regard to the definition of "spouse" in section 995-1 of the ITAA97, upon the death of Individual A, Individual B will no longer be a "spouse" of Individual A. Notwithstanding that Individual B will no longer be a "spouse" of A, this is as a **mere** consequence of death.

To this end, Individual B should still be a member of Individual A's "family" (and therefore "family group") at the time of the relevant distribution by virtue of subsection 272-95(2), which states: *"A person does not cease to be a family member **merely** because of the death of any other family member"*.

Notwithstanding this, the Commissioner<sup>112</sup> does place a focus on the word "**merely**" and to the extent that there are other factors which have resulted in a spouse no longer being a "spouse" other than simply death, then the risk is that that person will fall outside the family group.

For completeness, we note that subsection 272-90(2A)(b) of Sch 2F to the ITAA36 specifically ensures that widowers or widows of the test individual, or members of the test individual's "family", remain in the "family group" of the test individual if the widow or widower has become the spouse of an "outsider". There is no mention in that subsection to widows or widowers who have not remarried, and therefore that specific subsection has no application here. Nevertheless, it is interesting to note that had Individual B remarried after Individual A's passing (but before the distribution in June 2022

<sup>111</sup> ITAA36, Sch 2F, section 272-95(1)(d).

<sup>112</sup> See Edited Private Advice 1051629761894.

was made), then Individual B would still be a member of Individual A's "family group" at the time of the relevant distribution. In this scenario, it is arguably not just **mere** death that would otherwise prevent the widow or widower from being in the deceased's "family". Therefore, the widow or widower would not be included in the "family" of the deceased's family group but would be included in the "family group" of the deceased by virtue of subsection 272-90(2A)(b) of Sch 2F.

Say the trustee of Trust A later exercised its discretion to distribute another \$100 to the estate of the late Individual A. If that were the case, would the deceased estate be included in Individual A's family group, and would FTDT apply?

Subsection 272-90(9) of Sch 2F of the ITAA36 says that the deceased estates of the test individual and of the members of the test individual's family group will be included in the family group of the test individual at the time of a conferral or distribution if the test individual and all the members of his or her family are dead when the conferral or distribution takes place. Seeing as Individual B is still alive, that subsection has no application here. Therefore, so long as the deceased estate has made an IEE in respect of Trust A and Individual A, the distribution to the FTDT will not trigger FTDT. For completeness, we note that the deceased estate cannot make an FTE in respect of Individual A as Individual A is no longer alive. Despite the ability to make an IEE, the executors would need to closely scrutinise the Will and determine who the beneficiaries are as it may be that some of the beneficiaries entitled to benefit under the estate would not be within the "family group" of the deceased individual (for example, friends or distant relatives). The analysis in this paragraph equally applies where you have a testamentary trust.

### **7.3 When there is a need to consider either the sale of the business assets of a company or the sale of the shares**

Take the following example:

- Company A has an IEE in force for the company to be included in the "family group" of Individual A (who is the person specified in the FTE of Trust A). This IEE was originally put in place by the company's accountant as a matter of practice.
- Both the FTE and the IEE were made in 2021.
- Company A is owned 100% by Individual A.
- Company A carries on a business of selling widgets.
- In 2024, Individual A has been approached by the directors of Company B to sell all his shares in Company A to Company B. Company B is not included in the family group of Individual A.

If the shares in Company A were sold to Company B, will FTDT apply to any subsequent distribution made by Company A to Company B? If yes, when will it be due and payable? When will GIC start to accrue?

The answer to this is yes. Unless Company B has made an IEE (which it can't if it does not pass the "family control test") to be included in the family group of Individual A, any distribution that is made to Company B will attract FTDT. GIC will start to accrue 21 days after the relevant distribution.

If, however, the business (not the shares) of Company A was instead sold to Company B, then there wouldn't be an issue for FTE purposes, **provided** the value of the business does not exceed the amount or value of any consideration given in return for the business (see subsection 272-60(2) of Sch 2F to the ITAA36). As noted above, the Commissioner will infer that this is not the case where the relevant transaction was done on arm's length terms and was an ordinary incident of a business being carried on by the company in question.

Whether something is an "ordinary incident of a business being carried on" is a question of fact. An examination of a person or entity's ordinary business transactions and activities would be necessary to determine this (see Edited Private Advice 1051332153980).

Clearly the sale of a business would not necessarily be an "ordinary incident of the business being carried on by" Company A. However, it ought not matter so long as the parties to the transaction are negotiating on arm's length terms.

For completeness, we note that seeing as Company A is owned 100% by Individual A, there was actually no need for Company A to have an IEE in the first place (as Company A would have been a member of Individual A's "family group" by virtue of section 272-90(5) of Sch 2F in any event). Therefore, the directors of Company A may want to consider revoking the IEE before the impending sale if it has been less than four years since the start of the income year specified in the IEE or the start of the income year in which the entity became a member of the "family group" (whatever is the latest). This way, Individual A has more flexibility in deciding whether to sell the business assets of Company A or his shares in Company A. However, if time has elapsed to revoke the IEE, then this is a warning of the perils of putting in place unnecessary IEEs.

