Trust Loss Provisions and Family Trust Elections

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1. **FAMILY TRUST ELECTIONS BACKGROUND**

1.1 The concept of a “family trust” and “family trust elections” (FTE) were introduced as part of the trust loss provisions in schedule 2F of the 1936 Act. These provisions first applied in the 1995 tax year.

1.2 The Treasury and the ATO took a liking to the family trust concept and a number of subsequent amendments have made it a condition of trustees accessing concessions in the Acts that the trustee has lodged an FTE.¹

1.3 If a trustee makes a FTE and then subsequently “confers a present entitlement to, or distributes, income or capital of the trust”² to someone who is not a member of the “family group” covered by the FTE then the trustee is liable to pay family trust distribution tax pursuant to Division 271 of schedule 2F.

1.4 Related companies and trusts can elect to become part of the family group of a trust that is made an FTE by lodging an interposed entity election (IEE).³

1.5 The implications of lodging an IEE are substantially the same for lodging an FTE.

1.6 As the consequences of lodging an FTE are quite restrictive a trustee should only make an FTE after considering all issues. FTEs should not be made as a matter of course, even where a trust may have losses.

2. **FIXED TRUSTS, NON-FIXED TRUSTS AND FAMILY TRUSTS**

**Fixed Trust**

2.1 There is a common misconception that unit trusts are “fixed trusts”.

In fact most private unit trusts will not qualify as a fixed trust for the purposes of the Tax Acts.

2.2 This can be quite important as:

   (a) different rules apply under the “loss trust provisions”⁴ for fixed and non-fixed trusts;

   (b) a unit trust that holds shares cannot claim the franking credits attaching to dividends unless a family trust election has been made or the trust is a fixed trust; and

   (c) for most private unit trusts it will not be practical for the trustee to make a family trust election as the effect of making a family trust election is that the trustee will be liable for family trust distribution tax on any distributions outside of the family group of the test individual.

This means that it will be important in those circumstances that the unit trust qualifies as a fixed trust.

2.3 Definition of a ‘fixed trust’ for the purpose of loss trust provisions?

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¹ 45 day holding rule & carry forward company losses – s165-207
² Section 271-15 – schedule 2F
³ Section 272-90(4) and Section 272-85 – Schedule 2F of the 1936 Tax Act
⁴ Schedule 2F of the 1936 Tax Act
(a) A trust will be a fixed trust only “if persons have fixed entitlements to all of the income and capital of the trust”\(^5\).

(b) Beneficiaries will have fixed entitlements to the income and capital of a trust if, under a trust instrument they have “a vested and indefeasible interest” in a share of the income and/or capital\(^6\).

2.4 “Vested” and “Indefeasible”: What does mean?

Neither of these terms are defined in the Tax Acts, therefore they will take on the ordinary meaning.

(a) Meaning of vested\(^7\):

(i) A vested interest is one that is bound to take effect in possession at some point in time.

(ii) A vested interest is to be contrasted with a contingent interest which may never fall into possession. A contingent interest gives no rights at all unless or until some future event (the contingency) takes place. An example of a contingent interest might be a beneficiary’s entitlement to income which is expressed under the deed only to arise if the trustee exercises a power of appointment in favour of the beneficiary.

(b) Meaning of Indefeasible:

An interest is indefeasible if it is incapable of being terminated, invalidated or annulled.\(^8\)

Generally there will be no issue that a unitholder’s interest in a share of the income and capital of the trust will be vested.

The issue is whether that interest is capable of being terminated, invalidated or annulled.

Indefeasible interest

2.5 If a person holds units in a private unit trust, the mere fact that the units may be redeemable or that further units can be allotted, does not itself prevent them having a fixed and indefeasible interest, provided that units can only be redeemed or allotted at a price determined on the basis of \textit{net asset value in accordance with Australian accounting standards}.\(^9\)

Few private unit trust deeds will stipulate that the value of units has to be determined in this way.

2.1 Colonial First State Investments Ltd v FC of T\(^10\)

(a) Colonial First State Investments was the responsible entity and trustee of retail unit trust investment fund. In that capacity is held units in a wholesale unit trust fund.

\(^{5}\) Section 272-65 of Schedule 2F of the 1936 Act
\(^{6}\) Section 272-5(1) of Schedule 2F of the 1936 Act
\(^{7}\) Per the Explanatory Memorandum to the Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1998 (which introduced the definition of ‘Fixed Trust’ into the trust loss provisions)
\(^{8}\) Colonial First State Investments Ltd v FC of T 2011 FCA 16
\(^{9}\) section 272-5(2)(i) of Schedule 2F of the 1936 Act
\(^{10}\) 2001 FCA 16
Colonial First State Investments wanted to amend the Constitution of the wholesale fund in respect of the rights attaching to the units on redemption.

Clause 43 of the Constitution permitted the responsible entity to make “any modification, addition or deletion” to the Constitution.

The Commissioner submitted that the terms of clause 43 could allow for the interested in the income and capital of the wholesale fund to be defeated. However section 601GC(1)(b) of the Corporations Act 2001 provides that the responsible entity can only amend the Constitution if the responsible entity reasonably considers the change will not adversely affect members’ rights.

Justice Stone focused on section 601GG(1)(a) of the Corporations Act which empowered members to modify, repeal or replace the Constitution by a special resolution. At [105 and 106]

“Although the applicant focused on s 601GC(1)(b), the more telling argument that the right in question is defeasible stems from s 601GC(1)(a), which empowers members to modify, repeal or replace the constitution of a unit trust by special resolution. In ING Funds Management Barrett J’s comment that s 601GC(1)(a) is a plenary power vested in the member. As his Honour observed, at [60]:

There is no kind of modification that cannot be made in exercise of the power and by the means it prescribes, although the power is no doubt subject to the implied limitations that generally attend any power enabling a majority to bind a minority.

It follows that the members could vote to terminate the present right to a share of income and capital. Although in some circumstances such an exercise of power might be subject to the implied limitations to which his Honour refers, there is no reason to believe that this would always be so. For that reason it must be concluded that the Wholesale Fund is not a fixed trust …..”

(c) Following Colonial First State Investments, the ATO issued a Decision Impact Statement (June 2011)

ATO’s response:

“The decision confirms the ATO view that very few trusts satisfy the definition of ‘fixed trust’ in section 272-65 of Schedule 2F in the absence of the exercise of the Commissioner’s discretion (essentially because beneficiary entitlements to income or capital are generally liable to be defeated by the exercise of a power in the deed or by a statutory power).”