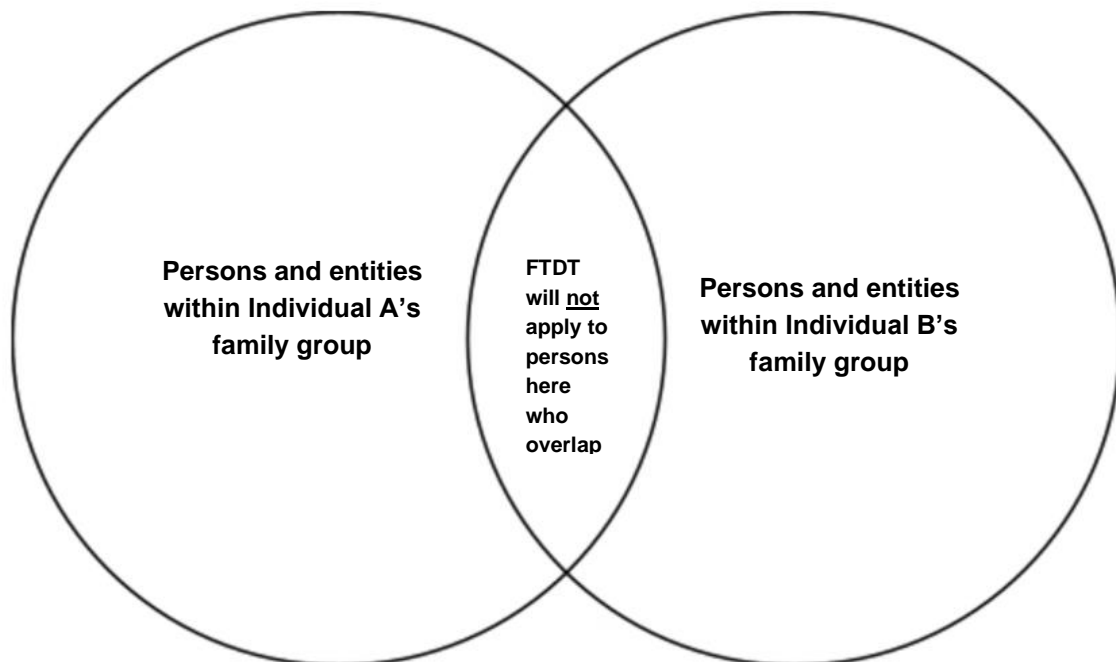
## **7.4 When an entity has made both an FTE in respect of one test individual and an IEE in respect of another test individual**

Take the following example:

- The persons in this example are Individual A, Individual B and Individual C. Individual C is the son of Individual B. Individual B is the grandmother of Individual A. Individual C is the uncle of Individual A.

- Individual A is the test individual for Trust A. Trust A was established in 2008 and the trustee of the trust made an FTE in the following year.
- Trust A also has an IEE in place with Individual B as the specified individual. Note that there is no provision preventing this from happening (see ATO ID 2005/174 (now withdrawn on the basis that the withdrawn ruling is a straight application of the law and does not contain an interpretative decision)).
- On 29 June 2012, the trustee of Trust A exercises its discretion to distribute \$100 to Individual B's son, Individual C.
- Will the distribution of \$100 to Individual C attract FTDT?

Whilst there is nothing in Sch 2F of the ITAA36 to specifically prohibit a trust from making both an FTE and an IEE, it can have the effect of narrowing the range of persons or entities to which distributions can be made or present entitlements conferred without giving rise to FTDT. Think of Individual A's "family group" as all those persons and entities within one circle of a venn diagram and Individual B's "family group" as all those persons and entities within the second circle of a venn diagram. Only distributions or conferrals of present entitlements to persons or entities that fall within the "overlapping" section will escape the imposition of FTDT.



We therefore need to determine whether Individual C is a member of both Individual A's "family group" and Individual B's "family group" (i.e. a person who falls within the overlapping section of the venn diagram).

Individual C will clearly be included in Individual B's family group as he is the son of Individual B and therefore satisfies subsection 272-90(2) of Sch 2F to the ITAA36 by reference to subsection 272-95(1)(b) of Sch 2F.

However, Individual C is Individual A's uncle and, uncles are not included in section 272-95 of Sch 2F as being "family" of an individual.

Accordingly, the distribution to Individual C will attract FTDT, and FTDT will be due and payable 21 days after the relevant distribution.

## **7.5 When there are two test individual groups, two family groups, two trusts and two wholly owned companies**

Take the following example:

- Individual A is the test individual for Trust A. Trust A was established in 2014 and the trustee of the trust made an FTE in the following year.
- Individual B is the test individual for Trust B. Trust B was established in 2014 and the trustee of the trust made an FTE in the following year.
- Individual A is Individual B's sister. Individual B is Individual A's brother.
- Company A is 100% owned by Trust A.
- Company B is 100% owned by Trust B.
- Is Company A within Individual B's "family group"?
- Is Company B within Individual A's "family group"?

As noted above, under subsection 272-90(5) of Sch 2F of the ITAA36, a company, partnership or trust is a member of the test individual's family group where any of the following have fixed entitlements directly or indirectly, and for their own benefit, to **all** of the income and capital of the company, partnership or trust:<sup>113</sup>

- the test individual;
- one or more members of the test individual's "family"; or
- the trustees of one or more family trusts, provided the test individual is specified in the FTE of each of those family trusts.

In this case, Company A is 100% owned by Trust A whose specified individual is Individual A. It is not owned by Individual B, not owned by a member of Individual B's "family (as defined in subsection 272-95 of Sch 2F) and is not owned by a family trust whose specified individual is Individual B.

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<sup>113</sup> ITAA36, Sch 2F, s 272-90(5).

Therefore, Company A will not be included in Individual B's "family group". For the same reasons, Company B will not be included in Individual A's "family group" under subsection 272-90(5).

Similarly, because Company A is 100% owned by Trust A whose specified individual is Individual A, and because Company B is 100% owned by Trust B whose specified individual is Individual B, each of the companies will not pass the "family control test" in section 272-87 of Sch 2F of the ITAA36 to make an IEE in relation to the respective family trusts.

Accordingly, no provision in Sch 2F of the ITAA36 will enable Company A to be included within Individual B's "family group", and no provision in Sch 2F of the ITAA36 will enable Company B to be included within Individual A's "family group".

Notwithstanding the above, Trust A can make an IEE to be included in the "family group" of Individual B, and vice versa. But, referring to our example above, and the venn diagram, the group of beneficiaries that Trust A and Trust B can distribute to will be narrowed as a result of the making of the IEEs, therefore precluding Company A from receiving a distribution from Trust A, and Company B receiving a distribution from Trust B free from FTDT.

## 7.6 When there are legacy companies

Take the following example:

- Company 1961 was incorporated in 1961.
- It was incorporated with different classes of shares on issue. This was for legacy reasons.
- The shareholders of Company 1961 are Trust A and Trust B.
- Trust A owns 51% of the A class shares. The A class shares carry discretionary rights to the capital and profits of the company.
- Trust B owns 49% of the B class shares. The B class shares also carry discretionary rights to the capital and profits of the company.
- Trust A has made an FTE with Individual A as the test individual.
- Trust B has made an FTE with Individual B as the test individual.
- Individual A and Individual B are siblings.
- Is Company 1961 within Individual A's "family group"?
- Is Company 1961 within Individual B's "family group"?

Can Company 1961 make an IEE in respect of Trust A's FTE?

Can Company 1961 make an IEE in respect of Trust B's FTE?

One of the requirements for a company to make an IEE is that the company must pass the "family control test" under section 272-87 of Sch 2F of the ITAA36 at the end of the income year.

Under subsection 272-87(3), a company in respect of which an IEE is proposed to be made passes the “family control test” if a group consisting of:

- the individual who is specified in the FTE in relation to the IEE; or
- one or more members of the individual's family; or
- the trustees of one or more family trusts, provided the individual is specified in the FTE of each of those family trusts; or
- any persons covered by any combination of the above paragraphs;

have (between them), directly or indirectly, and for their own benefit, “**fixed entitlements**” to a greater than 50% share of the income or a greater than 50% share of the capital of the company or partnership.

Section 272-10 of Sch 2F of the ITAA36 defines what it means to have a “**fixed entitlement**” to a share of income or capital of a company. The provision states:

(1) If a shareholder in a company holds shares carrying the right to receive **some or all** of the dividends that may be paid by the company, the shareholder has a fixed entitlement to a **share of the income of the company** equal to the percentage of the total dividends represented by the dividends that the shareholder has a right to receive.

(2) If a shareholder in a company holds shares carrying the right to receive the **whole or part** of any distribution of the paid - up share capital of the company in the event of any return of capital to shareholders, the shareholder has a fixed entitlement to a **share of the capital of the company** equal to the percentage of the total distribution represented by the amount that the shareholder has a right to receive.

In this case, seeing as Trust A and Trust B only have discretionary rights to receive some or all of the dividends and paid-up share capital of the company, neither Trust A nor Trust B have fixed entitlements to a share of income or capital of Company 1961 (let alone all of the income and capital of the company). Therefore, Company 1961 cannot make an IEE in respect of Individual A’s family group or Individual B’s family group.

For completeness, even if Trust A and Trust B had fixed entitlements to all the income and capital of Company 1961:

- Company 1961 could only make an IEE in respect of Trust A (as Trust B owns less than 50% of the income and capital of the company, and in addition to this, a company cannot make multiple IEEs in respect of family trusts with different specified individuals).
- Company 1961 would also not satisfy subsection 272-90(5) of Sch 2F as Trust A and Trust B are family trusts with **different** individuals specified in the FTES relating to each of those family trusts.



## 7.7 When there are safeguards from distributions being made outside the family group

Take the following example:

- Trust A was established in 2014 and the trustee of the trust made an FTE in the following year, with Individual A as the specified individual.
- On 30 June 2020, Trust A conferred a present entitlement on Individual B as to \$100 and paid this amount over to Individual B in cash.
- The trust deed for Trust A defined beneficiaries in the usual way for family trusts and provided that a beneficiary would not include an “Excluded Person”.
- Excluded person was defined as follows:

*A person is an Excluded Person if:*

- *An election made by the Trustee for the Trust to be treated as a family trust for the purposes of Schedule 2F of the Tax Act is in force;*
  - *The person is not a member of the relevant family group for the purposes of the election; and*
  - *A distribution of income or capital from the Trust to the person would give rise to a liability to pay family trust distribution tax for the purposes of the Tax Act.*
- The trust deed also provided that any income or capital of the Trust Fund paid to, applied or set aside for the benefit of any Excluded Person will be returned to the Trustee.
- On 30 June 2024, a newly appointed tax agent was reviewing Trust A’s records and identified that Individual B was an outsider. The trustee, upon becoming aware of this fact, sought to recoup the \$100 paid to Individual B on the basis that the resolution appointing \$100 in his/her favour was void ab initio as Individual B was not a beneficiary at 30 June 2020 (by dint of being an Excluded Person).

Is the Excluded Person provision and the steps taken by the trustee effective to ensure that FTDT is not imposed on a mistaken payment?

This will be discussed in further detail in the presentation, but whilst it might work to ensure that no distribution has been made to, or present entitlement conferred on, a person in their capacity as a beneficiary of the trust, the broad term “distribution” which can apply to outsiders generally would need to be closely considered. Particularly if the outsider has had the benefit of the funds for four years prior to realising that a breach of trust has occurred.