(d) Private binding rulings (since Colonial First State Investments in relation to ability to amend terms of the deed)

(i) Authorisation Number 101264567761

ATO – not a fixed trust?

The Trust deed could be amended by 75% of unitholders. This could permit the amendment of clauses to introduce defeasible powers which do not currently exist.

(ii) Authorisation Number 1012286707064, 1012250209822

ATO – unit trust a fixed trust
Trustee could only amend the trust deed with unanimous unitholder approval.

Current state of play

2.2 The Commissioner has a discretion to deem a beneficiary to have a fixed entitlement.\textsuperscript{11} In determining whether to exercise this discretion, the Commissioner must have regard to:

(a) the circumstances in which the entitlement is capable of not vesting or the defeasance can happen; and

(b) the likelihood of the entitlement not vesting or the defeasance happening; and

(c) the nature of the trust.\textsuperscript{12}

2.3 The ATO issued \textit{Practical Compliance Guideline} PCG 2016/16 on 13 September 2017 which outlined the factors which the Commissioner will consider in deciding whether to exercise its discretion to treat an interest in the income or capital of a trust as being a fixed entitlement. It also outlines a safe harbour approach which allows the trustees to manage the trust’s affairs as if the Commissioner had exercised the discretion to treat beneficiaries as having fixed entitlements to income and capital of the trust.

2.4 The Commissioner [at paragraph 16] outlines the following powers in trust deeds which cause a beneficiary’s interest to be defeasible:

(a) Broad powers to amend the trust instrument.

(b) Powers to issue new units after the trust is settled, or to redeem existing units.

(c) A power to reclassify existing units so that they do not all have equal rights to receive the income and capital of the trust.

(d) A power to classify receipts as being on income or capital account where the units that have been issued do not all have the same rights to receive the income and capital of the trust.

(e) A power to appoint a beneficiary’s interest in the income or capital of the trust to another beneficiary.

(f) A power to settle or appoint any part of the corpus of the trust to a new trust with different beneficiaries.

(g) A power to enforce the forfeiture or cancellation of partly paid units due to the non-payment of a call except where such partly paid units would be void \textit{ab initio}.

2.5 For the purposes of working out whether all beneficial interests have the same rights to receive the income and capital of the trust, the Commissioner will disregard the following factors which may otherwise result in a different conclusion [at paragraph 17]

(a) Fees or charges imposed by the trustee in relation to the beneficial interests.

(b) Issue price and redemption price of the beneficial interests (provided that the savings rule in subsection 272-5(2)).

(c) Exposure of the beneficial interests to foreign exchange gains and losses.

\textsuperscript{11} Section 272-5(3) of Schedule 2F of the 1936 Act

\textsuperscript{12} Sections 272-5(1)(b)(i)-(iii) of Schedule 2F of the 1936 Act
2.6 Satisfaction of the ‘savings rule’ in subsection 272-5(2) [at paragraphs 18 and 19]

(a) The mere fact that a trustee has power to redeem units in a unit trust, or issue further units, for an appropriate value, being:

(i) where the units are listed for quotation in the official list of an approved stock exchange — the same price as other units are offered for sale on that exchange at the time of the redemption or issue, or

(ii) where the units are not so listed — a price determined on the basis of the net asset value of the unit trust at the time of the redemption or issue according to Australian accounting principles

does not mean that unit holders’ interests in the income or capital of the unit trust are defeasible.

(b) The Commissioner considers that the savings rule is satisfied where further units may be issued or existing units redeemed in any of the following situations:

(i) For a price based on a market value of the assets and liabilities of the trust which has been determined by a licensed valuer.

(ii) For a price based on a market value of the assets and liabilities of the trust which has not been determined by a licensed valuer, but which nevertheless is accurate.

(iii) For a price determined by reference to a value of the trust which is sufficiently close to its net asset value (allowing an adjustment for transaction costs).

(iv) For a price determined by reference to a value of the trust which is sufficiently close to its net asset value (allowing an adjustment for transaction costs), including where accrued distributions are excluded from the net asset value based on a ‘unit day’s pricing model’.

(v) For a price based on the volume weighted average price (VWAP) of the units.

(vi) In accordance with ASIC Corporations (Managed investment product consideration) Instrument 2015/847. ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657] (if relevant), or any other ASIC guidance or relief on the same subject.

2.7 Commissioner’s discretion [at paragraphs 25 to 41]

(a) Where a trust is not a fixed trust, because all of the beneficiaries’ interests in the income and capital of the trust are not fixed entitlements, and the trust does not satisfy the requirements for a ‘safe harbour’, the trustee may request that the Commissioner exercise the discretion to treat beneficiaries’ interests as being vested and indefeasible.

(b) A trust can both rely on the savings rule in relation to some trustee powers in a trust instrument (the power to issue or redeem units), and request that the Commissioner exercise the discretion in the context of other powers that may defeat a beneficiary’s interest (such as in relation to a power to amend).

(c) Circumstances in which the interest is capable of not vesting or being defeated

(i) When examining the circumstances in which a beneficiary’s interest is capable of not vesting or being defeated, the Commissioner will have regard to any factor that may affect the defeasance of any beneficiary’s interest, including:
(A) the number of circumstances of potential defeasance, and

(B) the significance of those circumstances.

(ii) This includes having regard to:

(A) any person who is capable of altering the beneficiary’s interest;

(B) the nature of their relationship to the beneficiary, and

(C) any limitation on their capability to so alter that interest.

(iii) The likelihood of the interest not vesting or the defeasance happening

(A) When considering the likelihood of the interest not vesting or being defeated, the Commissioner must form a view as to the probability that the contingency or defeasance will happen. Where the likelihood of the contingency or event of defeasance occurring is low, this will weigh towards a favourable exercise of the discretion.

(B) Where the trustee or manager of the trust has a particular power to defeat a beneficiary’s interest, it is relevant to consider how often, if at all, they have exercised that power over a relevant period.

(C) Any preconditions or caveats that affect the likelihood of a beneficiary’s interest not vesting or being defeated are also relevant.