## 8. Conclusion

"Family is family. Whether it's the one you start out with, the one you end up with, or the family you gain along the way."

Modern Family

Characterising “family” can often be a complex task. This, coupled with the fact that the FTE rules in Sch 2F to the ITAA36 are themselves a complex beast (with very little jurisprudence despite being in existence for over 25 years), just shows the inherent difficulties in applying the FTE rules. They are, quite simply, a web of awfully inflexible rules which, if broken, can lead to terrible consequences.

What this paper has demonstrated (we hope) is the density of the FTE rules, and some of the issues that arise in practice when seeking to apply these rules. Through case studies, this paper has shown that, whilst the FTE regime may provide special concessionary treatment for entities that have made an FTE and/or an IEE, it comes at a price. What is clear is that the making of an FTE and/or an IEE limits the interactions that family trusts and/or interposed entities can have with other persons and other entities. These limitations are sometimes debilitating and warrant close attention... as failure to act in accordance with these limitations can potentially lead to significant (and possibly dire) tax and interest charges.

## Appendix 1 – ATO Guidance and Materials

The below table includes current and a selection of withdrawn ATO materials. Please take additional care when using withdrawn ATO materials.

Document	Issue
<a href="#">ATO ID 2014/3</a>	Are the requirements of subsection 272-80(3) of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) met if the trustee of a trust specifies an individual in a family trust election (FTE) who is deceased at the time of making the election?
<a href="#">ATO ID 2013/21</a>	Is an interposed entity election (IEE) still in force under subsection 272-85(6A) of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) if the trust in respect of which the relevant family trust election (FTE) was made ceases to exist?
<a href="#">ATO ID 2008/73</a>	Does subsection 272-80(11) of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) prevent the trustee of a trust making a family trust election (FTE) in respect of that trust after an FTE previously made in respect of the trust has been revoked?
<a href="#">ATO ID 2006/157</a>	Can a family trust, which is deemed to be a notional entity under section 165-207 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) for company loss recoupment purposes, be a 'continuing shareholder' for the purposes of section 175-10 of the ITAA 1997?
<a href="#">ATO ID 2006/31</a>	If a trustee of a discretionary trust elects to apply the capital gains tax (CGT) roll-over provisions of Subdivision 122-A of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) to deem the acquisition date of newly issued shares to be pre-20 September 1985, will the new shares be deemed to have been acquired before 20 September 1985 for the purposes of the imputation rules, in particular, the 'holding period' and 'related payment' rules contained in Division 1A of Part IIIA of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936)?
<a href="#">ATO ID 2004/245 (Withdrawn)</a>	Would a family trust election be in force for the whole of the income year (ended 30 June) if the family control test, pursuant to section 272-87 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936), is only passed from 1 January in the relevant income year?
<a href="#">ATO ID 2003/1108</a>	Is a beneficiary of a non-fixed trust in respect of which a family trust election has been made, a qualified person under section 160APHO of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) in relation to dividends paid on ordinary shares acquired by the trustee post 31 December 1997 where the trustee has not held the shares at risk for 45 days.
<a href="#">ATO ID 2003/1105</a>	Is a beneficiary of a non-fixed trust a qualified person under section 160APHO of the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) in relation to a dividend paid on ordinary shares acquired by the trustee post 31 December 1997 and held at risk for 45 days where the trustee has not made a family trust election?
<a href="#">ATO ID 2003/648 (Withdrawn)</a>	Is a family trust election (FTE) for the 1994-95 income year valid if the trust did not pass the family control test from 1 July 1994?

<a href="#">ATO ID 2004/876 (Withdrawn)</a>	Is a company, where all the shares are owned by the trustee of a family trust, required to make an interposed entity election pursuant to section 272-85 of Schedule 2F to the ITAA 1936 to be a member of the family group in relation to another family trust, where both trusts have specified the same individual in their family trust elections?
<a href="#">ATO ID 2002/748 (Withdrawn)</a>	If the trustee of the Superannuation Fund makes an interposed entity election and distributes income or capital to a person outside the family group, will the trustee of the Superannuation Fund be liable for Family Trust Distribution Tax under Division 271 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936)?
<a href="#">ATO ID 2002/746 (Withdrawn)</a>	Is the trustee of a trust, which has made a family trust election, liable for Family Trust Distribution Tax under Division 271 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) on a distribution of income or capital to a superannuation fund that is not a member of the test individual's family group under section 272-90 of Schedule 2F to the ITAA 1936?
<a href="#">ATO ID 2003/164 (Withdrawn)</a>	Is a company, that is wholly owned by members of the primary individual's family, required to make an interposed entity election pursuant to subsection 272-85(1) of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936), to be a member of the primary individual's family group?
<a href="#">ATO ID 2002/1082 (Withdrawn)</a>	Can an entity make an interposed entity election (IEE), under section 272-85 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936), in respect of two family trusts where the individual specified in the respective Family Trust Elections (FTE) are different?
<a href="#">ATO ID 2005/174 (Withdrawn)</a>	Can the trustee of a family trust make an interposed entity election (IEE) pursuant to section 272-85 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) to be included in the family group of another family trust where the primary individuals are not the same (in this case the respective primary individuals are brothers)?
<a href="#">ATO ID 2004/162</a>	Is the trustee of a family trust liable for Family Trust Distribution Tax (FTDT) pursuant to section 271-15 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> (ITAA 1936) on a payment made in respect of the redemption of units, where the amount paid exceeds the value of any consideration given in return?
<a href="#">ATO ID 2003/1106</a>	Will a beneficiary that holds an interest in the corpus of a trust, that is in receipt of franked distributions, be entitled to tax offsets under Division 207 of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) on distributions flowing through to the beneficiary, if the trustee has not made a family trust election?
<a href="#">ATO ID 2005/172</a>	Is a unitholder in a unit trust whose trust deed permits the issue of new units at the trustee's discretion and at a price determined by the trustee, a qualified person for the purposes of paragraph 207-150(1)(a) of the <i>Income Tax Assessment Act 1997</i> (ITAA 1997) in relation to dividends that flow indirectly where the trustee has held the shares at risk for more than 45 days in the absence of a family trust election ?
<a href="#">TD 2017/20</a>	Income tax: is a person who is not a beneficiary of the trust capable of having a distribution made to them for the purposes of section 272-60 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i> ?

<a href="#">ATO ID 2004/859</a>	<p>Income Tax: Is the trustee of a family trust, which is liable for Family Trust Distribution Tax (FTDT) pursuant to Division 271 of Schedule 2F to the <i>Income Tax Assessment Act 1936</i>(ITAA 1936) on a distribution to a beneficiary, able to use franking credits associated with that distribution to offset the FTDT?</p>
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## Appendix 2 – Relevant Cases

The below table contains cases which have considered the operation of FTEs.

1	<i>Advanced Holdings Pty Ltd (as trustee for Demian Trust) v Commissioner of Taxation</i> [2020] FCA 1479
2	<i>Deputy Commissioner of Taxation v Widdup (No 2)</i> [2023] FCA 377
3	<i>Widdup v Deputy Commissioner of Taxation</i> [2023] FCAFC 145



# Family trust election, revocation or variation

# 2024

Print neatly in BLOCK LETTERS with a black or blue ballpoint pen only.

Tax file number (TFN)  
of the trust

--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--

To make, revoke or vary a family trust election in accordance with section 272-80 of Schedule 2F to the *Income Tax Assessment Act 1936* (ITAA 1936), you must complete items **1** and **2**, item **3** if it applies and the declaration on page 4. You must also complete section **A** for an **election**, or section **B** for a **revocation**. For a **variation** items **6** or **7** and item **8** in section **A** must be completed. If you don't have enough space to complete an item, or if an item requires you to provide further information, attach a separate sheet of paper with the additional information.

**1 Are you using this form for an election, a revocation or a variation?**

☐

Print **E** for election, **R** for  
revocation or **V** for variation.

**2 Full name and current postal address (including country – if outside Australia) of trust for which the family trust election, revocation or variation is made.**

Full name of the trust


Current postal address of the trust

Suburb or town	State	Postcode
Country – if not Australia		

**3 If the name and/or the postal address for the trust identified in item 2 above has changed since its last tax return (if any) was lodged, print it exactly as shown on the last notice of assessment or the last tax return lodged.**

Full name of the trust as shown on  
last notice of assessment or  
last tax return lodged


Postal address of the trust  
as shown on last notice  
of assessment or last  
tax return lodged

Suburb or town	State	Postcode
Country – if not Australia		

## Section A: Family trust election or variation details

**4 Was the central management and control of the trust outside Australia at any time during the period from the election commencement time (see items 6 and 7) until the time the election is made (relevant period)?**

☐

Print **Y** for yes  
or **N** for no.

If you printed **Y**, specify the time(s) at which central management and control was outside Australia.

Full  
period

☐

Print **F** in the box if the central management and control of the trust was outside Australia at all times during the relevant period **OR** specify the time(s) during the relevant period at which central management and control of the trust was outside Australia.

If more than two time periods are to be specified, attach a separate sheet of paper with details of the additional time periods.

from

Day	Month	Year

to

Day	Month	Year

from

Day	Month	Year

to

Day	Month	Year

5 Full name, TFN, current postal address and residency details of every trustee of the trust from the election commencement time until the time the election is made (relevant period). Where any trustee is a company, the Australian company number (ACN) or Australian registered body number (ARBN) of each such trustee is also required.

If there was more than one trustee of the trust during the relevant period, attach a separate sheet of paper with all the information required for each additional trustee.

TFN of trustee  See the Privacy note in the Declaration.  
OR

Print **X** in the box if the trustee does not have a TFN. ☐

If the trustee is an individual

Title – for example, Mr, Mrs, Ms, Miss

Surname or family name

Given names

If the trustee is a company

Name

ACN/ARBN\* \*Cross out whichever is not applicable.

Current postal address of the trustee

Suburb or town

State

Postcode

Country – if not Australia

At any time during the relevant period was the trustee a non-resident for tax purposes? ☐ Print **Y** for yes or **N** for no. If you printed **Y**, specify the time(s) at which the trustee was a non-resident for tax purposes.

Print **F** in the box if the trustee was a non-resident for tax purposes at all times during the relevant period Full period ☐

OR  
Specify the time(s) during the relevant period at which the trustee was a non-resident for tax purposes.

Day

Month

Year

 to 

Day

Month

Year

If more than one time period is to be specified, attach a separate sheet of paper with details of the additional time periods in relation to the trustee.

6 Where making a family trust election – write the four-digit, 2005 or later, income year specified for the purposes of the family trust election. Where varying the specified individual of a family trust election, other than by way of an order, an agreement or an award (see item 7) – write the four-digit, 2024 income year of the trust’s return of income with which the variation must be lodged. The variation effective date is the first day of that year of income or the commencement date of the original election, whichever is later.

If the income year specified does not end on 30 June, state the substituted accounting period for that income year.

Income year specified

Substituted accounting period

from 

Day

Month

Year

 to 

Day

Month

Year

7 The commencement time for the family trust election or the effective date of a variation by way of an order, an agreement or an award. 