(iv) The nature of the trust

The nature of the trust refers to its basic legal characteristics and its economic function, both actual and intended. The ability of the trustee or manager of the trust to adversely affect the interests of beneficiaries could be limited where:

(A) additional responsibilities are placed on the trustee by legislation, most commonly as a registered managed investment scheme under Chapter 5C of the Corporations Act 2001;

(B) contractual restrictions limit the trust manager’s access to trust assets;

(C) the trust is subject to industry regulations, licensing or registration requirements, which are legally enforceable, such as the Australian Securities Exchange (ASX) Listing Rules which are enforceable against listed entities and their associates;

(D) commitments are made in a Product Disclosure Statement, Investment Memorandum or other document to exercise powers in a particular (restrictive and/or non-adverse) way;

(E) the trust deed restricts the ability of the trustee to issue and redeem units at anything other than market value or other values approximating net asset value, or

(F) the unanimous (100%) approval of the beneficiaries is required prior to the exercise of a power capable of defeating a beneficiary’s interest by the trustee or manager.

(v) Other contextual factors
(A) Having regard to the subject matter, scope and purpose of the trust loss rules, it is relevant for the Commissioner to consider whether the exercise of the discretion would allow a person to obtain a tax benefit from a trust claiming a deduction for a tax loss, bad debt deduction or debt/equity swap deduction when the person did not bear the economic loss incurred by the trust.

(B) The concept of a fixed entitlement is central to the operation of the trust loss rules, the purpose of which is to prevent the transfer of the tax benefit of those losses or deductions. The tax benefit of a loss 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.

(vi) Factors influencing the exercise of the Commissioner’s discretion

(A) Factors favourable to the exercise of the Commissioner’s discretion

- A trustee or manager has never exercised a power capable of defeating a beneficiary’s interest to defeat a beneficiary’s interest in the income or capital of the trust.

- Commitments are made in unit holder agreements, Product Disclosure Statements or other documents with legal consequences that the trustee or manager will not exercise a power capable of defeating a beneficiary’s interest at all, or in a way that is adverse to the rights of beneficiaries to receive the income and capital of the trust.

- All beneficiaries have the same rights to receive the income and capital of the trust.

- The trust instrument can only be amended with the unanimous (100%) approval of all the beneficiaries.

- Although the trust instrument can be amended without the unanimous approval of beneficiaries, the approval percentage calculated on the current interest or unit holdings of beneficiaries effectively means that all beneficiaries must approve any amendment (for example, where the approval of 75% of unit holders is required to make the amendment and the smallest unit holding is more than 25% of the units).

- The trust instrument has been amended in accordance with section 601GC of the Corporations Act 2001 (so as to assist with the efficient administration of the trust) but no beneficial interests in the income and capital of the trust are adversely affected.

- The beneficiaries whose rights to receive the income and capital of the trust have been adversely affected by the exercise of a power capable of defeating a beneficiary’s interest have explicitly consented to that specific act (such as upon the redemption of the interests of an employee not covered by the savings rule upon the cessation of employment).

- The trustee or manager deals with the beneficiaries of the trust on an arm’s length basis.
• The trust is governed by a foreign law that is similar to Chapter 5C of the Corporations Act 2001.

• The trust would satisfy the basic and specific conditions (as applicable to the type of trust) for access to a safe harbour.

(B) Factors adverse to the exercise of the Commissioner’s discretion

• a trustee or manager exercises a power to defeat beneficiaries’ interests in the income or capital of the trust, however:
  • the nature of the power that is exercised will be important, for example, compulsorily redeeming units where a unit holder’s stake is less than a minimum specified in the trust instrument, and the unit holder receives the redemption price of those units, is unlikely to preclude the exercise of the discretion
  • where external factors (such as those in the Global Financial Crisis) temporarily affect the ability of the trustee or manager to fund distributions or redemptions, this is unlikely to preclude the exercise of the discretion (for example, a temporary wholesale freezing or deferral of interests)

• there are significantly different beneficiaries of the trust in an income year for which an entity seeks to have a fixed entitlement, than the beneficiaries of the trust in the income year(s) in which the trust made a tax loss, or incurred a bad debt deduction or debt/equity swap deduction

• an arrangement has been entered into which would result in:
  • section 272-35 having application
  • the trafficking of the tax benefit of a tax loss, bad debt deduction or debt/equity swap deduction, or
  • fraud or evasion.

(C) In each case the Commissioner will weigh up all factors (favourable and unfavourable) in the context of the facts and circumstances of the case. The presence of more favourable factors will increase the likelihood that the Commissioner will exercise the discretion.

(D) However, a single power in a trust instrument may pose such a serious threat to beneficiaries’ interests that, in the absence of any mitigating factors, the Commissioner will not exercise the discretion.

(E) Conversely, the absence of some or all of the favourable factors does not necessarily preclude the exercise of the discretion.

2.8 “Safe harbours” [at Attachment B]

(a) The trustee of a trust that satisfies the conditions for one of the categories below can manage its tax affairs as if the Commissioner had exercised the discretion to treat the beneficiaries as having a fixed entitlement to the income and capital of the trust for the purposes of section 272-5.
(b) Accordingly, other than ensuring that a trust satisfies the relevant conditions of the category relied upon, the Commissioner will not allocate compliance resources to determine whether beneficiaries have fixed entitlements in cases where one of the categories below is met. A safe harbour only has application during the period in which the conditions for the relevant category are satisfied. A trustee that requires certainty as to whether or not the beneficiaries of the trust have fixed entitlements in relation to a future time must request the exercise of the Commissioner’s discretion.

c) Taxpayers should maintain relevant records that support their claim that they meet the relevant conditions being relied on.

d) Specific single interest holder trusts

The trust complies with all of the following conditions:

(i) the trust must have a trust instrument

(ii) all beneficial interests in the income and capital of the trust are vested

(iii) all beneficial interests have the same rights to receive the income and capital of the trust

(iv) all beneficial interests in the income and capital of the trust can be expressed as a percentage of the total income and capital of the trust

(v) the trust is not a discretionary trust or a trust with default income or capital beneficiaries — that is, no beneficial interest in the income or capital of the trust is capable of being defeated, partly or wholly, by the exercise of a power of appointment of income or capital by the trustee or other donee

(vi) one of the following types of entity holds all of the interests, directly or indirectly, in the trust and has the right to receive all of the income and capital of the trust, directly or indirectly, for their own benefit (that is, excluding a nominee, custodian or agent)

(A) an individual

(B) a listed trust

(C) a registered managed investment scheme), and

(vii) an arrangement has not been entered into which would result in:

(A) section 272-35 having application

(B) the trafficking of the tax benefit of a tax loss, bad debt deduction or debt/equity swap deduction, or

(C) fraud or evasion.

e) Trust (other than listed trusts, registered managed investment schemes that are trusts, unregistered managed investment schemes and certain widely held trust)

The trust complies with all of the following conditions:

(i) the trust must have a trust instrument

(ii) all beneficial interests in the income and capital of the trust are vested
(iii) all beneficial interests have the same rights to receive the income and capital of the trust

(iv) all beneficial interests in the income and capital of the trust can be expressed as a percentage of the total income and capital of the trust

(v) the trust is not a discretionary trust or a trust with default income or capital beneficiaries — that is, no beneficial interest in the income or capital of the trust is capable of being defeated, partly or wholly, by the exercise of a power of appointment of income or capital by the trustee or other donee

(vi) a trustee or manager has never exercised a power capable of defeating a beneficiary's interest to defeat a beneficiary's interest in the income or capital of the trust, and

(vii) an arrangement has not been entered into which would result in:

   (A) section 272-35 having application

   (B) the trafficking of the tax benefit of a tax loss, bad debt deduction or debt/equity swap deduction, or

   (C) fraud or evasion.

2.9 Varying the terms of a unit trust to make it a ‘fixed trust’

Need to consider resettlement issues.

Non-Fixed Trust

2.10 A trust is a non-fixed trust if it is not a fixed trust.13

Family Trust

2.11 A trust is a family trust at any time when a FTE in respect of the trust is in force.14

3. WHY MAY A TRUSTEE NEED TO MAKE A FTE?

Trust Losses

3.1 A trust will be denied a deduction for prior year losses if it fails to satisfy certain tests.

3.2 A fixed trust must meet:

   (a) the 50% stake test; and

   (b) the income injection test.

3.3 A non-fixed trust must meet:

   (a) the pattern of distributions test;

   (b) the 50% stake test;

   (c) the control test; and

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13 Section 272-70 of Schedule 2F of the 1936 Act
14 Section 272-75 of Schedule 2F of the 1936 Act
(d) the income injection test.

3.4 A family trust must meet the income injection test.

Company Loss Provisions

3.5 Company Loss Provisions

(a) To carry forward a loss a company must meet either the:

(i) continuity of ownership test (COT); or

(ii) the same business test.

(b) To satisfy COT, the same persons must beneficially own more than 50% of exactly the same shares in the company from the beginning of the loss year until the end of the year in which the losses are recouped (sections 165-12, 165-155 and 165-165 of the 1997 Act).

(c) Can the Company satisfy COT where at least 50% of the shares are held by a discretionary trust?

At law, a trustee cannot beneficially own shares. The ATO confirmed this was its view in TD 2000/27.

However, if the trustee makes a FTE from at least the beginning of the loss year, the shares are taken to be beneficially owned by the family trust from that time which means the company can satisfy the COT\(^{15}\).

Holding period rule for passing on franking credits

3.6 The holding period rule applies to all trusts that receive dividends from shares acquired on or after 31 December 1997.

3.7 The holding period rule will be satisfied where a beneficiary has held its interest in shares in respect of which a dividend has been paid for a period of 45 days.

3.8 However, a non-fixed trust cannot satisfy the holding period rule unless it makes a FTE.

TESTS TO SATISFY FOR TRUSTEE TO DEDUCT TRUST LOSSES AND BAD DEBTS

4. TESTS FOR FIXED TRUSTS

4.1 In order for a fixed trust to retain the benefit of its tax losses it must pass either the

(a) the 50% Stake Test; or

(b) the non-fixed stake test\(^{16}\).

4.2 50% Stake Test

(a) The 50% stake test is met if, at all times during the period (which commences at the beginning of the loss year and finishes at the end of the income year)\(^{17}\):

\(^{15}\) Section 165-207 – 1997 Tax Act
\(^{16}\) Section 266-40 and Section 266-45 of Schedule 2F of the 1936 Act
\(^{17}\) Subdivision 269-C of Schedule 2F of the 1936 Act
(i) the same individuals have more than a 50% stake in the income of a trust; and
(ii) the same individuals (who may be different to the above) have more than a 50% stake in the capital of the trust.

(b) Individuals have more than a 50% stake in the income of a trust if the individuals have (between them), fixed entitlements to a greater than 50% share of the income of a trust.

(c) Individuals have more than a 50% stake in the capital of a trust if the individuals have (between them), fixed entitlements to a greater than 50% share of the capital of a trust.

(d) For the purpose of this test, other trusts that hold units and have made a FTE will be treated as individuals who hold a fixed stake.

4.3 The non-fixed stake test will only apply in limited situations where non-fixed trusts (that have not made FTEs) hold a fixed interest (direct or indirect) of 50% or more in the income and capital of the trust.

Where this test applies each of the non-fixed trusts that hold units must satisfy all of the tests for non-fixed trusts.

5. TESTS FOR NON-FIXED TRUSTS

5.1 A non-fixed trust may have to satisfy:

(a) the pattern of distribution test;

(b) the control test;

(c) partially fixed stake test;

whichever are applicable.

5.2 However, it will be extremely rare for all three tests to apply in any one case.

Pattern of distribution test

5.3 In most cases, the relevant test will be the pattern of distribution test which applies if:

(a) the trust distributed income:

   (i) in the income year or within two months after its end; and

   (ii) in at least one of the six earlier income years; or

(b) the trust distributed capital:

   (i) in the income year or within two months after its end; and

   (ii) in at least one of the six earlier income years; or

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18 Section 272-30(2) of Schedule 2F of the 1936 Act
19 Section 267-30 of Schedule 2F of the 1936 Act
A trust passes the pattern of distributions test for an income year if the trust distributed directly or indirectly:

(a) a greater than 50% share of all test year distributions of income to the same individuals; and

(b) a greater than 50% share of all test year distributions of capital to the same individuals.

A test year distribution of income is the total of all distributions of income made by the trust in any of the following periods, provided the period does not start more than six years before the start of the income year:

(a) the period from the start of the income year until two months after its end;

(b) if the trust distributed income before the loss year – the income year, before the loss year that is closest to the loss year;

(c) if paragraph (b) does not apply and the trust distributed income in the loss year – the loss year;

(d) if neither paragraph (b) or (c) applies – the income year, closest to the loss year, in which the trust distributed income;

(e) each intervening income year (if any) between the one in paragraph (a) and the one in paragraph (b), (c) or (d).