Day

Month

Year

Note: Only complete this item if:

- specifying the 2023–24 income year for an election and the family control test in section 272-87 of Schedule 2F to the ITAA 1936 has **NOT** been satisfied at all times during the 2023–24 income year. In these circumstances, the election commencement time will be the earliest time from which the family control test was passed continuously until the end of the 2023–24 income year. In all other circumstances the election commencement time is the first day of the income year specified in item 6 of Section A, or
- varying the specified individual of a family trust election under subsection 272-80(5C) of Schedule 2F to the ITAA 1936 as a result of an order, an agreement, or an award. The variation effective date is the variation date specified by the order, agreement or award.



**8 Full name, TFN, date of birth and current address of principal place of residence (including country – if outside Australia) of the individual (specified individual) whose family group is taken into account in relation to the family trust election.**

**Note:** Only one individual can be specified.

TFN of the specified individual See the Privacy note in the Declaration.	<input type="text"/>	OR	<input type="checkbox"/> Print <b>X</b> in the box if the specified individual does not have a TFN.						
Title – for example, Mr, Mrs, Ms, Miss									
Full name of the specified individual	<input type="text"/>	Date of birth of the specified individual	<table><tr><td>Day</td><td>Month</td><td>Year</td></tr><tr><td><input type="text"/></td><td><input type="text"/></td><td><input type="text"/></td></tr></table>	Day	Month	Year	<input type="text"/>	<input type="text"/>	<input type="text"/>
Day	Month	Year							
<input type="text"/>	<input type="text"/>	<input type="text"/>							
Surname or family name		Given names							
<input type="text"/>		<input type="text"/>							
Current address of principal place of residence of the specified individual	<input type="text"/>								
<input type="text"/>									
Suburb or town		State	Postcode						
<input type="text"/>		<input type="text"/>	<input type="text"/>						
Country – if not Australia									

**Note:** Only complete section B if revoking a family trust election otherwise go to Declaration on page 4.

## Section B: Family trust revocation

**9a The later time under paragraph 272-80(6)(b) of Schedule 2F to the ITAA 1936 from which the family trust election referred to in items 10 and 11 ceases to be in force**

Day	Month	Year
<input type="text"/>	<input type="text"/>	<input type="text"/>

OR

**9b The income year from which the revocation is to be effective under subsection 272-80(8).**

Income year
<input type="text"/>

**10 The income year for which the details of the election being revoked were included in the tax return for the trust or given to the Commissioner as required under subsection 272-80(2) of Schedule 2F to the ITAA 1936 or sub-items 22(4) or 22A(4) of Schedule 1 to the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1998*.**

Income year
<input type="text"/>

**11 Specify the income year exactly as it appears in Section A of the relevant family trust election included in the tax return for the trust or given to the Commissioner for the income year identified, and the current TFN of the individual specified in that election.**

Income year	<input type="text"/>	TFN of the specified individual	<input type="text"/>	OR	Print <b>X</b> in the box if the <b>specified individual</b> does not have a TFN.	<input type="checkbox"/>
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**12 Full name, TFN and current postal address of any company, fund, partnership or trust which has an interposed entity election in force in respect of the trust and the specified individual identified in items 2 and 11. In the case of a company, also provide the ACN or ARBN.**

TFN of the *company/fund/partnership/trust	<input type="text"/>	OR	Print <b>X</b> in the box if the *company/fund/partnership/trust does not have a TFN.	<input type="checkbox"/>
Full name and ACN or ARBN of the *company/fund/partnership/trust	<input type="text"/>			
	<input type="text"/>			
	ACN/ARBN* <input type="text"/>			
	* Cross out whichever is not applicable			
Current postal address of the *company/fund/partnership/trust	<input type="text"/>			
	<input type="text"/>			
* Cross out whichever is not applicable.	Suburb or town	State	Postcode	
	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
	Country – if not Australia			

If there was more than one company, fund, partnership or trust which has an interposed entity election in force in respect of the trust and the specified individual identified in items 2 and 11, attach a separate sheet of paper with all the information required above for each additional company, fund, partnership or trust.

# Declaration

## Privacy

The ATO is authorised by the *Taxation Administration Act 1953* to request the provision of your tax file number (TFN). The ATO will use your TFN to identify you in our records. It is not an offence not to provide your TFN. However if you do not provide your TFN, the processing of this form could be delayed.

Taxation law authorises the ATO to collect information including personal information about the person authorised to sign the declaration. For information about your privacy go to **ato.gov.au/privacy**

**I/We** declare that all the information required has been provided on this form and any attachments to this form, and that the information provided is true and correct in every detail, and that the trustee(s) is/are making, varying or revoking a family trust election, the details of which are set out above, for the purposes of section 272-80 of Schedule 2F to the ITAA 1936 and that the trustee(s) is/are able to make, vary or revoke the election in accordance with that section.

**Full name of the trustee(s) at the time the family trust election is made or, where this form is being used to revoke a family trust election, the time the 2024 tax return is lodged with this form or this form is required to be given to the Commissioner.**

**Note:** If section **A** is required to be completed, the name of the trustee(s) must be written exactly as it appears in item **5**.

If the trustee is an individual

Title – for example, Mr, Mrs, Ms, Miss

Surname or family name

Given names

If the trustee is a company

Name

Signature of the trustee or, if the trustee is a company, the signature of the public officer of the corporate trustee

Date declaration made

Day	Month	Year

If there is more than one trustee of the trust at the time the family trust election is made or a family trust election is revoked or varied, attach a separate sheet of paper with the above details and signature for each additional trustee.