A test year distribution of capital applies the same way as the test year distribution of income.

If the percentage of distributions to an individual differs between years, the smallest percentage that it distributed to the individual is used. This means that if the same beneficiary received 80% of the income in one year and only 20% of income in another year in the test period, they are taken to have received a maximum of 20% in all years.

If the trustee distributes to an entity (for example, a corporate beneficiary) and individuals have fixed interests in income/capital, then the distribution to the corporate beneficiary will be attributed to the individuals for the purpose of the pattern of distribution test (incomplete distributions).

However, if the shares in a corporate beneficiary:

(a) are held by a discretionary trust; or

(b) have discretionary dividend entitlements;

the income distributed to the corporate beneficiary cannot be counted for purpose of the pattern of distribution as there will be no “individual” who receives the distribution.

This means it will be very difficult to pass the test if the trust makes substantial distributions to the corporate beneficiary.

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20 Subdivision 269-D of Schedule 2F of the 1936 Act
21 Section 269-70 of Schedule 2F of the 1936 Act
22 Section 269-75 of Schedule 2F of the 1936 Act
5.10 Caution is required in identifying “distributions” as this concept is defined very broadly\(^{23}\) and includes:

(a) distributions “by way of loan”;
(b) allowing a beneficiary to use trust property;
(c) release of debt.

5.11 Where there is no distribution to an individual because the individual has died or there is a breakdown in the marriage, no income or capital distributed to that individual by the trust is to be included in any test year distribution\(^ {24}\). Breakdown in the marriage includes de facto relationships.

Control test

5.12 A group must not, during the income year, begin to control the trust directly or indirectly\(^ {25}\).

5.13 A group controls a non-fixed trust if\(^ {26}\):

(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;
(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 or the control;
(d) the trustee 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; or
(f) the group acquires more than a 50% stake in the income or capital of the trust.

5.14 A group is:

(a) a person; or
(b) a person and one or more associates; or
(c) two or more associates of a person.

5.15 If a group ceases to control a non-fixed trust because of the death, incapacitation or breakdown in marriage of the individual comprising or an individual included in the group and a replacement group begins to control the trust, then the replacement group is taken to have controlled the trust from the time when the original group controlled it.

There are requirements as to who the replacement group may be\(^ {27}\).

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\(^{23}\) Section 272-60 of Schedule 2F of the 1936 Act
\(^{24}\) Section 269-80 of Schedule 2F of the 1936 Act
\(^{25}\) Section 267-45 of Schedule 2F of the 1936 Act
\(^{26}\) Subdivision 269-E of Schedule 2F of the 1936 Act
\(^{27}\) see section 269-95(2) of Schedule 2F of the 1936 Act
Partially fixed stake test

5.16 Will rarely apply as it requires that:

(a) there is a non-fixed trust; and

(b) “individuals” have a fixed stake to at least 50% of income or capital.

5.17 Test requires that, in those circumstances, individuals who hold a combined fixed stake in excess of 50% at the start of test period must continue to hold at least a 50% fixed stake.

6. INCOME INJECTION TEST

6.1 These provisions are contained in Division 270. If a trust fails the income injection test, it does not lose the benefit of carried forward losses (as is the case with the other tests) but cannot apply the losses as a deduction against the “injected income”.

6.2 The effect of the income injection rules is to deny a deduction to the trust where there is a scheme under which:

(a) the trustee derives assessable income;

(b) an "outsider" to the Trust provides a benefit to the trustee or an associate;

(c) the trustee provides a benefit to the outsider or associate; and

(d) a reasonable person would conclude that the Trust derived the income or entered into the scheme was wholly or partly because of the the deductions.\(^{28}\)

6.3 A benefit is defined to mean:

(a) money, a dividend or property; or

(b) a right or entitlement (whether or ot property); or

(c) services; or

(d) the extinguishment, forgiveness, release or waiver if a debt or other liability; or

(e) the doing of anything that results in the derivation of assessable income; or

(f) anything that, disregarding the above, is a benefit or advantage.

6.4 If the trust is not a family trust, an outsider to the trust is a person other than:

(a) the trustee of the trust; or

(b) a person with a fixed entitlement to a share of the income or capital of the trust.

6.5 If the trust is a family trust, an outsider to the trust is a person other than:

(a) the trustee of the trust;

(b) a person with a fixed entitlement to a share of the income or capital of the trust;

\(^{28}\) Section 270-10 of Schedule 2F of the 1936 Act
the individual specified in the trust’s FTE;

(d) a member of the individual’s family;

(e) a trust with the same individual specified in its FTE;

(f) a company, partnership or trust that has made an IEE to be included in the individual’s family group, where the election was in force when the scheme commenced; or

(g) a fixed trust, company or partnership where, at all times while the scheme was carried out:

(i) the individual specified in the trust’s FTE; or

(ii) one or more members of the individual’s family; or

(iii) the trustees of one or more family trusts, provided the individual is specified in the FTE of each of those family trusts; or

or any combination of the above, had fixed entitlements, directly or indirectly, and for their own benefit, to all of the income and capital of the entity.

7. FAMILY TRUST DISTRIBUTION TAX

Trusts which have made a FTE

7.1 If:

(a) a trustee makes a FTE in relation to a trust; and

(b) at any time while the election is in force, the trust confers a present entitlement to, or distributes, income or capital of the trust:

(i) upon or to a person who is neither the individual specified in the FTE nor a member of the individual’s family group in relation to the conferral or distribution; or

(ii) upon or to the individual specified in the FTE or a member of the individual’s family group, where that person is the trustee of a trust, that is not included in the individual’s family group in relation to the conferral or distribution; then

(c) if:

(i) the trustee is an individual – the trustee is liable to family trust distribution tax on the amount or value of the income or capital to which the entitlement relates, or that is distributed; or

(ii) the trustee is a company - the trustee, together with each person who was a director of the company at the time of the conferral or distribution is jointly and severally liable to family trust distribution tax on the amount or value of the income or capital to which the entitlement relates, or that is distributed.

29 Section 271-15 of Schedule 2F of the 1936 Act
Trusts which have made an IEE

7.2 If:

(a) a trustee makes an IEE for the trust to be included in the family group of the individual specified in a FTE; and

(b) at any time while the election is in force, the trust confers a present entitlement to, or distributes, income or capital of the trust:

(i) upon or to a person who is neither the individual specified in the FTE nor a member of the individual’s family group in relation to the conferral or distribution; or

(ii) upon or to the individual specified in the FTE or a member of the individual’s family group, where that person is the trustee of a trust, that is not included in the individual’s family group in relation to the conferral or distribution; then

(c) if:

(i) the trustee is an individual – the trustee is liable to family trust distribution tax on the amount or value of the income or capital to which the entitlement relates, or that is distributed; or

(ii) the trustee is a company - the trustee, together with each person who was a director of the company at the time of the conferral or distribution is jointly and severally liable to family trust distribution tax on the amount or value of the income or capital to which the entitlement relates, or that is distributed.

Partnerships which have made an IEE

7.3 If:

(a) the partners in a partnership make an IEE for the partnership to be included in the family group of the individual specified in a FTE; and

(b) at any time while the election is in force, the partnership confers a present entitlement to, or distributes, income or capital:

(i) upon or to a person who is neither the individual specified in the FTE nor a member of the individual’s family group in relation to the conferral or distribution; or

(ii) upon or to the individual specified in the FTE or a member of the individual’s family group, where that person is the trustee of a trust, that is not included in the individual’s family group in relation to the conferral or distribution; then

the partners, together with each person who at the time of the conferral or distribution was a director of any partners that was company is jointly and severally liable to family trust distribution tax on the amount or value of the income or capital to which the entitlement relates, or that is distributed.

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30 Section 271-20 of Schedule 2F of the 1936 Act
31 Section 271-25 of Schedule 2F of the 1936 Act
Companies which have made an IEE

7.4 If:

(a) a company makes an IEE for the company to be included in the family group of the individual specified in a FTE; and

(b) at any time while the election is in force, the company confers a present entitlement to, or distributes, income or capital of the company:

(i) upon or to a person who is neither the individual specified in the FTE nor a member of the individual’s family group in relation to the conferral or distribution; or

(ii) upon or to the individual specified in the FTE or a member of the individual’s family group, where that person is the trustee of a trust, that is not included in the individual’s family group in relation to the conferral or distribution; then

the company, together with each person who was a director of the company at the time of the conferral or distribution, is jointly and severally liable to family trust distribution tax on the amount or value of the income or capital to which the entitlement relates, or that is distributed.

Payment of family trust distribution tax

7.5 Family trust distribution tax is due and payable:

(a) in the case where the conferral or distribution was made before the day on which the election was made – at the end of 21 days after the day on which the election was made; and

(b) in any other case – at the end of 21 days after the day on which the conferral or distribution was made.

7.6 If any of the family trust distribution tax remains unpaid 60 days after the day by which it is due to be paid, the person is liable to pay general interest charge.

7.7 Section 271-105* If:

(a) a family trust distribution tax (the tax payable) becomes payable on the amount or value of income or capital of the company, partnership or trust; and

(b) a payment (the tax payment amount) of the whole or part of the tax payable is made; and

(c) the whole or part of the amount or value of the income or capital is included in the assessable income of the company, partnership or trust or of any other person;

the amount included in the assessable income is reduced by the amount worked out using the following formula:

\[
\text{Tax payment amount/tax payable} \times \text{original assessment amount.}
\]

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32 Section 271-30 of Schedule 2F of the 1936 Act
33 Section 271-75 of Schedule 2F of the 1936 Act
8. **FAMILY TRUST ELECTION**

8.1 Making a family trust election:\(^{34}\):

(a) A trustee may make a family trust election that it will be a ‘family trust’ at all time after the beginning of a specified year.

(b) The election must be in writing and in the approved form.

(c) The election must specify an individual (“test individual”) as the individual whose family group is to be taken into account in relation to the election.

ATO ID 2014/3 – the test individual must be alive when the FTE is made.

(d) If the trust does not pass the family control test at the end of the specified income year, the trustee must not make the election.

Private Binding Ruling Authorisation Number 1012188973240 – if a trust makes a FTE but fails to pass the family control test at the end of the year, the FTE is not valid.

(e) The ‘specified year’ can be a year earlier than the one in which the FTE is made provided that at all times from the beginning of the ‘specified year’ until 30 June in the income year before the one during the election is made:

(i) the trust passes the ‘family control test’; and

(ii) any distributions of income or capital of the trust have only been made members of the ‘test individual’s’ family group.

The specified year cannot be a year earlier than the 2005 year.

- Once a FTE has been made, it can only be varied or revoked in limited circumstances.

8.2 Revocation cases

(a) The trustee of a trust (other than a fixed trust) may revoke a FTE during the period beginning at the start of the income year specified in the FTE and finishing at the end of the fourth income year after the income year specified in the FTE provided that during that period the trust did not need to have the FTE in force in relation to franking credits, tax losses or bad debts.

(b) The revocation must be made in the trust’s return for the income year from which the revocation is to be effective.

If the trust’s tax return has been lodged for a year, the ATO’s view is that you cannot amend a tax return which has been lodged to include a revocation or variation (ATO publication on FTEs and IEES – Questions and Answers).

(c) If a family trust revokes a FTE, it cannot later make another FTE. This is because a trust must not make more than one FTE\(^{35}\) (ATO ID 2008/73).

8.3 Variation cases.

(a) The trustee of a trust may during the period beginning at the start of the income year specified in the FTE and finishing at the end of the fourth income year after the

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\(^{34}\) Section 272-80 of Schedule 2F of the 1936 Act

\(^{35}\) Section 272-80(11) of Schedule 2F of the 1936 Act
income year specified in the FTE vary the FTE so that a different individual is specified as the test individual provided that:

(i) the new individual was a member of the family of the original test individual;

(ii) any distributions of income or capital of the trust or entity for which an IEE has been made in relation to the trust have been made to either the new individual or members of the new individual’s family group.

(b) A variation can only be made once.

(c) A trustee of a trust may vary an election so that a new individual is specified as a test individual if as a result of a court order or BFA that individual and members of the new individual control the trust.

(d) The variation must be made in the trust’s return for the income year from which the variation is to be effective.

If an entity’s tax return has been lodged for a year, the ATO’s view is that you cannot amend a tax return which has been lodged to include a revocation or variation (ATO publication on FTEs and IEES – Questions and Answers).

8.4 Election commencement time

(a) If the trust does not pass the ‘family control test’ at all times in the income year specified – the earliest time from which the trust does pass the family control test for the remainder of that income year.