For more information, see the explanatory notes for the *Family trust election, revocation or variation 2024*.

Hours taken to prepare and complete this form (See notes below.)

The ATO is committed to reducing the costs of complying with your taxation obligations. By completing this item you will help us to monitor these costs as closely as possible.

When completing this item the trust should consider the time, rounded up to the nearest hour, which the trust (including the trustees) spent:

- reading the instructions
- collecting the necessary information to complete this form
- making any necessary calculations, and/or
- actually completing this form.

- Notes:**
- The answer should reflect the time both your business and tax agent spent preparing and completing this form. This includes the time spent by any other person whose assistance was obtained in doing this, such as an employee of the business.
  - If this form is lodged with the 2024 tax return, the answer should be included in the time box provided on the tax return.



# Interposed entity election or revocation

# 2024

Print neatly in BLOCK LETTERS with a black or blue ballpoint pen only.

Tax file number (TFN)  
of the trust, company or partnership

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To make or revoke an interposed entity election in accordance with section 272-85 of Schedule 2F to the *Income Tax Assessment Act 1936* (ITAA 1936), you must complete items **1** and **2**, item **3** if it applies, item **4** and the declaration on page 4. You must also complete section **A** for an **election** or section **B** for a **revocation**. If you don't have enough space to complete an item, or if an item requires you to provide further information, attach a separate sheet of paper with the additional information.

**1 Are you using this form for an election or a revocation?**

☐ Print **E** for election  
or **R** for revocation.

**2 Full name and current postal address (including country – if outside Australia) of the trust (including fund), company or partnership for which the interposed entity election or revocation is made (interposed entity). In the case of a company, also provide the Australian company number (ACN) or Australian registered body number (ARBN).**

Full name of the interposed entity  
(trust, company or partnership)

ACN/ARBN*											
* Cross out whichever is not applicable											

Current postal address of  
the interposed entity

Suburb or town				State				Postcode			

**3 If the name and/or the postal address for the trust (including fund), company, or partnership identified in item 2 above has changed since its last tax return (if any) was lodged, print it exactly as shown on the last notice of assessment or the last tax return lodged.**

Full name of the interposed entity  
(trust, company or partnership) as  
shown on last notice of assessment  
or last tax return lodged


Postal address of the  
interposed entity as shown on  
last notice of assessment or  
last tax return lodged

Suburb or town				State				Postcode			
Country – if not Australia											

**4 Interposed entity election – entity code**

☐ Print **C** for company, **P** for partnership,  
**T** for trust or **F** for fund.

## Section A: Interposed entity election specifying a day in the 2004–05 or later income year

**5a If the interposed entity is a trust (including fund), was the central management and control of the trust outside Australia at any time during the period from the election commencement time (see items 7 and 8) until the time the election is made (relevant period)?**

☐ Print **Y** for yes  
or **N** for no.

If you printed **Y**, specify the time(s) at which central  
management and control was outside Australia.

Full  
period ☐

Print **F** in the box if the central management and control of the trust  
was outside Australia at all times during the relevant period **OR**  
specify the time(s) during the relevant period at which central  
management and control of the trust was outside Australia.

If more than one time period is to be specified, attach a separate  
sheet of paper with details of the additional time periods.

from 

Day	Month	Year

 to 

Day	Month	Year

**5b If the interposed entity is a company, was the company a non-resident for tax purposes at any time during the period from the election commencement time (see items 7 and 8) until the time the election is made (relevant period)?**

☐ Print **Y** for yes  
or **N** for no.

If you printed **Y**, specify the time(s) at which the company  
was a non-resident for tax purposes.

Full  
period ☐

Print **F** in the box if the company was a non-resident for tax  
purposes at all times during the relevant period **OR**  
specify the time(s) during the relevant period at which the company  
was a non-resident for tax purposes.

If more than one time period is to be specified, attach a separate  
sheet of paper with details of the additional time periods.

from 

Day	Month	Year

 to 

Day	Month	Year

6 If the interposed entity is a trust (including fund) or partnership, provide the full name, TFN, current postal address and residency details of every trustee of the trust or partner of the partnership respectively during the period from the election commencement time (see items 7 and 8) until the time the election is made (relevant period).  
Where any trustee or partner is a company, the ACN or ARBN of each such trustee or partner is also required.

If there was more than one trustee of the trust or partner of the partnership during the relevant period, attach a separate sheet of paper with all the information required for each additional trustee or partner.

TFN of trustee or partner  See the Privacy note in the Declaration.

OR

Print **X** in the box if the trustee or partner does not have a TFN. ☐

If the trustee or partner is an individual

Title – for example, Mr, Mrs, Ms, Miss

Surname or family name

Given names

If the trustee or partner is a company

Name

ACN/ARBN\* \*Cross out whichever is not applicable.

Current postal address of the trustee or partner

<input type="text"/>		
<input type="text"/>		
Suburb or town	State	Postcode
<input type="text"/>	<input type="text"/>	<input type="text"/>
Country – if not Australia <input type="text"/>		

At any time during the relevant period was the trustee or partner a non-resident for tax purposes?

☐ Print **Y** for yes or **N** for no.

If you printed **Y**, specify the time(s) at which the trustee or partner was a non-resident for tax purposes.

Print **F** in the box if the trustee or partner was a non-resident for tax purposes at all times during the relevant period

Full period ☐

OR

Specify the time(s) during the relevant period at which the trustee or partner was a non-resident for tax purposes.

Day Month Year to Day Month Year

If more than one time period is to be specified, attach a separate sheet of paper with details of the additional time periods in relation to the trustee or partner.