(b) If the trust does pass the ‘family control test’ at all times in the income year specified – the beginning of the income year specified.

8.5 The trustee must not make more than one FTE in relation to the trust.36

If the trust has made a FTE and then revokes it, it cannot later make another FTE (ATO ID 2008/73).

9. INTERPOSED ENTITY ELECTION

9.1 Making an interposed entity election37:

(a) If a company, partnership or trust makes an IEE in respect of the trust which has made a FTE, that company, partnership or trust will be included in the ‘family group’ of the test individual specified in the FTE.

This means that the trust which has made the FTE can distribute to that company, partnership or trust.

(b) The election must be in writing and in the approved form.

(c) The company, partnership of trust must pass the family control test at the end of the specified income year.

(d) The ‘specified year’ can be a year earlier than the one in which the IEE is made provided that at all times from the beginning of the ‘specified year’ until 30 June in the income year before the one during the election is made:

36 Section 272-80(11) of Schedule 2F of the 1936 Act
37 Section 272-85 of Schedule 2F of the 1936 Act
(i) the company, partnership or trust passes the ‘family control test’; and

(ii) any distributions of income or capital of the trust have only been made members of the ‘test individual’s’ family group.

(e) Once an IEE has been made, it can only be revoked in limited circumstances.

9.2 Revocation cases

(a) Provided that the company, partnership or trust was when the IEE was made or later becomes a member of the family group of the individual specified in the FTE, it may revoke an IEE during the period:

(i) beginning at the later of:

(A) the beginning of the income year specified in the IEE; and

(B) the beginning of the income year in which the entity became a member of the family group; and

(ii) finishing at the end of the fourth income year after the income year referred to in subparagraph (A) or (B).

(b) If the FTE to which the IEE is made is revoked, the IEE is taken to be revoked.

(c) The revocation must be made in the trust’s return for the income year from which the revocation is to be effective.

9.3 The company, partners or trustee must not make an IEE to be included in the family group of the individual specified in the FTE in respect of more than one trust, unless the individual specified in each FTE is the same.

However, you can disregard an IEE which has been revoked.

10. FAMILY CONTROL TEST

Trusts

10.1 A trust cannot make a FTE or IEE unless it passes the ‘family control test’ at the end of the specified year.

10.2 A trust passes the ‘family control test’ if any one of the following are satisfied38:

(a) the ‘group’ has the power to obtain beneficial enjoyment (directly or indirectly) of the capital or income of the trust; or

(b) the group is able (directly or indirectly) to control the application of the capital or income of the trust; or

(c) the group is capable, under a scheme, of gaining the beneficial enjoyment in paragraph (a) or the control in paragraph (b); or

(d) the trustee of the trust is accustomed, under an obligation or might reasonably be expected, to act in accordance with the directions or wishes of the group; or

(e) the group can remove or appoint the trustee of the trust; or

38 Section 272-87(2) of Schedule 2F of the 1936 Act
(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.

10.3 Who is the ‘group’?

(a) The ‘group’ consists of:

(i) the individual (test individual) who is specified in the FTE, or in the case of the IEE, who is specified in the FTE to which the IEE will relate; or

(ii) one or more members of the test individual’s family; or

(iii) the test individual and one or more of the members of the test individual’s family.

(b) The requirement in any paragraphs (a) to (e) is satisfied in relation to a group consisting of:

(i) a person or persons being, the test individual and/or members of the test individual’s family; and

(ii) one or more legal or financial advisers to the test individual or to a member of the test individual’s family.

(c) The requirement in paragraph (f) is satisfied in relation to a group consisting of the trustees of one or more family trusts, provided the test individual is specified in the FTE of each of those family trusts and/or a person or persons being, the test individual and/or members of the test individual’s family.

Companies and partnerships

10.4 A company or partnership in respect of which an IEE is proposed to be made passes the family control test if a group consisting of39:

(a) the individual who is specified in the FTE in relation to the IEE; and/or

(b) one or members of the test individual family; and/or

(c) the trustees of one or more family trusts, provided the individual is specified in the FTE of each of those family trusts

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.

39 Section 272-87(3) of Schedule 2F of the 1936 Act
11. **FAMILY AND FAMILY GROUP**

11.1 ‘Family’ of the test individual

(a) The ‘family’\(^{40}\) of a test individual consists of the test individual and all of the following:

(i) any parent, grandparent, brother or sister of the test individual or the test individual’s spouse;

(ii) any nephew, niece or child of the test individual or the test individual’s spouse;

(iii) any lineal descendant of a nephew, niece or child of the test individual or the test individual’s spouse;

(iv) the spouse of the test individual or of anyone who is a member of the test individual’s family because of the above paragraphs.

‘Spouse’ is defined in section 995-1(1) of the 1997 Act and includes same sex couples.

‘Child’ is defined in section 995(1) of the 1997 Act to also include the individual’s adopted child, stepchild or ex-nuptual child and a child of the individual’s spouse.

(b) A person does not cease to be a family member merely because of the death of any other family member.

(c) An adopted child, step-child or ex-nuptual child of a person is taken to be a lineal descendant of that person for the purposes of determining the lineal descendants of that person or any other person.

11.2 ‘Family Group’\(^{41}\)

(a) The section states whether a person is a member of the family group of the test individual in relation to a conferral of a present entitlement to, or a distribution of, income or capital of a company, partnership or trust, upon or to the person.

(b) A member of the test individual’s family is a member of the test individual’s family group in relation to the conferral or distribution.

(c) The following former family members in relation to the conferral or distribution:

(i) 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.

(ii) A person:

   (A) who was the spouse of either the test individual or of a member of the test individual’s family before the death of the test individual or of a member of the test individual’s family; and

   (B) who is now the spouse of a person who is not a member of the primary individual’s family; and

   (C) a person who was a child of the spouse of either the test individual or of a member of the test individual’s family before a breakdown in the

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\(^{40}\) Section 272-95(1) of Schedule 2F of the 1936 Act

\(^{41}\) Section 272-90 of Schedule 2F of the 1936 Act
marriage of relationship of the primary individual or the member of the primary individual’s family.

(d) A trust in respect of which the FTE was made is a member of the test individual’s family group in relation to the conferral or distribution.

A trust does not become part of the ‘family group’ until the FTE has been made. Therefore if distributions are made to a trust before the FTE is made, family trust distribution tax will apply (Private Binding Ruling 1011305850418).

(e) A trust with the same test individual specified in its FTE is a member of the test individual’s family group in relation to the conferral or distribution.

(f) A company, partnership or trust is a member of the test individual’s family group in relation to the conferral or distribution if:

(i) the company, partnership or trust has made an IEE to that effect; and

(ii) the election is in force when the conferral takes place or the distribution is made.

(g) A company, partnership or trust is a member of the test individual’s family group in relation to the conferral or distribution if:

(i) the test individual; and/or

(ii) one or members of the test individual’s family; and/or

(iii) the trustees of one or more family trusts, provided the primary individual is specified in the FTE of each of those family trusts;

have fixed entitlements directly or indirectly, and for their own benefit, to all of the income and capital of the company, partnership or trust.

(h) A fund, authority or institution in Australia covered by Subdivision 30-B of the 1997 Act (about recipients for gift recipients).

(i) An institution, hospital, trustee, society, association, club or fund, all of whose income is exempt under:

(i) section 50-5 (charity, education and science);

(ii) section 50-10 (community service);

(iii) Items 6.1 or 6.2 of section 50-30 (public hospital or hospital carried on by a society or association);

(iv) Items 9.1 or 9.2 of section 50-45 (sports, culture and recreation).
12. **FIXED ENTITLEMENTS TO A SHARE OF INCOME OR CAPITAL**

**Fixed entitlements to the income and capital of a trust**

12.1 Beneficiaries will have fixed entitlements to the income and capital of a trust if, under a trust instrument they have "a vested and indefeasible interest" in a share of the income and/or capital.

**Fixed entitlement to a share of income or capital of a company**

12.2 If a shareholder in a company holds shares carrying the right to receive:

(a) 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; and

(b) 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.

**Fixed entitlement to a share of income or capital of a partnership**

12.3 If under a partnership agreement, a partnership is entitlement to a share of income that the partnership derives from time to time, or of the capital of the partnership and the share is not able to be varied, the partner has a fixed entitlement to that share of the income or capital.

12.4 If a partner does not have a fixed entitlement to income or capital of the partnership, only because the partner’s share is able to be varied, the Commissioner does have a discretion to treat the partners as having a fixed entitlement having regard to:

(a) the circumstances in which the share is able to be varied;

(b) the likelihood of the variation happening; and

(c) the nature of the partnership.

**Fixed entitlement to share of income or capital indirectly**

12.5 A person holds a fixed entitlement to a share of the income or capital of a company, partnership or trust indirectly if the person holds the entitlement indirectly through fixed entitlements to shares of the income or capital, respectively, of interposed companies, partnerships or trusts.

12.6 Additional special cases of fixed entitlements held directly or indirectly

(a) Section 272-30 also affects references to a person or individual having, directly or indirectly, a fixed entitlement to a share of the income or capital of a company, partnership of trust (other than in sections 269-75(b)(ii) or 272-25) at a particular time (test time).

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42 Section 272-5(1) of Schedule 2F of the 1936 Act
43 Section 272-5(1) of Schedule 2F of the 1936 Act
44 Section 272-10 of Schedule 2F of the 1936 Act
45 Section 272-15 of Schedule 2F of the 1936 Act
46 Section 272-20 of Schedule 2F of the 1936 Act
Section 272-30 will not affect a reference to a person or individual having a fixed entitlement where the phrase ‘directly or indirectly’ is not used.

(b) If at the test time a family trust has, directly or indirectly, a fixed entitlement to a share of the income or capital of the main entity, it is treated as if it and the fixed entitlement as an individual and for the individual’s own benefit.

Fixed entitlement on death

12.7 If, immediately before an individual dies, he or she has a fixed entitlement to a share of the income or capital of a trust, partnership or company directly or indirectly, and for his or her own benefit, the individual is taken to continue to have the entitlement for so long as:

(a) It is held by someone as trustee of the individual’s estate; or

(b) It is held by someone who received it as a beneficiary of the estate (s 272-40).

13. DISTRIBUTION OF INCOME OR CAPITAL

Trust distribution to a beneficiary\textsuperscript{47}

Company distribution to a shareholder\textsuperscript{48}

13.1 A company distributes income of the company to a person if the company pays a dividend or non-share dividend to the person.

13.2 A company distributes capital of the company to a person if:

(a) 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; and

(b) the payment, crediting or transfer is not the payment of the dividend.

13.3 A company distributes capital of the company to a person if the company makes a non-share capital return to the person.

Partnership distribution to a partner\textsuperscript{49}

13.4 A partnership distributes income or capital of the partnership to a person if it:

(a) pays or credits the income or capital in the form of money to the person; or

(b) transfers the income or capital in the form of property to the person; or

(c) reinvests or otherwise deals with the income or capital on behalf of the person or in accordance with the directions of the person; or

(d) applies the income or capital for the benefit of the person;

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

\textsuperscript{47} Section 272-45 of Schedule 2F of the 1936 Act
\textsuperscript{48} Section 272-50 of Schedule 2F of the 1936 Act
\textsuperscript{49} Section 272-55 of Schedule 2F of the 1936 Act
Other distributions of income and capital\(^{50}\)

13.5 A company, partnership or trust also distributes income or capital to a person if it:

(a) pays (including by way of a loan) or credits money of the entity to the person, or reinvestments such money for the person; or

(b) transfers property of the entity to, or allows use of the 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

(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 (section 272-60(1)).

13.6 However, section 272-60(1) only applies if, and to the extent that:

(a) the amount paid, credited, reinvested or applied, the value of the property transferred or the value of the other thing done; exceeds

(b) the amount or value of any consideration given in return.

13.7 Each thing that is a distribution because of section 272-60(1) is a distribution of income unless it is clear that the money or property concerned was capital, or that the debt or liability was attributable to capital, of the entity.

Distribute indirectly\(^{51}\)

13.8 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:

(a) the first interposed entity distributes to the individual an amount or property attributable to the income or capital; or

(b) 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:

(i) the distribution of an amount or property attributable to the income or capital to the final interposed entity by the first interposed entity; or

(ii) 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.

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\(^{50}\) Section 272-60 of Schedule 2F of the 1936 Act

\(^{51}\) Section 272-63 of Schedule 2F of the 1936 Act
This paper is only intended as a general overview of issues relevant to the topic and is not legal advice. If there are any matters you would like us to advise you on in relation to this paper, please let us know.