7 Write the four-digit, 2005 or later, income year specified for the purposes of the interposed entity election. If the specified income year does not end on 30 June, state the substituted accounting period for that specified income year.

Write also the day specified in that income year for the purposes of the election. Note that a day must be specified for an election to be made.

Income year specified  Day specified  Substituted accounting period

8 The election commencement time for the interposed entity election.

Day Month Year

**Note:** Only complete this item if specifying the 2023–24 income year and if the family control test in section 272-87 of Schedule 2F to the ITAA 1936 has NOT been satisfied at all times during the 2023–24 income year from the day specified in item 7. In these circumstances, the election commencement time will be the later of the earliest time from which the family control test was passed continuously until the end of the 2023–24 income year and the beginning of the day specified in item 7.

**9 Full name, TFN and current postal address (including country – if outside Australia) of the family trust in respect of which the interposed entity election in this form is made.**

TFN of the family trust

OR

☐ Print **X** in the box if the family trust does not have a TFN.

Full name of the family trust

Current postal address of the family trust

Suburb or town

State

Postcode

Country – if not Australia

**Note:** If an interposed entity election is made in respect of more than one family trust a separate *Interposed entity election or revocation 2024* must be completed for each election in respect of each family trust.

**10 The income year specified in the family trust election for the trust identified in item 9 which specifies the individual identified in item 11 AND the election commencement time for that election. If the family trust's specified income year does not end on 30 June, state the substituted accounting period for that income year.**

Income year specified in the family trust election

Election commencement time for the family trust election

Day	Month	Year
<input type="text"/>	<input type="text"/>	<input type="text"/>

from

Substituted accounting period of the family trust

Day	Month	Year
<input type="text"/>	<input type="text"/>	<input type="text"/>

to

Day	Month	Year
<input type="text"/>	<input type="text"/>	<input type="text"/>

**Note:** The specified income year **and** the election commencement time shown here must correspond exactly to the details provided in section **A** of the relevant family trust election that has been lodged or given to the Commissioner for the family trust identified. If no date was specified on the relevant family trust election, leave the election commencement time box at this item blank.

**11 Full name, TFN, date of birth and current address of principal place of residence (including country – if outside Australia) of the individual (specified individual) whose family group is taken into account in relation to the family trust election for the trust identified in items 9 and 10, and in whose family group the interposed entity is electing to be included.**

TFN of the specified individual

OR

☐ Print **X** in the box if the specified individual does not have a TFN.

Date of birth of the specified individual

Day	Month	Year
<input type="text"/>	<input type="text"/>	<input type="text"/>

Full name of the specified individual

Title – for example, Mr, Mrs, Ms, Miss

Surname or family name

Given names

Current address of principal place of residence of the specified individual

Suburb or town

State

Postcode

Country – if not Australia

**Note:** Only complete section **B** if revoking an interposed entity election otherwise go to **Declaration on page 4**.

**Section B: Interposed entity revocation**

**12 Full name, TFN and current postal address (including country – if outside Australia) of the family trust in respect of which the interposed entity election in this form is being revoked.**

TFN of the family trust

Full name of the family trust

Current postal address of the family trust

Suburb or town

State

Postcode

Country – if not Australia

**13 The income year from which the revocation is to be effective.**

Income year

**Note:** If revoking an interposed entity election in respect of more than one family trust, a separate *Interposed entity election or revocation 2024* must be completed for each election being revoked in respect of each family trust.

Declaration

Privacy

The ATO is authorised by the *Taxation Administration Act 1953* to request the provision of tax file numbers (TFNs). We will use the TFN to identify the entity in our records. It is not an offence not to provide the TFN. However if you do not provide the TFN, the processing of this form may be delayed.

Taxation law authorises the ATO to collect information and to disclose it to other government agencies. For information about your privacy go to [ato.gov.au/privacy](https://ato.gov.au/privacy)

I/We declare that all the information required has been provided on this form and any attachments to this form, and that the information provided is true and correct in every detail, and that the trustee(s)/company/partners is/are making or revoking an interposed entity election, the details of which are set out above, for the purposes of section 272-85 of Schedule 2F to the ITAA 1936 and that the trustee(s)/company/partners is/are able to make or revoke the election in accordance with that section.

Full name of the trustee(s)/the company public officer/the partners at the time the election is made.

Note: If the election is being made for a trust (including fund) or partnership, the name of the trustee or partner must be written exactly as it appears at item 6.

If an individual

Title – for example, Mr, Mrs, Ms, Miss

Surname or family name

Given names

If the trustee or partner is a company

Name

Signature of the trustee/company public officer/partner or, if the trustee or partner is a company, the signature of the public officer of the corporate trustee/partner

Date declaration made

Day

Month

Year

If there is more than one trustee of the trust or partner of the partnership at the time the election is made, attach a separate sheet of paper with the above details and signature for each additional trustee or partner.

For more information, see the explanatory notes for the *Interposed entity election or revocation 2024*.

Hours taken to prepare and complete this form

(See notes below.)

The ATO is committed to reducing the costs of complying with your taxation obligations. By completing this item you will help us to monitor these costs as closely as possible. When completing this item the trust, company or partnership should consider the time, rounded up to the nearest hour spent:

- reading the instructions
- collecting the necessary information to complete this form
- making any necessary calculations, and/or
- actually completing this form.

- Notes:
- The answer should reflect the time both your business and tax agent spent preparing and completing this form. This includes the time spent by any other person whose assistance was obtained, such as an employee of the business.
  - If this form is lodged with the 2024 tax return, the answer should be included in the time box provided on the tax return.